

**SPECIFIC INSTANCE COMPLAINT UNDER THE
OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES REGARDING THE CONTRIBUTIONS OF
ANDRITZ AG
TO HUMAN RIGHTS ABUSE AND ENVIRONMENTAL DAMAGE
IN CONNECTION WITH THE XAYABURI HYDROPOWER PROJECT IN LAO PDR**

**ADDRESSED TO THE AUSTRIAN NATIONAL CONTACT POINT
FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES**

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TABLE OF ABBREVIATIONS

ASEAN	Association of Southeast Asian Nations
CESCR	United Nations Committee on Economic, Social, and Cultural Rights
ComNet Mekong	Northeast Community Network of 7 Provinces of the Mekong River Basin
CNR	Compagnie Nationale du Rhône
CRC	Community Resources Centre of Thailand
CSRD	Centre for Social Research and Development
EGAT	Electricity Generating Authority of Thailand
EIA	Environmental Impact Assessment
ERI	EarthRights International
FACT	Fisheries Action Coalition Team
UNGPs	United Nations Guiding Principles on Business and Human Rights
IBAMA	Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social, and Cultural Rights
IFC	International Finance Corporation
IFReDI	Inland Fisheries Research and Development Institute
ICEM	International Centre for Environmental Management
Lao PDR	Lao People's Democratic Republic
LMB	Lower Mekong Basin
LPSD	Law and Policy of Sustainable Development Research Center
MNE	Multinational Enterprise
MRC	Mekong River Commission
NCP	National Contact Point
NGO	Non-governmental organization
OECD	Organization for Economic Cooperation and Development
PNPCA	Procedures for Notification, Prior Consultation and Agreement
PPA	Power Purchase Agreement
RCC	Rivers Coalition in Cambodia
SEA	Strategic Environmental Assessment
SEG	Sediment Expert Group
SIA	Social Impact Assessment
UFS	United Fiber System

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I. INTRODUCTION

A. *Identity and Interest of the Complainants*

ECA Watch Austria, the Community Resources Center (CRC) (Thailand), Fisheries Action Coalition Team (FACT) (Cambodia), Samreth Law Group, (Cambodia), Law and Policy of Sustainable Development Research Center (LPSD) (Vietnam), Centre for Social Research and Development (CSRD) (Vietnam), International Rivers (USA/Mekong Region) and EarthRights International (ERI) (USA/Mekong Region) bring this complaint alleging that ANDRITZ Group (“Andritz”) has breached and will continue to breach a number of provisions of the OECD Guidelines for Multinational Enterprises (the “Guidelines”) related to their activities in supplying key components for the Xayaburi Hydropower Project (“Xayaburi Dam” or “Xayaburi Project”) in the Lao People’s Democratic Republic (“Laos” or “Lao PDR”).

At the outset, the complainants note that access to the site of the Xayaburi Project is severely restricted, and civil society groups that seek to approach the area to speak with local communities or investigate the progress of construction are often intimidated by security forces. As a result, the ability of the complainants to provide updated information from the dam site itself, or to represent the grievances and concerns of local inhabitants – especially in Laos - is constrained. Because of concerns for the safety of community members in Laos itself, we have no Laotian groups signed on to this complaint. The factual information in this complaint therefore focuses principally on downstream impacts; however, the complainants are equally concerned about the impacts of the project on affected communities in Laos and present recommendations for their benefit as well.

ECA WATCH AUSTRIA was founded in the late 1990s as a platform of Austrian environmental and human rights organisations aiming for the reform of the Austrian export credit agency OeKB and was established as an independent environmental and human rights organisation in 2008. ECA Watch Austria also functions as a learning and advocacy platform for Austrian NGOs concerning more general issues of ethical finance as well as the financialisation of nature, such as food speculation, land grab, or the financialisation of resource extraction.

The organisation does advocacy work both at the national and international level towards achieving more transparency and better practices within the Austrian export credit system, as well as campaign work targeted at the prevention of highly destructive export projects.

The NORTHEAST COMMUNITY NETWORK OF 7 PROVINCES OF THE MEKONG RIVER BASIN (“ComNet Mekong”) was established under the Community Organization Council Act, B.E. 2551 (2008) under the umbrella of the Institute of Community Organization Development, Ministry of Social Development and Human Security, in May 17, 2009. The network comprises

64 founding subdistricts in 7 provinces along the Mekong including Loei, Nong Khai, Buengkan, Nakhon Phanom, Mukdahan, Amnat Chareon and Ubon Ratchathani.

The objectives of ComNet Mekong are to protect community rights in natural resource management – in particular land, water and minerals; build collaboration on sustainable environmental and natural resource management; monitor and respond to disasters; empower community organizations and networks to monitor threats to human security; promote participatory community based research; promote participatory water governance among communities in Thailand and the Mekong region; and publish and share information regarding the activities of network members.

The COMMUNITY RESOURCES CENTRE OF THAILAND (CRC) is a non-governmental organization that is committed to protecting and promoting human rights, community rights and environmental rights. CRC acts as a watchdog on the implementation of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international laws in Thailand and the Mekong Region and conducts public interest law cases and legal advocacy to protect community rights to natural resources and environmental protection. CRC has represented communities impacted by the Xayaburi Dam in legal actions in Thailand and is engaged in regional advocacy on the impacts of Mekong mainstream dams.

The FISHERIES ACTION COALITION TEAM (FACT) OF CAMBODIA is a coalition of eight non-governmental organizations (NGOs) working in collaboration with 38 NGO partners on fisheries and environmental issues around the Tonle Sap Lake, the Mekong River and the coastal provinces of Cambodia. FACT works on issues that affect the livelihood of local fishing communities, addressing a wide range of fishery resource conflicts in both inland and marine fisheries. FACT monitors fisheries policy development and mobilizes grassroots organizations and fishers' networks to effectively conduct advocacy on development policies and plans. FACT is extremely concerned about the predicted impacts to fishing livelihoods along the Mekong River and Tonle Sap Lake due to the Xayaburi and other proposed Mekong dams. As an active member of the Rivers Coalition in Cambodia (RCC), FACT has been instrumental in leading and conducting advocacy campaigns against all hydropower development on the Mekong mainstream and its tributaries.

SAMRETH LAW GROUP is a public interest law firm based in Cambodia. Samreth provides advice and representation to individuals and communities involved in land and other natural resource disputes or other matters of a public interest nature. Samreth aims to establish public interest legal advocacy as a viable component of the legal profession in Cambodia, and to instill a culture in which legal norms are valued and implemented. Samreth conducts pro bono case work, promotes the rights of the poor and works to develop a culture of transparency and accountability. Samreth is extremely concerned about the downstream impacts of the Xayaburi Dam on vulnerable communities reliant on fisheries and other riverine resources along the Mekong River and Tonle Sap Lake in Cambodia. Samreth is committed to promoting adherence to law and transparency in environmental decision-making on the Xayaburi Dam in Cambodia and the region.

The CENTRE FOR SOCIAL RESEARCH AND DEVELOPMENT (CSRD) is a national non-governmental organization based in the city of Hue in Central Vietnam. CSRD has been working since 2008 to protect Vietnam's natural environment, in particular, water resources and river systems. CSRD also works to support poor and vulnerable communities, many of whom depend on the rivers for their life and livelihoods. CSRD works closely with local communities, supporting them with information, training, advocacy services and practical assistance and also makes policy recommendations to government and business, based on community-based research. CSRD is committed to working to preserve the health and well-being of Vietnam's water resources and the communities who rely upon them. CSRD works in the Lower Mekong Basin to bring together local community based groups to voice concerns and take action on adverse impacts of hydropower dams on the Mekong River.

The LAW AND POLICY OF SUSTAINABLE DEVELOPMENT RESEARCH CENTER (LPSD) focuses on law and policy research, with the goal of promoting sustainable development to ensure economic growth, social development, and environmental protection. LPSD analyzes development related policy and provides legal and policy support in the public interest to provincial and national governments. LPSD is now expanding its mandate to include community engagement. LPSD takes a public interest legal approach to issues surrounding sustainable development and works with communities affected by development, poor industrial practices, and environmental degradation to help them understand and enforce their rights. LPSD has conducted policy research on legal and institutional strengthening regarding decision-making on hydropower dams in Vietnam and the Mekong region.

INTERNATIONAL RIVERS works to stop destructive dams, improve decision-making processes in the water and energy sectors, and promote water and energy solutions for a just and sustainable world. Since 1994 International Rivers has been working to protect the Mekong River Basin. As an active member of the Save the Mekong Coalition, International Rivers works with partners in the region to advocate against destructive dams on the Mekong River and promote more responsible options for meeting the region's energy and development needs.

EARTHRIGHTS INTERNATIONAL (ERI) is the legal consultant on this complaint. ERI is a non-governmental, non-profit organization that combines the power of law and the power of people in defense of human rights and the environment, defined as "earth rights." ERI specializes in fact-finding, legal actions against perpetrators of earth rights abuses, training grassroots and community leaders, and advocacy campaigns. Through these strategies, ERI seeks to end earth rights abuses, to provide real solutions for real people, and to promote and protect human rights and the environment in affected communities. ERI's Mekong Legal Program builds regional capacity for campaigning and legal advocacy responding to the negative social and environmental impacts of irresponsible development practices by governments and multinational corporations, including hydropower dams on the Mekong River.

B. Identity of the Corporation Involved

ANDRITZ Group, or Andritz AG, is an international technology group that supplies customized plants, systems, equipment, and services for the hydropower, pulp and paper, solid/liquid

separation, steel, and feed and biomass industries.¹ Andritz is headquartered in Graz, Austria. The company divides its activities into five “business areas”: Hydro, Pulp and Paper, Metals, Environment and Process, and Feed and Biofuel. Andritz Hydro, one of its major business areas, is an important global supplier of electro-mechanical systems and services for hydropower plants.² Andritz Hydro is headquartered in Vienna, Austria, and has more than 50 locations in 20 countries worldwide.

Andritz Hydro was the winning bidder in an international tender to supply electromechanical equipment for the Xayaburi hydropower plant in Lao PDR.³ The Xayaburi Power Company Ltd., a subsidiary of Thai construction company Ch. Karnchang Public Company Ltd., has ordered turbines, generators, automation systems, and additional equipment from Andritz, with a total value of between 250 and 300 million Euros.⁴ The company has credited its past involvement in Laos, specifically its supply of electromechanical equipment for the Nam Theun II hydropower plant, which went into operation in 2010, as a critical factor in its success in the tendering process.⁵

II. FACTUAL ALLEGATIONS

The Xayaburi Dam threatens to endanger hundreds of thousands of people’s livelihoods, increase food insecurity on a widespread basis, and eliminate many species of fish that thrive only in the Mekong River. Construction on the dam would not likely not go forward without Andritz’s assistance. As this section will demonstrate, the hydropower components that Andritz supplies for the Xayaburi Dam are critical for the completion of the project and will contribute to the dam’s irreparable social and environmental impacts.

This section will proceed in four parts. First, it will introduce the Mekong River, as well as the communities and biodiversity that it sustains. Next, it will describe the Mekong River Commission (MRC), the inter-governmental agency created to jointly manage and develop the Mekong,⁶ as well as the dams that are planned or under construction for the river. The following subsection will explain the impacts that the Xayaburi Dam has had and will continue to have on local communities and environment. Finally, this section will explain how Andritz’s involvement is necessary for construction of the Xayaburi Dam project to proceed and therefore will lead to significant social and environmental harms.

A. Background on the Mekong River and Water Resource Management

¹ Andritz Group, *The ANDRITZ GROUP at a Glance*, at <http://www.andritz.com/group/gr-about-us.htm>; Andritz Ag (ANDR: Vienna): *Company Description*, BLOOMBERG BUSINESSWEEK, at http://investing.businessweek.com/research/stocks/snapshot/snapshot_article.asp?ticker=ANDR:AV.

² Andritz Group, *ANDRITZ HYDRO*, at <http://www.andritz.com/hydro.htm>.

³ Press Release, Andritz Group, *Andritz to Supply Electromechanical Equipment for Xayaburi Hydropower Plant* (Oct. 25, 2012), at <http://www.andritz.com/group/gr-news/gr-news-detail.htm?id=23737>.

⁴ *Another Major Xayaburi Pact*, ECO-BUSINESS, (Oct. 31, 2012), at <http://www.eco-business.com/news/another-major-xayaburi-pact/>.

⁵ See e.g., Andritz Group, *News Detail: ANDRITZ to Supply Electromechanical Equipment for Xayaburi Hydropower Plant, Lao People's Democratic Republic EAE* (Oct. 25, 2012), at <http://reports.andritz.com/2012q1/print/gr-teletrader?tt=newsdetail.asp&ID=18717948&layID=0>.

⁶ Mekong River Comm’n, *About the MRC*, at <http://www.mrcmekong.org/about-the-mrc/>.

The Mekong River flows 4,600km through China, Myanmar, Lao PDR, Thailand, Cambodia and then Vietnam. It is home to a vast array of species, including endangered species such as the Mekong giant catfish, the Irrawaddy dolphin, the giant pangasius, and the seven-striped barb,⁷ and is second only to the Amazon River in biodiversity.⁸ There have been over one thousand species recorded in the Mekong, and its fish harvests total between \$3-7 billion annually,⁹ making it one of the richest inland fisheries in the world.

The Lower Mekong Basin covers approximately 36% of Thailand, almost the entirety of Laos, 86% of Cambodia, and 20% of Vietnam,¹⁰ and is home to more than a third of the populations of those countries.¹¹ The latter two countries – being the furthest downstream – are perhaps most vulnerable to alterations in the flow of the Mekong, especially the fisheries and flood plains of Cambodia, as well as the Mekong Delta in Vietnam, which depends on a steady water supply to prevent erosion and saltwater intrusion.¹²

The Mekong offers vital life support to 60 million people, many of whom are farmers and fishermen who rely on the river as the primary source of their nutrition and livelihoods.¹³ Those living near the river represent a range of diverse ethnic groups, who rely on its resources on a daily basis to meet fish protein needs and cultivate rice. In the Xayaburi area, communities also look to the river as a source of *kai* (a freshwater weed used as food and income); they also pan for gold in the river and use its water for crop irrigation.¹⁴

B. Dams on the Mekong River

1. Mekong Dams and Inter-Governmental Cooperation

Recognizing that the Mekong River is a vital transnational resource and intending to ensure its development in a sustainable, mutually beneficial manner, the four countries of the lower Mekong – Cambodia, Laos, Thailand, and Vietnam – signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River (“Mekong Agreement”) in 1995. Under

⁷ Sean Havey, *Mekong Dams Threaten Burmese Fishing, Rice Farming: Activists*, THE IRRAWADDY (May 31, 2013), <http://www.irrawaddy.org/archives/36090>; Zeb Hogan, *Three Megafish Species Imperiled by Lao’s Mekong River Dam*, NATIONAL GEOGRAPHIC (Dec. 27, 2012), at <http://newswatch.nationalgeographic.com/2012/12/27/three-megafish-species-imperiled-by-laos-mekong-river-dam/>.

⁸ *Greater Mekong: Overview*, WORLD WILDLIFE FUND, at <http://worldwildlife.org/places/greater-mekong>.

⁹ Hogan, *supra* note 7. Also see, Mekong River Commission State of the Basin Report Summary at 12 (2010), available at <http://www.mrcmekong.org/assets/Publications/basin-reports/MRC-SOB-Summary-reportEnglish.pdf>.

¹⁰ Ellen Bruzelius Backer, *The Mekong River Commission: Does It Work, and How Does the Mekong Basin’s Geography Influence Its Effectiveness?*, SÜDOSTASIEN AKTUELL 37, 39-42 (2007), available at <http://www.fni.no/doc&pdf/ebb-mekong-2007.pdf>.

¹¹ *The Mekong River - survival for millions*, UNEP, <http://www.unep.org/dewa/vitalwater/article120.html> (last visited Sept. 13, 2013).

¹² Backer, *supra* note 10, at 37, 40-42 (2007), available at <http://www.fni.no/doc&pdf/ebb-mekong-2007.pdf>.

¹³ *People of the Greater Mekong*, WORLD WILDLIFE FUND, http://wwf.panda.org/what_we_do/where_we_work/greatermekong/discovering_the_greater_mekong/people_of_the_greater_mekong/.

¹⁴ See International Rivers, *The Xayaburi Dam: A Looming Threat to The Mekong River* (Jan. 2011), http://www.internationalrivers.org/files/attached-files/the_xayaburi_dam_eng.pdf.

the Mekong Agreement, riparian states agree to use the water of the Mekong in a “reasonable and equitable manner” and to “take all appropriate measures to prevent the causing of significant harm to other watercourse States.”¹⁵ Therefore, riparian states have agreed to notify, consult and seek agreement with each other before undertaking an action that will have significant effects on the Mekong River’s mainstream flows.¹⁶

The Mekong Agreement creates an inter-governmental Mekong River Commission (MRC), which is tasked with implementing the agreement and developing procedures for intergovernmental dialogue. The MRC has promulgated Procedures for Notification, Prior Consultation and Agreement (PNPCA) that establish the manner in which information must be shared before a riparian state undertakes a significant year-round use of Mekong water.¹⁷ Notably, the proposing state is expected to inform and consult in good faith, share sufficient information for other states to evaluate the potential impacts of the project, and seek to reach a consensus agreement on the proposed use.

2. Proposed Cascade of Dams on the Lower Mekong

The four Lower Mekong Basin (LMB) countries of Lao PDR, Thailand, Cambodia, and Vietnam have proposed eleven dam projects on the Lower Mekong. China is now planning more than 20 dams on the Upper Mekong (Lancang),¹⁸ and there may be over 80 projects on the entire river system (including tributaries) by 2030.¹⁹ The Xayaburi Dam is particularly significant as it is the first dam project scheduled for construction on the mainstream below China, potentially causing irrevocable environmental consequences,²⁰ and decisions made about Xayaburi will set a precedent for future projects on the mainstream.

Thailand and Vietnam are predicted to purchase close to 90% of the power generated by the proposed mainstream projects.²¹ However, both the Thai²² and Vietnamese²³ energy demand calculations have been subject to dispute. Regardless of whether or not there is an over-

¹⁵Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin arts. 5, 7, Apr. 5, 1995, 34 I.L.M. 864 [“Mekong River Agreement”], *available at* <http://www.mrcmekong.org/assets/Publications/agreements/agreement-Apr95.pdf>.

¹⁶*Id.* art. 5(B).

¹⁷Mekong River Comm'n, Procedures for Notification, Prior Consultation and Agreement, *available at* <http://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf>.

¹⁸International Rivers, *Mekong/Lancang River*, <http://www.internationalrivers.org/campaigns/mekong-lancang-river>.

¹⁹Int'l Ctr. For Env'tl Mgmt., Strategic Environmental Assessment of Hydropower on the Mekong Mainstream at 8 (2010) [“SEA Report”], <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf>.

²⁰The geology and hydrology of the Lower Mekong River is quite distinct from that of the Upper Mekong, north of the Chinese border. Thus the impacts of the LMB mainstream dams are expected to be quite distinct from those of the already existing dams in China.

²¹SEA Report, *supra* note 19, at 10

²²Chris Graecen & Apsara Palettu, *Energy sector planning and hydropower in the Mekong Region*, *available at* http://berkeley.academia.edu/ChrisGraecen/Papers/1125510/Electricity_sector_planning_and_hydropower_in_the_Mekong_Region, published as Ch. 5 in Louis Lebel *et al.*, DEMOCRATIZING WATER GOVERNANCE IN THE MEKONG REGION (2007).

²³SEA Report, *supra* note 19, at 9-10.

estimation of future power demand, the eleven mainstream dam projects are not critical to ensure healthy growth in the LMB regional power sector.²⁴ Unfortunately, despite the predictions of serious adverse social and environmental consequences, LMB governments have not adequately explored alternatives, such as the possibility of meeting regional energy needs without damming the Mekong mainstream or designing dams that do not block the river channel.²⁵

The planned cascade of dams has proven extremely controversial and led the MRC to commission the International Centre for Environmental Management to carry out a Strategic Environmental Assessment (SEA) of the dams' impacts. **The SEA concluded in 2010 that the eleven dams, taken cumulatively, would degrade fisheries, exacerbate inequality, result in "serious and irreversible environmental damage," harm biodiversity, impoverish repeatedly resettled communities, and "fundamentally undermine the abundance, productivity and diversity of the Mekong fish resources, affecting the millions of rural people who rely on it for nutrition and livelihoods."**²⁶ The SEA therefore recommended that the four riparian countries should impose a ten-year moratorium on building mainstream dams in order to further study potential impacts and design mitigation strategies.²⁷ At the MRC's Special Joint Committee Meeting in April 2011, Vietnam requested a 10-year moratorium on decisions over mainstream dams.²⁸ The World Bank subsequently announced that it would not fund any mainstream dams on the Mekong due to the concerns raised in the SEA.²⁹

All four MRC member governments committed to commissioning a further report on the impacts of dams on the Mekong River mainstream in December 2011,³⁰ and the Vietnamese government has commissioned a further report on the impacts of mainstream hydropower development on the Mekong Delta.³¹ However, the Lao PDR, Thailand and the business enterprises involved have not followed the recommendations of the SEA report, nor have they waited for the MRC or Vietnamese government studies to be completed before commencing construction at Xayaburi.

Communities and their advocates have been concerned that if Xayaburi goes forward – particularly in the form currently planned and without the provision of information requested by Cambodia and Vietnam – it will lead to the construction of all eleven mainstream dams without adequate study of impacts. These fears appears to have been prescient; in addition to Xayaburi,

²⁴ *Id.* at 20.

²⁵ *Id.*

²⁶ *Id.* at 12-18.

²⁷ *Id.* at 137.

²⁸ See e.g., Luang Prabang, *Laos' neighbors unhappy with Xayaburi dam construction*, Hydroworld.com (Jan. 21, 2013), available at <http://www.hydroworld.com/articles/2013/january/laos--neighbors-unhappy-with-xayaburi-dam-construction.html>.

²⁹ World Bank Group, *World Bank Group Welcomes Strategic Environmental Assessment of Mekong Mainstream Dams*, (Oct. 22, 2010), at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/CAMBODIAEXTN/0,,contentMDK:22740418~menuPK:293875~pagePK:2865066~piPK:2865079~theSitePK:293856,00.html>.

³⁰ Mekong River Comm'n, *Further study on impact of Mekong mainstream development to be conducted, say Lower Mekong Countries* (Dec. 8, 2011), at <http://www.mrcmekong.org/news-and-events/news/further-study-on-impact-of-mekong-mainstream-development-to-be-conducted-say-lower-mekong-countries/>.

³¹ The study will be carried out by the International Centre for Environmental Management. See Int'l Ctr. For Env'tl Mgmt., *Study of the impact of mainstream hydropower on the Mekong Delta*, at http://www.icem.com.au/02_contents/03/03_40_delta%20study.htm.

which is discussed in fuller detail below, the Lao PDR has begun preparatory work for a second mainstream dam, the Don Sahong Dam – just two kilometers from the Cambodian border. The Lao government announced in October 2013 that it is not required to invoke the Mekong Agreement’s PNPCA mechanism because the Don Sahong Dam will not completely block the Mekong’s flow. However, in a 2007 draft report, the MRC Secretariat provided advice that Don Sahong should trigger the prior consultation procedure,³² and Cambodia, Vietnam, and Thailand have all demanded full consultation.³³ Independent international experts have found that the Don Sahong dam will block a key fish passage corridor that provides the only means for both upstream and downstream migration during the dry season.³⁴

3. The Xayaburi Hydropower Project

a. The Project is Launched

On May 4, 2007, the Government of Lao PDR and Thailand’s Ch. Karnchang Public Company Ltd. (“Ch. Karnchang”) signed a Memorandum of Understanding to build a hydroelectric dam at Xayaburi in northern Laos.³⁵ The developer for the project is the Xayaburi Power Company Ltd., a 50% owned subsidiary of Ch. Karnchang, which has designated its parent company as the lead contractor.³⁶ These two actors signed a Project Development Agreement in November 2008, and Ch. Karnchang submitted the dam’s Environmental Impact Assessment (EIA) to Lao PDR for approval in February 2010. Ch. Karnchang’s contractor, TEAM Consulting Engineering and Management Ltd., finalized the EIA report, along with the Social Impact Assessment (SIA), in August 2010.

Lao PDR and the Xayaburi Power Company Ltd. signed a Concession Agreement on October 29, 2010, and the developer began preparatory construction work on the project in late 2010.³⁷ In October 2011, Thailand’s National Energy Policy Committee approved a Power Purchase Agreement (PPA), in which the Electricity Generating Authority of Thailand (EGAT) agreed to buy 95% of the electricity from Xayaburi, a decision that was subject to a directive of the Thai National Energy Policy Council requiring compliance with the 1995 Mekong Agreement.³⁸

³² Mekong River Comm’n Secretariat, *Draft Review Report of the Environmental Impact Assessment Report Prepared for Don Sahong Hydropower Project, Lao PDR* ¶ 35 (Nov. 2007). It is not known whether a finalized version of this document exists.

³³ See Mekong River Comm’n, *MRC takes Don Sahong Project discussions to ministerial level* (Jan. 16, 2014), at <http://www.mrcmekong.org/news-and-events/news/mrc-takes-don-sahong-project-discussions-to-ministerial-level/>.

³⁴ See, e.g., Eric Baran & Blake Ratner, *The Don Sahong Dam And Mekong Fisheries*, WORLD FISH CENTER (June 2007), at http://www.worldfishcenter.org/resource_centre/DonSahong-final.pdf.

³⁵ Ame Trandem, *Dodgy Deal: Xayaburi dam Laos*, BANKTRACK, at http://www.BankTrack.org/manage/ajax/ems_dodgydeals/createPDF/xayaburi_dam.

³⁶ See Plew Trivisvavet, CEO, Ch. Karnchang, Notification of Resolutions of the Board of Directors’ Meeting No. 2/2010 (Mar. 26, 2010), at <http://www3.set.or.th/set/newsdetails.do;jsessionid=A5DEC9DAE3235D0FEFC6CA3BD43980B3.itnpi06?type=H&time=1269566940000&pdf=dat%2Fnews%2F201003%2F10011155.pdf+++++++&filename=dat%2Fnews%2F201003%2F10011155.e10+++++++&source=CK&headline=establish+subsidiary+sig+n+MOU+with+EGAT&symbol=CK&language=en&country=US>.

³⁷ See International Rivers, *Xayaburi Dam: Timeline of Events*, at http://www.internationalrivers.org/files/attached-files/xayaburi_dam_timeline_of_events_july_2013_1.pdf (last updated July 2013).

³⁸ See International Rivers, *Thai Utility Commits to Purchase of Power from Xayaburi Dam* (Dec. 18, 2011), at <http://www.internationalrivers.org/resources/thai-utility-commits-to-purchase-power-from-xayaburi-dam-3692>.

b. Stakeholders and Neighboring Countries Object in Regional Consultations

The regional consensus building process prescribed by the Mekong Agreement for the Xayaburi began in September 2010, when the Lao PDR submitted project documents to the MRC initiating the PNPCA process. During the period of regional consultation, the MRC organized seven stakeholder meetings in Thailand, Cambodia and Vietnam, in which community members and civil society organizations expressed widespread concern over the dam's transboundary impacts and the poor consultation process. Neither the Lao Government nor Ch. Karnchang made the key documents for the project publicly available until mid-March 2011, weeks *after* regional meetings took place as part of the PNPCA process.³⁹

In their official replies to the consultation process, Thailand, Vietnam, and Cambodia all expressed strong concerns about the effects of the Xayaburi Dam as proposed on fish populations, sediment flow, and the transboundary impacts of the project, among other things.⁴⁰ At a Special Joint Committee meeting of the MRC on April 19, 2011, LMB government representatives agreed that a decision on the Xayaburi Dam should be deferred until a future Ministerial-level meeting could be held later in the year. While Lao PDR had proposed to proceed with the dam, Thailand, Cambodia, and Vietnam called for an extension to the decision-making process, citing concerns about transboundary impacts and knowledge gaps that required both future study and public consultation. Together, the four countries agreed to raise the issue from the MRC's Joint Committee to the MRC's Council, in order for them to decide whether or not to build the dam. A decision has yet to be made by the Council. During a side-meeting at the 18th ASEAN Summit on May 7, 2011, between the Prime Ministers of Lao PDR and Vietnam, Lao PDR agreed to temporarily suspend the dam in order to allow for the preparation of a new study on the dam's social and environmental impacts. However, as reported in section 3e, this did not happen.

c. Environmental, Social, and Compliance Studies Fault Xayaburi for Serious Impacts and Inadequate Mitigation Measures

In reaction to the widespread criticism of the project, the MRC initiated a technical expert review of the key project documents, which criticized the project for its lack of rigorous analysis or data, documented considerable transboundary fishery impacts, and reaffirmed that no proven mitigation measures exist.⁴¹

³⁹ See Ame Trandem, *Fatally Flawed Xayaburi EIA Fails to Uphold International Standards: A Preliminary Review of the Environmental Impact Assessment (EIA) Report For the Xayaburi Hydropower Dam on the Mekong River mainstem in Northern Lao PDR*, INTERNATIONAL RIVERS, (Mar. 14, 2011), http://www.BankTrack.org/manage/ems_files/download/fatally_flawed_xayaburi_eia_fails_to_uphold_international_standards/110707_preliminary_review_of_xayaburi_eia_14_03_11_final.pdf.

⁴⁰ The official reply forms of the three co-riparian states can be found on the website of the Mekong River Commission Secretariat at <http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process/>.

⁴¹ Mekong River Comm'n Secretariat, *Proposed Xayaburi Dam Project- Mekong River: Prior Consultation Project Review Report 92-96* (Mar. 2011) ["MRC Prior Consultation Review"], available at <http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>.

In response, the project developer commissioned a three-month compliance review of the project EIA and SIA by Pöyry Energy AG, the Swiss subsidiary of a Finnish consulting and contracting company. The resulting report – which (like the original environmental and social assessments) considered Lao PDR’s compliance with its obligations under the Mekong Agreement but did not address transboundary impacts – concluded that Xayaburi is principally in compliance,⁴² despite identifying the need for approximately 40 additional studies and recommending numerous improvements on critical issues, such as fish passages. In a review of the Pöyry report that was requested by Vietnam, the MRC concluded that Pöyry erred in recommending that major project design flaws and information gaps may be cured in the course of construction; instead, these decisions should be made before construction begins in earnest.⁴³ The MRC expressed particular concern with Pöyry’s approach to fish passages, which it considered to be inadequately developed, and called for a multi-year study period prior to construction. The Pöyry report did not involve any further collection of data and has also been criticized by scientists from the International Centre for Environmental Management⁴⁴ and from the World Wide Fund for Nature,⁴⁵ and by Cambodia’s Fisheries Administration.⁴⁶ The developer commissioned French engineering firm Compagnie Nationale du Rhône (CNR) to carry out a partial peer review of the Pöyry report, which recommended that Ch. Karnchang redesign certain aspects to reduce obstructions to sediment.⁴⁷ In November 2012, despite the controversy over its report, Pöyry was selected to review the design and oversee construction for the entire Xayaburi project.⁴⁸

⁴² Pöyry Energy AG, *Main Report: Xayaburi Hydroelectric Power Project – Run-Of-River Plant* at 14 (2011) [“Pöyry Report”].

⁴³ Mekong River Comm’n Secretariat, *Observations and Comments on the Pöyry Report on the Xayaburi Hydropower Project* at ii, 30-31 (Nov. 2011) [“MRC Pöyry Comments”], available at http://www.internationalrivers.org/files/attached-files/mrcs_comments_on_poyry_report_nov_2011_0.pdf.

⁴⁴ Int’l Ctr. for Env’tl Mgmt, *Xayaburi Hydropower Power Project: Gains and losses for the Lower Mekong Basin*, presented at Vietnam Union of Science and Technology Associations Seminar on Mainstream Hydropower, Ho Chi Minh City, Nov. 23, 2011, available at

http://www.icem.com.au/documents/envassessment/mrc_sea_hp/VUSTA%20poyry%20review.pdf.

⁴⁵ Denis Gray, *Decision Looms on First Mekong Mainstream Dam*, THE IRRAWADDY, Dec. 7, 2011, at http://www2.irrawaddy.org/print_article.php?art_id=22610.

⁴⁶ Kristin Lynch, *Transparency sought in Xayaburi decision*, PHNOM PENH POST, Dec. 8, 2011, at <http://www.phnompenhpost.com/national/transparency-sought-xayaburi-decision>.

⁴⁷ Compagnie Nationale du Rhône, *Xayaburi Hydroelectric Power Project – Peer Review of Compliance Report Made by Pöyry* 20 (Apr. 2012) [“CNR Report”], available at <http://www.poweringprogress.com/download/Reports/2012/April/Final-report-V1.pdf>. For more on the CNR Report, see *infra* Part III.C.1.d.

⁴⁸ See *Laos Hires Firm Under Probe*, RADIO FREE ASIA, Nov. 12, 2012, at <http://www.rfa.org/english/news/laos/probe-11122012182135.html>. In other words, Pöyry, having passed on the environmental and social suitability of the project at a time when it knew its conclusions might influence its selection as general engineer, will now serve as project engineer for the construction of the dam. Pöyry was analyzed as a candidate for the Swiss Public Eye Award, which is granted to companies whose operations have severe negative social and environmental impacts. Although the award panel did not select Pöyry as a winner, its analysis of the company found that Pöyry “accepts human rights violations and environmental damage as part of its business practice.” Institute for Business Ethics, University of St. Gallen, *Review of Public Eye Award Nomination 2013_9: Pöyry*. It further concluded that the company “has actively supported Laos in covering up scientific evidence documenting the dam project’s negative ramifications and risks.” In June 2012, Pöyry suffered another setback when it was blacklisted from contracts with the World Bank for “submitting false invoices and providing improper benefits to World Bank Group staff.” *Pöyry Blacklisted by World Bank*, BOMBORRA, July 19, 2012, <http://bomborra.com/productions/?p=2413>.

To date, neither the project developer nor the Government of Lao PDR have released public details about whether they intend to undertake the many studies and design improvement recommended in the reports prepared by Pöyry and CNR, let alone those released by the MRC or independent experts. After the release of the CNR report, the project developer pledged an additional \$100 million to improve fish passages and sediment flow,⁴⁹ but neither the Lao PDR government nor the developer has provided any details about how they intend to prevent the expected negative impacts. Moreover, they have not explained how it will be possible to mitigate the risks of a dam whose potential impacts have not been adequately studied.

d. Thai Government and Civil Society Objectors Raise Questions on the Power Purchase Agreement

Numerous groups in Thailand have raised serious questions about the degree to which the Power Purchase Agreement (PPA) – by which the Thai electricity authorities agreed to buy 95% of the electricity from Xayaburi - complies with Thai law. The Senate Commissions on Good Governance Promotion and Corruption Investigation has called for a transboundary impact assessment of the dam's impacts on Thailand. Moreover, the Thai National Human Rights Commission has released a statement calling on the Thai Prime Minister to review the implementation of the Xayaburi Dam's construction, comply with the MRC Council resolution to study the impacts of mainstream hydropower development, and suspend the PPA until an investigation into its approval is conducted.

Seeking a remedy for the impacts that the Xayaburi Dam will have on their lives, a coalition of Thai environmental and community groups, representing people from each of the eight provinces living along the Mekong River to be affected by the dam, filed a lawsuit in the Administrative Court of Thailand.⁵⁰ The lawsuit argues that the approvals of the PPA by both the National Energy Policy Council and Cabinet were unconstitutional and therefore illegal because they did not include an impact assessment or public consultation in Thailand. In February 2013 the Thai Administrative Court denied the lawsuit on the basis that the villagers lack standing and the court lacks jurisdiction over the dispute, but the villagers have appealed that decision.⁵¹

e. Xayaburi Moves Forward Despite the Continuing Objections of Cambodia, Vietnam, and International Development Partners

The Lao government has repeatedly disregarded the MRC process, which calls for good faith consultation and an attempt to reach consensus before any country takes action on the Mekong. Despite the continued requests of other riparian states to provide further information and

⁴⁹ See *Xayaburi dam project commits 100 million dollars to redesign*, THE NATION (THAILAND), July 19, 2012, at <http://www.nationmultimedia.com/breakingnews/Xayaburi-dam-project-commits-100-million-dollars-t-30186538.html>; *Thai govt supports Xayaburi dam*, BANGKOK POST, Nov. 6, 2012, at <http://www.bangkokpost.com/lite/breakingnews/319838/thailand-backs-xayaburi-dam>.

⁵⁰ *Laos to Break Ground on Dam*, RADIO FREE ASIA, Nov. 5, 2012, at <http://www.rfa.org/english/news/laos/dam-11052012201418.html>.

⁵¹ Post of Evelyn Chuang, *Xayaburi Dam Court Decision Prompts Community Consultation*, EARTHRIGHTS INTERNATIONAL BLOG, (Mar. 19, 2013), <http://www.earthrights.org/blog/xayaburi-dam-court-decision-prompts-community-consultation>.

guarantees before the consultation period is complete, and despite the Lao PDR's own promises to suspend construction pending the completion of key studies, the Xayaburi developers have moved inexorably forward with the project.

In their April 2011 responses to the PNPCA, Cambodia and Vietnam asked for a postponement of the project until further impact studies could first be conducted. In response, Lao PDR announced that it would suspend construction until the conclusion of an expert review, a decision then-U.S. Secretary of State Hillary Clinton praised as “forward-leaning.”⁵² But then, without resolving any of the outstanding issues, the Lao Government announced in early September 2011, that construction would continue. This unilateral decision to proceed with the dam ignores Lao PDR's legal obligations to respect the outcome of the regional decision-making process, and its customary international law obligation to conduct a transboundary environmental impact assessment.⁵³ On November 7, 2012, an official “groundbreaking” ceremony was held to mark the official start of construction.⁵⁴ However, it actually appears that construction had never been suspended in the first place; for the entire year prior to November 7, while the project was supposedly on hold, the developers were carrying out extensive construction work.⁵⁵

In connection with the announcement that construction would go forward, Lao PDR Deputy Minister of Energy and Mining Viraphonh Viravong told reporters that concerns voiced by the MRC Secretariat had been addressed sufficiently, that the dam design had been modified to make it more environmentally acceptable, and that he was “very confident that we will not have any adverse impacts on the Mekong River.”⁵⁶ These “modifications,” however, remain untested, and many critics continue to charge that they are far from adequate.⁵⁷ Moreover, the details have not been made public.⁵⁸ Viravong later released public remarks about the project, insisting that that Lao PDR had incorporated feedback from neighboring countries into the design, and that the concerns associated with sediment and fish migration have been fully addressed. However, he refused to disclose details of the changes made, saying, “I'm surprised that people don't seem to understand the process. We have been very open with the design change and other reports such

⁵² See Robin McDowell, *Mekong River Dam: United States Praises Laos For Suspending Project*, HUFF POST GREEN (July 22, 2011), http://www.huffingtonpost.com/2011/07/22/mekong-dam-united-states-praises-laos_n_907013.html.

⁵³ See Mekong Legal Network, *Briefing Note on Duties of Notification, Prior Consultation, and Assessment Arising From International Law in Relation to the Xayaburi Dam Project in Northern Lao PDR*, (Sept. 2011), available at http://w4pn.org/index.php/w4pn-resources-download/doc_view/54-memorandum-on-legal-aspects-of-the-power-purchase-agreement-for-the-xayaburi-hydropower-project.raw?tmpl=component.

⁵⁴ *Lao Holds “Groundbreaking” Ceremony for Contentious Mekong Dam*, REUTERS, Nov. 7, 2012, at <http://www.reuters.com/article/2012/11/07/laos-dam-idUSL3E8M77GG20121107>.

⁵⁵ Ben Otto, *Laos Dam Kicks Off Controversial Mekong Plans*, WALL STREET JOURNAL, Nov. 8, 2012, <http://online.wsj.com/article/SB10001424127887324073504578104873476933846.html>.

⁵⁶ Jacey Fortin, *A Dam Conundrum: Xayaburi Project Could Help Laos and Thailand, Hurt Cambodia and Vietnam*, INTERNATIONAL BUSINESS TIMES, Nov. 5, 2012, available at <http://www.ibtimes.com/dam-conundrum-xayaburi-project-could-help-laos-thailand-hurt-cambodia-vietnam-859904>.

⁵⁷ See *id.*

⁵⁸ Thomas Fuller & Poypiti Amatatham, *Laos Presses Ahead with Mekong Dam Project*, NEW YORK TIMES, Nov. 6, 2012, available at <http://www.nytimes.com/2012/11/07/world/asia/laos-presses-ahead-with-mekong-dam-project.html? r=0>.

as corporate social responsibility. Anyone can see it. But it is impossible to publish the detailed design.”⁵⁹

During a state visit to Vientiane in July 2012, U.S. Secretary of State Hillary Clinton urged the Lao PDR to conduct more studies before approving construction of the dam.⁶⁰ In November 2012, the U.S. State Department released a statement expressing continuing concern that construction was moving forward before the completion of impact studies, and without consensus from the members of the MRC that the project should proceed.⁶¹ The statement also noted uncertainty about the Xayaburi Project’s impacts on “an ecosystem that provides food security and livelihoods for millions.”⁶²

Vietnam and Cambodia spoke out against the dam again in January of 2013 at a Mekong River Commission meeting. The two countries demanded that construction be halted.⁶³ Vietnam argued that no dams should be constructed on the Mekong unless a mutually agreed upon independent study of the dams’ effects could be completed.⁶⁴ Vietnam and Cambodia continue to urge suspension of the project until further studies are carried out.⁶⁵

In spite of objections from the surrounding countries, and questions surrounding the legality of the PPA in Thailand, construction on the Xayaburi Dam was thirty percent complete as of March 2014.⁶⁶ All of the service roads, bridges, and housing facilities for laborers and technicians for the project are completely finished.⁶⁷ Construction at the site is moving along full speed ahead with reports of around-the-clock construction.⁶⁸ However, environmentalists believe that irreversible impacts are still avoidable – at least until construction begins across the main channel of the river in approximately February 2015.⁶⁹

C. Impacts of the Xayaburi Dam

According to the SEA and the findings of independent international experts, the Xayaburi Project will cause devastating effects on the natural environment that cannot be mitigated, including:

⁵⁹ *Vientiane says sorry for broken Xayaburi ground*, BANGKOK POST, Nov. 25, 2012, available at <http://www.bangkokpost.com/news/investigation/322967/vientiane-says-sorry-for-broken-xayaburi-ground>.

⁶⁰ Daniel Ten Kate and Nicole Gaouette, *Clinton Presses Laos for More Studies on Mekong Dam in Visit*, BLOOMBERG NEWS, July 11, 2012, available at <http://www.businessweek.com/news/2012-07-11/clinton-lands-in-laos-to-discuss-mekong-dam-war-legacy>.

⁶¹ Office of the Spokesperson, U.S. State Dep’t, *Taken Questions: Laos Approval of Xayaburi Dam* (Nov. 5, 2012), <http://www.state.gov/r/pa/prs/ps/2012/11/200190.htm>.

⁶² *Id.*

⁶³ Luke Hunt, *Laos Finally Called Out over Xayaburi Dam*, THE DIPLOMAT, (Jan. 23, 2013), available at <http://thediplomat.com/asean-beat/2013/01/23/laos-finally-called-out-over-xayaburi-dam/>.

⁶⁴ *Id.*

⁶⁵ Laignee Barron, *At Mekong meet, all eyes on Laos dams*, Phnom Penh Post (April 7, 2014) available at <http://www.phnompenhpost.com/national/mekong-meet-all-eyes-laos-dams>.

⁶⁶ Shane Worrell, *Xayaburi dam 30% finished, says Laos*, Phnom Penh Post (March 25, 2014) available at, <http://www.phnompenhpost.com/national/xayaburi-dam-30-finished-says-laos>.

⁶⁷ *Dark Days for Villagers Relocated to Make Way for Xayaburi Dam*, RADIO FREE ASIA, July 1, 2013, at <http://www.rfa.org/english/news/laos/xayaburi-07012013182231.html>.

⁶⁸ *Xayaburi Dam Presents No Risks to Environment, Lao Government*, GLOBAL TIMES, March 19, 2013, at <http://www.globaltimes.cn/content/769096.shtml#Ue7EUI1JOAg>.

⁶⁹ See WWF-Greater Mekong, *Xayaburi Dam Brief: The Undoing of the Mekong* at 5 (Oct. 2013).

- Likely extinction of 41 critically threatened species, including the giant Mekong catfish
- Overall significant reduction in biomass of fish in the Mekong River due to changed hydrology and the inability of migratory species to circumvent the dam
- Trapping of sediment, resulting in reduction of nutrient availability to downstream farmlands and fisheries and a deterioration in water quality

Human impacts are likely to include increased malnutrition and decreases to food supply; degradation of traditional livelihoods; exacerbation of income inequality; and economic and physical displacement of communities.

These findings contradict the results of the environmental⁷⁰ and social impact assessments⁷¹ commissioned by the project developer, which found that the project would have acceptable impact levels. However, the developer's assessments only considered impacts of the dam in the reservoir and ten kilometers downstream and did not include a transboundary assessment of impacts. The developer's assessments have been criticized by independent experts in terms of both methodology and analysis.

1. Environmental Impacts

The MRC's SEA concluded that the environmental risks of the planned mainstream dams – including Xayaburi – are so great in magnitude and so poorly understood that all dam construction should be deferred for ten years.⁷² The designers and developers of the Xayaburi Dam have failed to conduct sufficient research into the ecology and sediment content of the Mekong.⁷³ Moreover, the dam's design is substantially non-compliant with the MRC's Preliminary Design Guidance, which serves as a reference point for both the design and review of dam projects in the Lower Mekong,⁷⁴ Even the 2011 Pöyry report identifies eight important ways in which the dam design was deficient, despite the statement in its Executive Summary that “the Xayaburi HPP [Hydroelectric Power Project] has principally been designed in accordance with the applicable MRC Design Guidelines.”⁷⁵

a. Extinction of fish species

⁷⁰ Team Consulting Engineering and Management Co., Ltd., *Environmental Impact Assessment: Xayaburi Hydroelectric Power Project, LAO PDR* (Aug. 2010) [“Developer's EIA”], available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/>.

⁷¹ The Team Consulting Engineering and Management Co., Ltd., *Social Impact Assessment: Xayaburi Hydroelectric Power Project, LAO PDR* (Aug. 2010) [“Developer's SIA”], available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/>.

⁷² SEA Report, *supra* note 19, at 137.

⁷³ Andrea Kraljevic et al, *Seven Sins of Dam Building*, WORLD WILDLIFE FUND, 17 (March 2013), http://awsassets.panda.org/downloads/wwf_seven_sins_of_dam_building.pdf.

⁷⁴ Mekong River Comm'n, *Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin, Final Version* (Sept. 2009), available at <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/Preliminary-DG-of-LMB-Mainstream-dams-FinalVersion-Sept09.pdf>.

⁷⁵ Pöyry Report, *supra* note 42, at 9-10.

According to the MRC's technical review of the Xayaburi Project, the completion of the Xayaburi Dam is likely to bring large fish that exist only in the Mekong, like the giant catfish, to the brink of extinction.⁷⁶ It will block the giant catfish, which can reach approximately 3 meters in length and is one of the rarest freshwater fishes, from access to its upstream spawning area. The dam developers plan to use fish ladders to solve this problem, but there is no evidence that these fish ladders, designed for fish of smaller sizes and stronger swimming abilities, will be effective in allowing these freshwater giants to pass through the dam and avoid extinction.⁷⁷ Other dams in the region have demonstrated that fish ladders do not work for the large fish species in the Mekong.⁷⁸ It is likely that the technology necessary to allow large fish species to pass through such mega-dams simply does not yet exist. An international expert group convened by the MRC Secretariat concluded that "current fish-passage technology would not be effective in maintaining the migration of the large number and diverse fish species found in the Mekong. [sic]"⁷⁹ Professor Philip Hirsch of the Australian Mekong Research Centre at Sydney University supported that conclusion, saying that "the overwhelming consensus of scientists, who understand how the Mekong River works, is that the mitigation measures proposed . . . are unproven and unlikely to work."⁸⁰ Pöyry's own report notes the lack of knowledge about the fish species in the Mekong, and the insufficient design of the facility to handle migrating fish.⁸¹ The report concludes that "the knowledge concerning the specific requirements of the aquatic fauna on the fish passage facility is not sufficient."⁸²

b. Reduction of Fish Biomass

In addition to the giant catfish, it is projected that the Xayaburi Dam will lead to the extinction of at least six other migratory fish species and cause one other to become critically endangered.⁸³ In addition, there are at least 41 non-migratory species that face similar risks.⁸⁴ While estimates are not available for the total reduction of fish biomass as a result of Xayaburi alone, the MRC has concluded that the fish passage facilities as designed are not appropriate for a river with the diversity and density of fish life as the Mekong, and that the six planned upstream Lao dams

⁷⁶ MRC Prior Consultation Review, *supra* note 41, at 37 (Mar. 2011), available at <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process/> (noting that building even one dam would likely lead to the extinction of the catfish because "the only confirmed spawning area is above Luang Prabang [upstream of the Xayaburi site]"); see also *Laos' New Mekong Dam Pushes Giant Catfish Toward Extinction, Says WWF*, THE FISH SITE (July 2, 2013), <http://www.thefishsite.com/fishnews/20631/laos-new-mekong-dam-pushes-giant-catfish-toward-extinction-says-wwf>.

⁷⁷ Joshua Lipes, *Mekong Dams Threaten Extinction of Giant Catfish*, RADIO FREE ASIA, June 19, 2013, <http://www.rfa.org/english/news/laos/dams-06192013184629.html>.

⁷⁸ Kraljevic, *supra* note 73.

⁷⁹ Patrick Dugan, *Mainstream Dams as Barriers to Fish Migration: International Learning and Implications for the Mekong*, 14 CATCH AND CULTURE No. 3, 12 (Dec. 2008), available at <http://www.mrcmekong.org/assets/Publications/Catch-and-Culture/CatchCulturevol14.3.pdf>.

⁸⁰ Tom Fawthrop, *Trouble on the Mekong*, THE DIPLOMAT, July 2, 2013, available at <http://thediplomat.com/2013/07/02/trouble-on-the-mekong/2/>.

⁸¹ See Pöyry Report, *supra* note 42, at 23-27.

⁸² *Id.* at 25.

⁸³ Baran *et al.*, *Review of the Fish and Fisheries Aspects in the Feasibility Study and the Environmental Impact Assessment of the Proposed Xayaburi Dam on the Mekong Mainstream* 21 (Mar. 2011), available at http://assets.panda.org/downloads/wwf_xayaburi_dam_review310311.pdf.

⁸⁴ *Id.*

would likely lead to an overall drop in capture fish production of at least 16% in Lao PDR, 5% in Thailand, 18% in Cambodia and 16% in Vietnam – and possibly much higher.⁸⁵ The Pöyry Report itself conceded that “[b]asic knowledge concerning the fish species of the Mekong River, their swimming ability and behaviour needs to be greatly improved.”⁸⁶ Pöyry called for deeper consideration of measures to handle the biomass in the Mekong River, stating that “the migration pattern and the amount of biomass need to be assessed and it needs to be verified whether the envisaged designs are capable for handling the biomass...[.]”⁸⁷ In addition, Andritz’s turbine blades may not be designed to avoid killing large numbers of fish directly.

c. Sediment Trapping

The Sediment Expert Group (“SEG”), which provided expert advice to the MRC on the preparation of its Project Review Report for the Xayaburi Dam, concluded that sedimentation could become a major problem for the Xayaburi Dam unless the project design includes sedimentation routing and flushing capabilities.⁸⁸ Both the MRC’s Preliminary Design Guidance and the Lao Department of Electricity’s Optimization Study of Mekong Mainstream Hydropower recognize sediment trapping as a potential danger of mainstream dams. In particular, they identify as major impacts of sedimentation:

- Interference with the flow of nutrients downstream, with potential transboundary impacts on the health of fisheries and agricultural lands
- Transformation of the river bed and banks upstream, which could cause local flooding
- Interference with dam functioning and eventual reduction of reservoir capacity
- Erosion and lowering of the water table downstream
- Creation of obstacles to downstream navigation

The SEG Report notes that sediment changes in rivers can have extremely detrimental effects. Sediment tends to become trapped behind a dam, leading to slower flows upstream and “sediment scouring” downstream. The faster downstream flows can be expected to degrade wetlands and erode fertile alluvial plains, delta agricultural lands, coastal beaches, sand spits, and riverbanks. Further effects include algal blooms upstream (due to increased nutrient content in the reservoir) and reduced nutrient output downstream, resulting in lost fertility to agricultural lands that depend on sediment deposits from upstream.⁸⁹ The SEG concluded that, as designed,

⁸⁵ MRC Prior Consultation Review, *supra* note 41, at 37-38. The SEA elaborates that the six planned Lao dams would be responsible for a reduction of 3%, or 60,000 tons of fish; the remainder would be attributable to increased tributary dams construction. If the full slate of mainstream dams were to be constructed throughout the Lower Mekong Basin, they would account for a loss of approximately 340,000 tons of fish resources annually. See Int’l Ctr. for Env’tl Mgmt, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report* 15 (Oct. 2010) [“SEA Summary”], available at <http://www.mrcmekong.org/about-the-mrc/programmes/initiative-on-sustainable-hydropower/strategic-environmental-assessment-of-mainstream-dams/>.

⁸⁶ See Pöyry Report, *supra* note 42, at 23.

⁸⁷ *Id.* at 27.

⁸⁸ Thorne *et al.*, *Review of Sediment Transport, Morphology, and Nutrient Balance* at 7, submitted as Annex 3 to the MRC Prior Consultation Review, available at <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Annex3-Sediment-Expert-Group-Report.pdf>.

⁸⁹ *Id.* at 11. The SEA also estimates that if all planned dams are constructed, inundation will permanently destroy 17% of all Mekong Basin wetlands. SEA Report, *supra* note 19, at 14. <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf>.

the Xayaburi Dam could trap up to half of all incoming phosphorus and one-third of all incoming nitrogen, but that proposed modifications could reduce such trapping to acceptable levels.⁹⁰ It further concluded that the dam as planned could result in a nutrient level reduction of up to 15% to the lower reaches of the Mekong, which would include the Tonle Sap inland fisheries of Cambodia, the agricultural lands of the Mekong Delta in Vietnam, and offshore fisheries.⁹¹

In 2012, Pöyry suggested in a presentation to stakeholders that the project would be improved to include several large-capacity, low-level outlets to flush sediment,⁹² but it is unclear whether hydropower operations can practicably be stopped periodically in order to allow for flushing, especially given the terms of the PPA and Concession Agreements, which do not contemplate such hiatuses in plant operation. In addition, none of the studies commissioned thus far addresses the potential environmental impacts of sediment flushing. Experience from the Rhône River shows that flushing can itself cause contamination due to the sudden large-scale release of trapped pollutants and can kill fish by clogging their gills with sand and depleting dissolved oxygen levels.⁹³ CNR itself conducted flushing for a cascade of dams on the Rhône River in 2012 that is believed to have killed a large percentage of both adult and juvenile fish along sections of the river due to the spike in suspended sediments.⁹⁴ Moreover, even with the proposed improvements, the Lao government still proposes to transport coarse sediments “by mechanical means.”⁹⁵ This presumably refers to the proposal to transport sediments over the dam in barges, which is, according to scientists from the World Wildlife Fund, “utterly impractical and unsustainable.”⁹⁶ Detailed information about which measures – if any – have been adopted to address the sedimentation issue is still unavailable.

d. Inadequate Studies Commissioned by Developer

In response to these concerns, the project developer commissioned a French company, Compagnie Nationale du Rhône (CNR), to conduct a partial review of the Pöyry report. CNR’s review indicates that if certain suggestions on redesign are adopted, the dam could become “transparent” with respect to sediment and other obstructions.⁹⁷ However, the review does state that this idea is still only “conceptual” and did not assess whether Ch. Karnchang or the Lao

⁹⁰ Thorne, *supra* note 88, at 12.

⁹¹ SEA Report, *supra* note 19, at 13. The report also gives a breakdown of the relative contribution of various future dam construction scenarios to sediment trapping, concluding that the six Lao dams would result in an overall reduction of 5% in sediment loads from the baseline scenario. The greatest contributors to sediment trapping are the upstream dams in China and the dozens of planned upstream tributary dams. *Id.* at 21 Table 5.2a. The 5% estimate appears to assume that the project is modified as recommended by the expert group, although the report is not clear on this point. If all expected dams on the river are constructed, they could trap between 75-100% of all sediment.

⁹² Pöyry, *Xayaburi Run-of-River Hpp: Presentation to Government of Lao PDR and other Interested Stakeholders*, slides 40-46 (July 2012), available at <http://www.slideshare.net/sarodp/xiyaburi-dam-project-poyry-july2012v03>.

⁹³ National Research Institute of Science and Technology for Environment and Agriculture, *Sediment Removal Has Begun in the Rhône River*, July 16, 2012, at <http://www.irstea.fr/en/all-news/water-department/sediment-removal-has-begun-rhone-river>.

⁹⁴ World Wildlife Fund, *The Challenges of Flushing Dams: The Cascade of Dams on the Rhone (Switzerland and France)* at 1 (Dec. 2013).

⁹⁵ Pöyry, *Xayaburi Run-of-River Hpp*, *supra* note 92, slide 46. This proposal appears in a peer review study commissioned by the Lao PDR government to counter criticism of the Pöyry report, which has itself come under intense criticism. See CNR Report, *supra* note 47, at 75.

⁹⁶ Kraljevic, *supra* note 73.

⁹⁷ CNR Report, *supra* note 47, at 20.

PDR are likely to adopt the suggestions. CNR did not review Pöyry's conclusions on fish passage design.

As it stands now, neither the project developer nor Andritz has publicly announced a plan to effectively address any of the concerns about the Xayaburi Dam's effect on Mekong River fauna and sediments that have been raised by the Cambodian and Vietnamese governments during the PNPCA or the MRC Secretariat.

2. Human Impacts of the Xayaburi Dam

Some environmental experts believe that the dam will directly harm the livelihoods of 200,000 people and threaten the food security of millions more.⁹⁸ The dam will cause significant displacement, and its effects on fisheries and farmland will exacerbate income inequality.

a. Livelihoods Impacts

Some Thai residents who will be affected by the Xayaburi Dam have already experienced diminished livelihoods from the Mekong River dams in China.⁹⁹ The impacts of the Xayaburi Dam are likely to be more drastic. The completion of the Xayaburi Dam will lead to losses for fisheries and agricultural production, which will threaten the livelihoods of tens of thousands of people in the region. It will also lead to a growth in inequality and impoverishment, particularly for poor families in rural and urban riparian areas, undermining food security. The SEA concluded that all of the proposed dams would contribute to growing income inequality and poverty in the Mekong Basin for the first 25 years, as benefits would accrue to “electricity consumers using national grids, developers, financiers and host governments, whereas most costs would be borne by poor and vulnerable riparian communities and some economic sectors.”¹⁰⁰

The MRC's Project Review Report, which assesses the dam's transboundary impacts through household and community surveys, found that the rural poor of the region depend on access to a variety of livelihood strategies, most notably fishing and farming, which were the chief occupations of 63% of respondents.¹⁰¹ However, food insecurity is high and is a common feature of rural poverty. The report concluded, therefore, “[p]oorer households would be far more likely to suffer the consequences of any major decline in fish stocks than better-off households.”¹⁰² In downstream Lao PDR, households spend relatively little on food due to primary reliance on their own husbandry, which means that families would need to see a significant increase in income to offset a decline in the fish stocks and crops on which they depend. In the relevant areas of Cambodia, families already spend a significant amount on food due to a scarcity of farmland, which they pay for by selling relatively abundant fish; a decline in fish stocks would disrupt their primary source of income and undermine their ability to purchase adequate food.¹⁰³ Any

⁹⁸ *Assistance for Villagers Resettled by Xayaburi Dam to Last One Year*, RADIO FREE ASIA, (June 18, 2013), at <http://www.rfa.org/english/news/laos/xayaburi-06182013164824.html>.

⁹⁹ Rachel Vandenbrink, *Thai Villagers Sue Over Dam*, RADIO FREE ASIA (Aug. 7, 2012), at <http://www.rfa.org/english/news/laos/xayaburi-08072012171723.html>.

¹⁰⁰ SEA Report, *supra* note 19, at 11.

¹⁰¹ MRC Prior Consultation Review, *supra* note 41, at 87.

¹⁰² *Id.* at 85-88.

¹⁰³ *Id.* at 90.

reduction in river flow or in the rich sediment load could also lead to erosion, loss of fertility, and saltwater intrusion in the ecologically delicate Mekong Delta in Vietnam, reducing harvest yields for the region's vital rice farming economy.¹⁰⁴

David J.H. Blake, a livelihoods expert with extensive experience in the Mekong Basin, has analyzed the developer's SIA and found serious shortcomings. In particular, he concludes that the assessment entirely overlooks the likelihood that an influx of construction workers will put extreme pressure on local wildlife in the vicinity of the dam, which community members rely on as a supplementary source of food.¹⁰⁵ Blake points out that the project's studies do not even begin to consider the ripple effects of the large-scale construction activities, roads, and power transmission lines on the public health of communities that may be outside of the officially designated dam corridor.¹⁰⁶

The Pöyry Report itself notes these deficiencies, describing the project documents as “weak concerning aquatic fauna and all related issues,” and stating that the livelihood restoration program needs to be improved.¹⁰⁷

b. Food insecurity in Cambodia

The consumption of fish and other aquatic animals is the primary form of protein intake for over 75% of rural Cambodians¹⁰⁸ and 18% of total food intake for all Cambodians.¹⁰⁹ In 2012, Cambodians consumed an estimated 625,000 tons of inland aquatic animals, and long-distance transboundary migratory fish (which are especially sensitive to dam development) comprised 25% of total fish intake.¹¹⁰ For the average Cambodian, fish and other aquatic animals contribute 37% of total protein, 28% of total fats and 37% of total iron intake.¹¹¹

A recent study by the Inland Fisheries Research and Development Institute (IFReDI) at the Cambodian Fisheries Administration confirms that dam construction on the mainstream in Cambodia will reduce fish biomass downstream and affect food security, especially for rural Cambodians.¹¹² School-aged children and pregnant women are the most food-insecure and most vulnerable to protein reduction.¹¹³ Although the IFReDI study focuses on the effects of building mainstream dams inside Cambodia, it specifically notes that “[a] reduction in the availability of

¹⁰⁴ See Banyan Blog, *Lies, dams and statistics*, THE ECONOMIST (Jul. 26, 2012, 8:55 GMT), at <http://www.economist.com/blogs/banyan/2012/07/mekong-river>.

¹⁰⁵ David J.H. Blake, *Comments Concerning the Environmental Impact Assessment and Social Impact Assessment Documents Provided for the Xayaburi Hydroelectric Power Project, Lao PDR* at 9 (Aug. 2010), available at http://www.internationalrivers.org/files/attached-files/blake_livelihoods_review_final.pdf.

¹⁰⁶ *Id.* at 9-10.

¹⁰⁷ Pöyry Report, *supra* note 42, at 25-26.

¹⁰⁸ Food and Agriculture Organization, *National Fishery Sector Overview: Cambodia* 8 (Mar. 2011), available at ftp://ftp.fao.org/fi/document/fcp/en/FI_CP_KH.pdf.

¹⁰⁹ Inland Fisheries Research and Development Institute (IFReDI), Cambodian Fisheries Administration, *Food and nutrition security vulnerability to mainstream hydropower dam development in Cambodia* 11 (Dec. 2012), available at <http://www.business-humanrights.org/media/cambodia-dams-and-food-security-2013.pdf>.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 8.

fish and specifically of long distance migrants, which is important for the provision of iron, would have a strong detrimental impact on the rural population driving iron security even lower and posing a risk to public health.”¹¹⁴ The impacts are likely to be devastating in a country where only 25% of the population currently have the recommended levels of dietary energy intake and 19% have the required levels of iron intake.¹¹⁵ Thus the conclusion that mainstream dam construction will reduce fish biomass and increase malnutrition downstream applies to Xayaburi as well as any dams built locally in Cambodia.

Given these stark numbers, Xayaburi Dam will contribute to already existing food and health insecurity,¹¹⁶ as the loss of an essential food and protein source will likely result in increased poverty and malnutrition. These impacts will be particularly significant in Cambodia, a country where 80% of the rural population already falls under the national poverty line, and 33% of the entire population is already undernourished.¹¹⁷

c. Displacement of Entire Communities

As of July 2013, hundreds of people had been officially relocated in Laos from Pak Neun and Khok Yai to Houay Hip, and 400 had been officially relocated from Houay Souy to Nar Tor Yai because of the Xayaburi Dam project.¹¹⁸ Around 1,100 more villagers will be relocated as dam construction proceeds.¹¹⁹ The Lao Government and project developer have consistently declined to compensate the relocated villagers for lost use of natural resources and have violated Lao laws and international commitments.¹²⁰

Blake also analyzed the project’s SIA’s identification of affected communities that will lose their farmland because of the dam. He found that the SIA did not look widely enough to identify affected communities and underestimated the difficulty of adequately resettling entire communities, especially in a mountainous area such as Xayaburi, where suitable agricultural land is at a premium.¹²¹

Lao PDR officials have touted the generosity of their compensation plans for those displaced by the project,¹²² but closer scrutiny reveals that provisions for the displaced fall far short of international standards. For example, the Lao Government has said that it will take five years for relocated people to adjust to their new lives, yet intends to provide only one year of financial assistance.¹²³ Beyond the difficulty of being relocated from their homes, further problems for

¹¹⁴ *Id.* at 40.

¹¹⁵ *Id.* at 24.

¹¹⁶ Tracy A. Farrell, *Opinion: Mekong River Dam Threatens Livelihoods and Ecosystems*, CNN, 19 Dec. 2012, available at <http://edition.cnn.com/2012/12/18/opinion/opinion-mekong-river-dam>.

¹¹⁷ Mekong River Comm’n, *State of the Basin Report 2010* 3-4 (April 2010).

¹¹⁸ *Dark Days for villagers Relocated to Make Way for Xayaburi Dam*, *supra* note 67.

¹¹⁹ *Id.*

¹²⁰ See Kirk Hebertson, *The Xayaburi Dam: Threatening Food Security in the Mekong*, INTERNATIONAL RIVERS, (Sept. 11, 2012), at <http://www.internationalrivers.org/resources/the-xayaburi-dam-threatening-food-security-in-the-mekong-7675>.

¹²¹ Blake, *supra* note 105, at 17-18, 20-21.

¹²² See, e.g., *Xayaboury dam developers pledge ‘well-being’ of relocated villagers*, VIENTIANE TIMES, Aug. 14, 2013, at <http://mekong.waterandfood.org/archives/3519>.

¹²³ *Assistance for Villagers Resettled by Xayaburi Dam to Last One Year*, *supra* note 98.

these relocated groups can already be seen. In June 2013, the village of Houay Hip lost electricity—the provision of which was a condition of their relocation—due to a landslide.¹²⁴ The government had already been warned of the risk of such a landslide, but failed to act to prevent it.¹²⁵ The villagers requested that the government build a retaining wall to prevent such a landslide from reoccurring.¹²⁶ Initially, government officials agreed to address the issue, but later reneged on this promise and told villagers that the construction of the wall would have to wait until dry season.¹²⁷ The villagers’ concerns were not unfounded: in August 2013, heavy rains triggered another landslide, destroying several houses and part of the village road.¹²⁸ Most of the relocated people in the village are unemployed and have no farmland.¹²⁹ It is not clear how these people who previously depended on their proximity to the Mekong River are expected to support themselves.

The Xayaburi Dam project as planned will have grave repercussions for the livelihoods of thousands of people who depend on the Mekong River, and the project developer have wholly failed to address these effects in an adequate and acceptable way.

III. THE ROLE OF ANDRITZ AG IN THE XAYABURI DAM AND ANDRITZ’S RESPONSIBILITY FOR XAYABURI’S IMPACTS

Andritz is *substantially contributing* to the serious adverse human rights impacts of the Xayaburi Hydroelectric Project.¹³⁰ Despite being aware of the expected consequences of the dam for the people of the Lower Mekong Basin, Andritz has contracted to supply essential components for the project and has failed to take measures to mitigate or remediate the impacts to which it contributes. Its conduct is therefore inconsistent with the OECD Guidelines.

Under the OECD Guidelines and other international standards, contributors to adverse human rights impacts are expected to identify and seek to prevent potential adverse social and environmental impacts of the dams. If risks are identified, the company should take necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impacts to the greatest extent possible.¹³¹ If the company has little or no leverage with the third party, the company should seek to increase its leverage. If insufficient leverage can be created to correct the third party’s behavior, the company should consider terminating the relationship.¹³²

¹²⁴ *Dark Days for Villagers Relocated to Make Way for Xayaburi Dam*, *supra* note 67.

¹²⁵ *Id.*

¹²⁶ *Landslides Wreak Havoc in Xayaburi Resettlement Village*, RADIO FREE ASIA, Aug. 22, 2013, at <http://www.rfa.org/english/news/laos/xayaburi-landslides-08212013173919.html>.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Dark Days for Villagers Relocated to Make Way for Xayaburi Dam*, *supra* note 65.

¹³⁰ See OECD, *OECD Guidelines for Multinational Enterprises*, General Policies ¶ 11 (2011) [“OECD Guidelines”].

¹³¹ *Id.*, Commentary on General Policies, ¶ 19.

¹³² U.N. Special Rep. of the Sec.-Gen. on the Issue of Human Rights & Transnational Corps. & Other Bus. Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Commentary to Principle 19, Human Rights Council, 17th Sess., Agenda Item 3, U.N. Doc.A/HRC/17/31 (Mar. 21, 2011) [“UNGPs”], available at <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

There is little question that the standards relevant to enterprises that contribute to adverse human rights impacts apply to suppliers of crucial operating components for hydroelectric power stations such as Andritz. The OECD Guidelines apply to all entities in a supply chain, operating at any level of the supply chain.¹³³ Other NCPs have also held that the OECD Guidelines apply to companies in the procurement chain, in addition to the final decision-makers or manufacturers of end products. For example, in another action relating to the Xayaburi Dam, the Finnish NCP held that Pöyry, the technical consultant that advised the project developer, was subject to the Guidelines.¹³⁴ Likewise, the U.S. NCP has concluded that the Guidelines apply to a company that held an exclusive contract to purchase sugar that was produced by a different company through unethical practices that violated the Guidelines.¹³⁵ Moreover, other international standards, such as the U.N. Guiding Principles on Business and Human Rights (UNGPs),¹³⁶ ISO 26000,¹³⁷ and the International Finance Corporation's Performance Standards,¹³⁸ confirm that suppliers have a responsibility to address the adverse impacts to which they contribute through their business activities.

A. Andritz is a substantial contributor to the negative human rights impacts of the Xayaburi Project

Andritz's actions and omissions cause and facilitate the project developer to create significant adverse human rights impacts, and may exacerbate those impacts. It has contracted with Xayaburi's developers to supply hundreds of millions of euros worth of turbines, generators, automations, and other essential equipment without taking steps to mitigate those impacts or provide remediation for affected groups. Moreover, the custom-made turbines that Andritz will supply are expected to be one of the components that most completely and directly obstructs fish passage. The turbines are also expected to kill large numbers of fish, including those important for food and, possibly, endangered species. In other words, Andritz's role is neither secondary nor marginal to the project: it has agreed to provide the components that will make the Xayaburi Dam work, according to a design that will devastate the livelihoods of hundreds of thousands of people downstream.

¹³³ See OECD Guidelines, *supra* note 130, Commentary to General Policies ¶¶ 17 – 19.

¹³⁴ Finnish Ministry of Employment & the Economy Finnish NCP Final Statement on Pöyry, Unofficial Translation at 12 (June 10, 2013), available at http://www.tem.fi/files/37027/Poyry_NCP_Final_Statement_EN.pdf. (The Finnish NCP determined, however, that Pöyry had not violated the Guidelines because it had, within the limited purview of its consultancy contract, recommended measures to improve the environmental design of the project. It recommended that Pöyry take greater care in engaging stakeholders and ensure that adequate studies are carried out.)

¹³⁵ See U.S. National Contact Point for the OECD Guidelines for Multinational Enterprises, Final Statement, Community Legal Education Center of Cambodia (CLEC)/Earthrights International (ERI) and American Sugar Refining Inc. (ASR), (June 20 2013), available at <http://www.state.gov/e/eb/oecd/usncp/links/rls/210970.htm>.

¹³⁶ UNGPs, *supra* note 132, Principle 13.

¹³⁷ International Organization for Standardization (ISO), ISO 26000 (2010), available at <https://www.iso.org/obp/ui/#iso:std:iso:26000:ed-1:v1:en> (defining “sphere of influence” as the “range/extent of political, contractual, economic, or other relationship through which an organization has the ability to affect the decisions or activities of individuals or organizations.”) (emphasis added).

¹³⁸ International Finance Corporation (IFC), Performance Standard 1 ¶¶ 9-10, 14 (requiring clients manage their supply chains to address the risks and impacts of third parties “in a manner commensurate with the client’s control and influence over the third parties); see also Performance Standard 2 ¶¶ 27-29; Performance Standard 6 ¶ 30.

Commentators analyzing the human rights responsibilities of the large network of enterprises involved in the construction and operation of large dams with serious human rights impacts have recognized that enterprises providing products and services for building a dam “can all be considered as contributing to the adverse impacts through their own operations.”¹³⁹

There is little doubt that Andritz is aware of its contributions to the serious adverse human rights impacts of the project. Concerns about the environmental and social impacts of Xayaburi have received extensive media attention, and Andritz’s own role has been highlighted in the same articles that refer to the controversial nature of the project.¹⁴⁰ Andritz has been named with concern by international watchdog organizations such as BankTrack¹⁴¹ and the World Wildlife Fund.¹⁴² It is therefore a substantial, important, and knowing contributor to all the negative human rights and environmental impacts of the Xayaburi Hydroelectric Project.

B. Andritz has substantial leverage to influence the Xayaburi project developer to better mitigate the adverse impacts of the project

Andritz is providing hundreds of millions of euros worth of equipment and supplies to the Xayaburi developers, without which the dam could not operate. Under such circumstances, Andritz has significant leverage over the design of the project. Suppliers of key, highly-specialized, customized components are in a position to advise developers, advocate for better protections, assist in the development of better solutions, and participate in remediation for people who suffer from adverse human rights impacts. This is especially true with a dam such as the Xayaburi Dam, due to its high degree of technical complexity, international controversy, and potential destructiveness. Indeed, it is precisely for business relationships such as the one that exists between Andritz and the Xayaburi developers that the UNGPs and the OECD Guidelines adopted recommendations directing companies to use the leverage they possess to mitigate the human rights impacts of the operations of their supply chain partners.

C. Through policy and due diligence failures, Andritz has failed to prevent, mitigate, or remedy Xayaburi’s human rights impacts

As a contributor to adverse human rights impacts, Andritz should immediately cease its contributions and use its leverage to mitigate any remaining impacts.¹⁴³ It should also “engage

¹³⁹ Karlijn Kuypers et al., *A Normative-Empirical Analysis of State Duties and Corporate Responsibilities Related to Adverse Human Rights Impacts on the Amazonian Minerals-Energy Frontier*, JOURNAL OF CLEANER PRODUCTION (forthcoming).

¹⁴⁰ See, e.g., Leo Himmelbauer, *Andritz steht wegen Mega-Projekt in Laos am Pranger*, WIRTSCHAFTSBLATT, Nov. 7, 2012, available at <http://wirtschaftsblatt.at/home/nachrichten/oesterreich/1309694/Andritz-steht-wegen-MegaProjekt-in-Laos-am-Pranger>; *Mekong Hydropower Gets a Boost*, UPI, Nov. 1, 2012, at http://www.upi.com/Business_News/Energy-Resources/2012/11/01/Mekong-hydropower-project-gets-a-boost/UPI-75911351796230/.

¹⁴¹ See BankTrack, *Company: Andritz*, at http://www.BankTrack.org/manage/ajax/ems_companyprofiles/createPDF/andritz (last updated Dec. 16, 2013).

¹⁴² See World Wildlife Fund Austria, *Andritz AG gefährdet Leben von 60 Millionen Menschen am Mekong*, <http://www.wwf.at/de/kraftwerk-mekong-staudamm-xayaburi-andritz/>.

¹⁴³ See OECD Guidelines, *supra* note 130, Commentary on General Policies ¶ 19 & Commentary on Human Rights ¶ 42.

actively” in the remediation of such impacts “either directly or in cooperation with others[.]”¹⁴⁴ Yet Andritz has failed to take mitigating measures that are under its control, by declining to use its leverage with the project developer to improve the design of the dam and by neglecting to adopt even the most rudimentary human rights and environmental policies that would allow for identification, mitigation, and remediation of adverse impacts.

Andritz’s reaction to the expected negative impacts of Xayaburi has been to wait and see, preferring to deal with major issues in the course of construction rather than using its leverage to insist on the development of a better plan beforehand. In the press release in which it announced its contract with Ch. Karnchang, Andritz asserted:

In collaboration with European experts, the Lao government has generally approved the project on the basis of accompanying measures addressing ecological and social aspects. In the course of the further process, the accompanying measures (for example fish ladders) will be defined in detail in cooperation with all stakeholders involved.¹⁴⁵

This approach has been rejected by the Mekong River Commission and the International Center for Environmental Management, the independent experts hired by the MRC to conduct the SEA. These experts concluded that failure to address major design defects now with respect to “sediment, fisheries, water quality and aquatic ecosystem health as well as transboundary/cumulative aspects” could lead to “regret measures,” which it defines as “actions that may ultimately be inappropriate and lead to expensive and/or irreversible unintended negative impacts.”¹⁴⁶ Regardless, the complainants have not been able to uncover any information suggesting that Andritz has made efforts to improve the design of the dam to avoid or reduce impacts as construction as proceeded.

Moreover, while Andritz appears committed to sustainability in its own production processes,¹⁴⁷ it lacks any publicly available policies or procedures to assess the impacts of the projects to which it contributes. In its Annual Reports from 2006 and 2007, Andritz referred vaguely to the generally admirable nature of its customers:

Most of Andritz’s customers have a strong commitment towards sustainability. Their sustainability strategy is based on implementation of the best environmental technologies and practices, strong social commitment, and active dialog with all relevant stakeholders. This results in significant investments in infrastructure, healthcare, and education of the people and communities where Andritz’s

¹⁴⁴ See U.N. Office of the High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: an Interpretive Guide* 18 (2012), available at <http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf>.

¹⁴⁵ *Andritz to Supply Electromechanical Equipment for Xayaburi Hydropower Plant*, *supra* note 3.

¹⁴⁶ MRC Pöyry Comments, *supra* note 43, at ii, 22, 27.

¹⁴⁷ Andritz Group, *Andritz Code of Business Conduct and Ethics* Section 3.4.1. “Environmental Protection.” (July 2010) (discussing the company’s commitment to providing “technologies that maximize the generation of energy from renewable sources,” and “continuously enhancing the environmental performance and energy efficiency of our products.”), available at http://atl.g.andritz.com/c/com2011/00/01/32/13292/1/1/0/800923192/gr-grz-3515840-v5-andritz_code_of_business_conduct_and_ethics_e.pdf.

customers operate. In addition, many new jobs for local workers, sub-suppliers, and other involved industries are created, thus improving the standard of living of several thousand people.¹⁴⁸

Importantly, this statement does not suggest that Andritz seeks to avoid contributing to serious environmental or social harms and violations or that it would reject the opportunity to do business with companies that fail to meet these standards of sustainability and community engagement. In fact, Andritz appears to disclaim any responsibility for the environmental impacts of the projects to which it contributes. Andritz's website includes a description of the company's participation in the Hydropower Sustainability Assessment Protocol, a multi-stakeholder effort to measure dam projects against international best practice.¹⁴⁹ This article notes that equipment suppliers such as Andritz focus their efforts on "propagating wide application of the Protocol and thereby encouraging global recognition" because "equipment suppliers do not initiate or develop projects by themselves[.]" Nowhere does Andritz commit to using its leverage with the developers of its projects to ensure sustainable, human rights-compatible design; rather it expresses a vague goal of encouraging broad uptake of a voluntary protocol and excuses itself from further responsibility because of the presence of business partners.¹⁵⁰ In a March 2012 assessment that it performed for Pictet Asset Management, Ethos, a Swiss foundation for sustainable development, came to the same conclusion: ". . . Andritz does not consider the environmental and social sustainability of large dam projects in which it is involved to be its responsibility."¹⁵¹

This lack of policy has led to Andritz's repeated involvement and – in some cases – leadership of controversial and internationally discredited projects. For example:

- In 2007, Andritz contracted to supply turbines, generators, and related equipment and products worth around 340 million euros for the widely criticized Ilisu Project in southeastern Turkey. Studies predict that its completion will occasion the resettlement of more than 60,000 residents (mostly Kurds); the destruction of over 300 archeological sites, including the 12,000 year old town of Hasankeyf; the devastation of ecosystems with threatened species and rich biodiversity; and negative impacts on the water supply of thousands of people in Iraq.¹⁵² In 2009, European export credit agencies, banks, and construction companies withdrew from the project after it became clear that Turkey would not fulfill internationally established standards concerning resettlement and the

¹⁴⁸ Andritz Group, *Annual Report 2006: Social Sustainability*, available at <http://reports.andritz.com/2006/index/sustainability-corporate-responsibility/soziale-nachhaltigkeit.htm>. It is unclear whether even this vague understanding of Andritz's customer base has been maintained since 2007; the Complainants have found no documents dated after 2007 that ever mention "corporate responsibility" or the conduct expected from Andritz' customers.

¹⁴⁹ There is no indication, however, that Andritz has submitted the Xayaburi to a Hydropower Sustainability Assessment Protocol trial.

¹⁵⁰ Andritz Group, *Protocol for Sustainability*, at <http://reports.andritz.com/2012/ba-hp-protocol-for-sustainability>.

¹⁵¹ Ethos, *Engagement Report: Ethos Engagement - Pictet Environmental MegaTrend Selection; Company: Andritz*, (March 2012). The authors of this complaint read the report when it was first prepared; however we have been since been informed by Ethos that it is no longer available and that they have discontinued their sustainability dialogue with Andritz.

¹⁵² See e.g. BankTrack, *Ilisu Dam Project* (last updated Nov. 12, 2012), at http://www.BankTrack.org/show/dodgydeals/ilisu_dam_project#tab_dodgydeals_basics.

protection of the environment and cultural heritage.¹⁵³ Andritz is the only major European company still involved.

- In early 2011, Andritz received an order to supply turbines, generators and other related products for the Belo Monte dam project in Brazil, worth approximately 330 million euros. The dam, which is slated to be one of the biggest in the world, has been a continuing source of domestic and international controversy due to the expectations that it will divert 80% of the Xingu River from its original course, resulting in permanent drought on the river's "big bend," the decimation of fish stocks, the extinction of species endemic to the area, and devastating impacts on the rainforest and biodiversity. Surrounding ecosystems will be dramatically changed, threatening the survival of a number of indigenous tribes, and at least 20,000 people will be displaced. The dam has been the subject of legal battles within Brazil and in the Inter-American human rights system. When confronted with Andritz's role in the project, CEO Wolfgang Leitner simply insisted, "It is rather unrealistic to think that the hydroelectric project Belo Monte would be stopped because of Andritz stepping aside."¹⁵⁴
- Andritz signed an agreement to provide machinery for a United Fiber System (UFS) pulp mill project in Kalimantan, Indonesia.¹⁵⁵ Environmental concerns reportedly led private banks, such as Deutsche Bank and JPMorgan, to pull out of agreements with UFS in 2006,¹⁵⁶ while Merrill Lynch, which had been in talks to finance the project, declined to get involved.¹⁵⁷ Andritz was prepared to go forward with the project despite concerns raised by civil society coalitions,¹⁵⁸ but UFS eventually shelved the project in 2010 when the financing deal it had signed as a last resort with a Chinese construction company expired.¹⁵⁹
- Andritz was involved in the controversial Veracel Pulp Mill in Bahia, Brazil, which started operations in 2005. Veracel has been criticized for establishing tree plantations in areas of high environmental risk and in indigenous territories and for repeatedly violating labor laws. The company has been convicted of deforestation and has been fined by the Brazilian Public Ministry and the national environmental authority, IBAMA, for

¹⁵³ See e.g. Committee of Experts, *Ilisu Hydroelectric Dam Power Plant Project: Report on the First Field Visit of the Resettlement Committee of Experts* (Feb. 8, 2008) available at

<http://www.oekb.at/de/osn/DownloadCenter/projekt-und-umweltanalysen/Ilisu/Report-CoE-Resettlement.pdf>;
European export credit agencies abandon Turkey's 1,200-MW Ilisu Dam, HYDROWORLD.COM, July 7, 2009 at <http://www.hydroworld.com/articles/2009/07/european-export-credit.html>.

¹⁵⁴ *Andritz criticized because of Belo Monte hydroelectric power plant*, FRIEDLNEWS, Sept. 6, 2010, <http://www.friedlnews.com/article/andritz-criticized-because-of-belo-monte-hydroelectric-power-plant>. For further discussion of the Belo Monte Dam.

¹⁵⁵ *UFS announces execution of contract for new pulp mill*, PULP INC. BLOG, posted Apr. 11, 2008, at <http://pulpinc.wordpress.com/2008/04/11/ufs-announces-execution-of-contract-for-new-pulp-mill/>.

¹⁵⁶ Shawn Donnan and Francesco Guerrero, *Merrill in Talks over UFS Mill Bid*, FINANCIAL TIMES, Feb. 15, 2006, available at <http://www.ft.com/intl/cms/s/0/dc7d0bf4-9dc7-11da-b1c6-0000779e2340.html#axzz2DdfRFocj>;
Indonesia: Deutsche Bank pulls out of UFS pulp project, PULP INC. BLOG, posted Jan. 24, 2006, at <http://chrislang.org/2006/01/24/indonesia-deutsche-bank-pulls-out-of-ufs-pulp-project/>; Francesco Guerrero and Shawn Donnan, *Merrill Turns Down UFS over Kiani Funding*, FINANCIAL TIMES, Feb. 22, 2006, available at <http://www.ft.com/intl/cms/s/0/b6e9ad96-a3dc-11da-83cc-0000779e2340.html>.

¹⁵⁷ Guerrero & Donnan, *Merrill Turns Down UFS over Kiani Funding*, *supra* note 156.

¹⁵⁸ See Letter from Marianne Klute, Watch Indonesia! Alliance, to Wolfgang Leitner, CEO, Andritz AG, and Walter Rothensteiner, Gen. Dir., Raffeyen Zentralbank, Nov. 21, 2005, at <http://home.snafu.de/watchin/Andritz.htm>.

¹⁵⁹ *United Fiber shelves pulp mill in Kalimantan*, PULP INC. BLOG, posted Sept. 19, 2010, at <http://pulpinc.wordpress.com/2010/09/19/united-fiber-shelves-pulp-mill-in-kalimantan/>.

pollution of rivers and streams resulting from the use of toxic chemicals.¹⁶⁰ The President of Veracel Cellulose made clear that Andritz had been “much more than just a vendor. . . . They have overall responsibility for achieving the performance of what was sold to us, not just delivering the equipment and supervision. They really behaved as a partner and took their responsibilities seriously.”¹⁶¹ In an interview, he referred to Andritz as a “perfect partner,” and made clear the leverage Andritz holds in such projects but fails to use: “This mill depends upon Andritz technology to make pulp. There is no backup position.”¹⁶²

An extensive search of public sources has revealed no indication that Andritz has used its leverage as a primary supplier of the necessary equipment for the operation of the dam to influence its development partners in Xayaburi or any of the above-mentioned projects to remedy the environmental and social devastation that they have caused. Instead, the evidence cited above suggests that Andritz has been a repeated, willing contributor – and sometimes a primary participant – in the design, supply, construction, and management of some of the world’s most controversial and devastating infrastructure projects.

IV. SPECIFIC BREACHES OF THE GUIDELINES BY ANDRITZ

Andritz has detracted from sustainable development in Lao PDR and downstream countries, contributed to human rights abuses through its own activities, and failed to take reasonable measures to prevent or mitigate human rights abuses by other entities connected to it through business relationships. Andritz has supplied crucial components that will enable and directly contribute to the serious environmental and human rights abuses of the Xayaburi Project despite widespread public knowledge of these expected impacts.

A. Chapter II: General Policies

1. General Policy A.1: Enterprises should contribute to economic, environmental, and social progress with a view to achieving sustainable development.

Informed by the foundational value of “mutual confidence between enterprises and the societies in which they operate,”¹⁶³ General Policy A.1 encourages enterprises to further the goal of achieving sustainable development. The Commentary to the Guidelines explains that “[t]here should not be any contradiction between the activity of multinational enterprises (MNEs) and sustainable development.” The Commentary further stresses the necessary link between “economic, social, and environmental progress.”

¹⁶⁰ Fabiana Frayssinet, *Brazil: Accusations Mount Against Pulp and Paper Giant*, INTER PRESS SERVICE, May 10, 2011, <http://www.ipsnews.net/2011/05/brazil-accusations-mount-against-pulp-and-paper-giant/>; World Rainforest Movement, *Brazil: Historic Federal Court Decision Sentences VeracelCelulose (Stora Enso-Aracruz) for Environmental Violations*, (July 2008), at http://www.wrm.org.uy/bulletin/132/Brazil_2.html.

¹⁶¹ Andritz Group, *VeracelCelulose: Single-line Success*, FIBER SPECTRUM 5 (2005), available at http://atl.g.andritz.com/c/spectrum/00/00/57/5706/1/6/0/543224559/iss_12.pdf.

¹⁶² Andritz Group, Annual Report 2005, *Interview with Renato Guero, President of Veracel Celulose S.A., Brazil*, available at <http://reports.andritz.com/2005/index/customer-projects/pup-interview-overview/pup-interview.htm>.

¹⁶³ OECD Guidelines, *supra* note 130, Preface ¶ 1.

Although the Guidelines themselves do not define “sustainable development,” the 1987 Brundtland Report, the Rio Declaration, and United Nations Agenda 21 provide commonly accepted definitions. The Brundtland Report defines “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁶⁴ The Report further describes that “[s]ustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.”¹⁶⁵ This definition is enshrined in Rio Declaration Principle 3, and further elaborated throughout the Declaration.¹⁶⁶ The Rio Declaration sets forth essential principles of sustainable development, including: 1) the “integral” role of environmental protection in the development process (Principle 4); 2) the “eradicat[ion] [of] poverty as an indispensable requirement” (Principle 5); 3) the “effective participation” of indigenous peoples (Principle 22); and 4) that human beings be “at the centre of concerns for sustainable development” (Principle 1).¹⁶⁷

These principles are further defined in UN Agenda 21, which sets forth a comprehensive action plan for achieving worldwide sustainable development.¹⁶⁸ This includes: 1) “combating poverty” and “enabling the poor to achieve sustainable livelihoods” (Ch. 3); 2) “protecting and promoting human health” (Ch. 6); 3) “integrating environment and development in decision-making” (Ch. 8); and “recognizing and strengthening the role of indigenous people and their communities” (Ch. 26).¹⁶⁹

Far from promoting sustainable development and combating poverty, the crucial hydropower equipment that Andritz has contracted to supply enables the Xayaburi Project to go forward as currently designed, contributing to irreparable damage to the Mekong River and threatening current and future generations. The dam will bring the large fish that live exclusively in the Mekong to the brink of extinction, drastically reduce the biomass and diversity of aquatic life in the Mekong, lead to flooding, and deprive fisheries and farms of vital nutrients, thereby threatening the food security of millions.¹⁷⁰ The project has already displaced hundreds of people, many of whom are now unemployed and without access to the farmland on which they depend.¹⁷¹ Farmers and fisherman who previously made an ample living now worry about eking out enough to feed their families. Contrary to the principles of the Brundtland Report, the Rio Declaration, and UN Agenda 21, this dam will exacerbate income inequality, as poor and vulnerable communities will be forced to bear the project’s costs while those with access to electricity will enjoy the benefits. This new economic reality is neither environmentally nor

¹⁶⁴ United Nations, *Report of the World Commission on Environment and Development: Our Common Future* [“Brundtland Report”], ch. 2, ¶ 1 (1987), available at http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf.

¹⁶⁵ *Id.* ch. 2, ¶ 4.

¹⁶⁶ Report of the United Nations Conference on Environment and Development, June 3-14, 1992, Rio Declaration on Environment and Development, Annex I Principle 4, U.N. Doc A/CONF.151/26 (Vol. I) (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1>.

¹⁶⁷ *Id.*

¹⁶⁸ U.N. Dept. Econ. & Soc. Affairs, *Agenda 21*, adopted by the United Nations Conference on Environment and Development, June 3-14, 1992, available at <http://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>.

¹⁶⁹ *Id.*

¹⁷⁰ *See supra* Part II.C.1.

¹⁷¹ *See supra* Part II.C.2.

socially sustainable for the communities dependent on the Mekong River.

2. General Policy A.2: Enterprises should respect the internationally recognized human rights of those affected by their activities.

General Policy A.2 states that enterprises should “respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.” Laos ratified the International Covenant on Civil and Political Rights (ICCPR) on September 25, 2009,¹⁷² and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) on February 13, 2007.¹⁷³ Moreover, like all nations, Laos is bound by human rights protections under customary international law.

Article 17 of the ICCPR essentially states that no one should be subjected to arbitrary interference in their home and should be protected by law against such interference.¹⁷⁴ Article 11 of the ICESCR requires States to recognize the right to an adequate standard of living, including housing and the continuous improvement of living conditions.¹⁷⁵

Instead of fulfilling its responsibility to respect human rights, Andritz’s involvement in the Xayaburi Dam contributes to human rights violations by enabling the completion of a project that will displace communities and devastate livelihoods without adequate legal protection and compensation. The Xayaburi Project has relocated hundreds of people and will relocate over a thousand more.¹⁷⁶ People displaced by the Xayaburi Dam, many of whom rely on fishing and farming to survive,¹⁷⁷ have been deprived of their right to an adequate standard of living as they now lack employment and farmland.¹⁷⁸ Moreover, these displaced people have not received adequate compensation for the loss of their lands and livelihoods.¹⁷⁹

These relocations implicate several specific treaty-based rights as well as broader customary international law protections against forced displacement without adequate safeguards. The protection against arbitrary displacement or relocation without adequate legal protection or compensation is accepted as a norm of customary international law through the expression of other derivative basic human rights, such as the freedom of movement, freedom from interference with one’s home, and the right to housing.¹⁸⁰ Article 11 of the ICESCR requires

¹⁷² International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 176 [“ICCPR”].

¹⁷³ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [“ICESCR”].

¹⁷⁴ ICCPR, *supra* note 172, art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation . . . Everyone has the right to the protection of the law against such interference or attacks”).

¹⁷⁵ ICESCR, *supra* note 173, art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”).

¹⁷⁶ See *Villagers Awaiting Xayaburi Relocation Hit by Floods*, RADIO FREE ASIA, Aug. 13, 2013, at <http://www.rfa.org/english/news/laos/xayaburi-08132013181245.html>.

¹⁷⁷ MRC Prior Consultation Review, *supra* note 41, at 87.

¹⁷⁸ *Dark Days for villagers Relocated to Make Way for Xayaburi Dam*, *supra* note 67.

¹⁷⁹ *Assistance for Villagers Resettled by Xayaburi Dam to Last One Year*, *supra* note 98.

¹⁸⁰ See Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Displacement*, 34 COLUM. HUMAN RIGHTS L. REV. 95 (2002); Maria Stavropolou, *The Right Not to Be Displaced*, 9 AM. U. J. INT’L L. & POL’Y 689.

States to recognize the right to an adequate standard of living, including housing and the continuous improvement of living conditions.¹⁸¹ The United Nations Committee on Economic, Social, and Cultural Rights, charged with interpreting and implementing the ICESCR, has explicitly recognized that international agencies should avoid involvement in projects that cause large-scale displacement without “appropriate protection and compensation.”¹⁸²

The Guiding Principles on Internal Displacement are the internationally- recognized normative framework used to identify the rights and guarantees relevant to the internally displaced in all phases of displacement.¹⁸³ This includes protection against arbitrary displacement, a basis for protection and assistance during displacement, and guarantees for safe return, resettlement, and reintegration.¹⁸⁴ Displacement is arbitrary and therefore prohibited “in cases of large-scale development projects that are not justified by compelling and overriding public interests.”¹⁸⁵

Principle 9 of the Internal Displacement Principles states:

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to the land.¹⁸⁶

Similarly, Performance Standard 5 of the International Finance Corporation (IFC) addresses involuntary resettlement and land acquisition in the context of development projects. The IFC requires development partners to:

- avoid displacement when possible and to minimize it when avoidance is not possible;
- avoid forced eviction;
- mitigate negative social and economic impacts by providing adequate compensation and

728-33 (1994); Universal Declaration of Human Rights art. 12, 13(1), 17, & 25(1), U.N. GAOR, G.A. Res. 217A, 3d Sess., pmb., U.N. Doc. A/810 (1948); ICCPR, *supra* note 172, arts. 12(3) and 17; ICESCR, *supra* note 173, art. 11; Convention on the Rights of the Child (CRC) art.27, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination against Women art.14 ¶ 2(h), Dec. 18, 1979, 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination art. 5(e)(iii), Mar. 12, 1963, 660 U.N.T.S. 13; International Labour Organisation [ILO], Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries art. 16, June 27, 1989, 28 I.L.M. 1382.

¹⁸¹ ICESCR, *supra* note 173, art. 11 (“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent”).

¹⁸² U.N. Comm. on Econ., Soc. & Cultural Rights [CESCR], *General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant)*, U.N. Doc. E/1990/23 at ¶ 6 (Feb. 2, 1990).

¹⁸³ Francis Deng & et al., *Guiding Principles on Internal Displacement presented to the United Nations Office for the Coordination of Humanitarian Affairs, Geneva, Switzerland*, [“Internal Displacement Principles”] (Aug. 2, 1998), available at <http://www.idpguidingprinciples.org/>. The Guiding Principles were officially approved and adopted by the U.N. Human Rights Council in 1998. See U.N. ESCOR, E.S.C. Res. 1998/50, 54th Sess., Supp. No. 3, at 164-67, U.N. Doc. E/CN.4/1998/50 (1998).

¹⁸⁴ See Francis Deng, *Introductory Note by the Representative of the Secretary-General on Internally Displaced Persons, to Guiding Principles on Internal Displacement*, presented to United Nations Office for the Coordination of Humanitarian Affairs, Geneva, Switzerland (Aug. 2, 1998), available at <http://www.idpguidingprinciples.org/>.

¹⁸⁵ Internal Displacement Principles, *supra* note 183, Principle 6, Part 2(c).

¹⁸⁶ *Id.*

- ensuring the informed consultation and participation of the displaced;
- improve and restore the livelihoods of the displaced; and
- provide adequate housing and security of tenure to the displaced.¹⁸⁷

The hundreds of people who have been or will be displaced by the Xayaburi Dam have yet to be adequately compensated for their loss of land and livelihoods. Andritz, which is likely to receive significant profit from the Xayaburi Project, benefited from the relocations because displacing the villagers allowed the project to go forward. Although Lao government officials have promised that relocated villagers will receive financial assistance for a year, the government and Ch. Karnchang have refused to compensate the villagers for lost use of natural resources,¹⁸⁸ and officials admit that it will take the villagers five years to adjust to their new lives.¹⁸⁹ Thus, villagers displaced by the project have not received adequate protection or compensation.

3. General Policy A.10: Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.

The requirement to exercise due diligence is a means of identifying, preventing, and mitigating adverse human rights impacts throughout the supply chain.¹⁹⁰ There is no sign that Andritz conducted any risk-based due diligence upon agreeing to supply Ch. Karnchang with turbines, generators, automation systems, and additional hydropower equipment. Even if it did conduct due diligence, it does not appear to have integrated that information to prevent or mitigate the expected impacts. Based on the above-cited Andritz’s own press release as well as the widespread international criticism of the Xayaburi Dam, including public statements from the World Bank and the U.S. Secretary of State, demonstrate that it is clear that Andritz was on notice of the project’s expected environmental and social impacts and the need for further investigation and due diligence. Moreover, the nature and scale of Andritz’s contribution – supplying generators that are the centerpiece of the project and turbines that are expected to cause significant loss of fish biomass and ultimately species extinction – is such that Andritz should be expected to have assessed the likely ramifications of the project it is enabling.

The Preface to the Guidelines notes that “many enterprises have responded to [human rights] concerns by developing internal programmes, guidance and management systems,” including employment of consultants to facilitate due diligence.¹⁹¹ This suggests that there are myriad resources available to companies seeking to comply with the OECD Guidelines by conducting

¹⁸⁷ IFC, Performance Standard 5, Objectives.

¹⁸⁸ See International Rivers, *The Xayaburi Dam: Threatening Food Security in the Mekong*, Annex 3 at 36 (Sept. 2012), at http://www.internationalrivers.org/files/attached-files/intl_rivers_xayaburi_food_security_report_sept_2012.pdf.

¹⁸⁹ *Assistance for Villagers Resettled by Xayaburi Dam to Last One Year*, *supra* note 98.

¹⁹⁰ OECD Guidelines, *supra* note 130, Commentary on General Policies ¶ 14.

¹⁹¹ OECD Guidelines, *supra* note 130, Preface ¶ 7.

appropriate due diligence.¹⁹² Andritz could have satisfied the Guidelines' expectations by identifying the project's key environmental and social risks, including the harm that the dam would pose to the unique fish species living in the Mekong and the risk of displacing over more than one thousand villagers whose livelihoods depend on the river. Andritz could have also conducted an independent investigation into the project's potential impacts, and discussed plans to mitigate the potential harms with the Lao PDR government and Ch. Karnchang. For example, it could have subjected Xayaburi to an independent and transparent Hydropower Sustainability Assessment Protocol audit. Instead, Andritz chose to ignore the potential impacts of the Xayaburi Project and proceed with its business on the terms set by the dam's developer.

4. General Policy A.11: Enterprises should avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.

Andritz is contributing to and benefiting from adverse impacts on matters covered by the Guidelines. The company's custom-built engines and turbines will have a direct effect on the human rights of local and downstream communities. In addition, the Commentary expressly states that an enterprise's "own activities" includes activities within its supply chain.¹⁹³ Indeed, the Commentary provides a general rule for a company assessing its possible involvement in human rights violations in the supply chain: "In the context of its supply chain, if the enterprise identifies a risk of causing an adverse impact, then it should take the necessary steps to cease or prevent that impact."¹⁹⁴ Moreover, a company should "use its leverage to mitigate *any remaining impacts* to the greatest extent possible."¹⁹⁵

As explained above in Part III.C, Andritz failed to exercise reasonable due diligence before agreeing to supply Ch. Karnchang with hydropower equipment. After learning about the existing and potential damage caused by the Xayaburi Dam, Andritz should have tried to use its leverage as a primary supplier of the necessary equipment for the operation of the dam to encourage Ch. Karnchang or the Lao Government to investigate and address these harms. Instead, there is no indication that Andritz has taken any steps to prevent or remedy the significant negative social and environmental risks associated with Xayaburi Project.

Andritz's role as a supplier of key equipment gives the corporation significant influence with the Lao government and the project developer. The importance of Andritz's contribution is clear: the turbines and other products are vital for the construction and operation of the dam to go forward. In addition, the turbines themselves are expected to impede downstream migration and cause loss of significant fish biomass and species extinction. The products the company is supplying are some of the main components and are functionally integral parts of the underlying project. Perhaps most importantly, the project is unlikely to move forward easily without Andritz's custom hydropower components.

¹⁹² One prominent example is the International Finance Corporations' Human Rights Impact Assessment and Management tool, *available at* http://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management.

¹⁹³ OECD Guidelines, *supra* note 130, Commentary ¶ 17.

¹⁹⁴ *Id.*, Commentary ¶ 18.

¹⁹⁵ *Id.*, Commentary ¶ 19 (emphasis added).

Far from trying to address the project's risks, Andritz appears to have made even an implied public reference to "ecological and social concerns" just once, in its press release discussed Part III.C above.¹⁹⁶ Particularly troubling is the apparent acknowledgment that the dam as designed does not have adequate plans for "accompanying measures," a term that appears to include the dam's most controversial aspects, including the provisions for fish passage. As noted above in Part II.C.1.a above, independent experts believe that there is likely no way to build the dam as currently designed that would prevent devastating impacts on fish populations, including the likely extinction of rare endemic species such as the giant Mekong catfish, which pose unique challenges for conservation. Andritz has provided no details suggesting that this has changed. Andritz also has not made available for independent scientific verification any information on steps it may take to mitigate the danger to fish populations, or evidence that any such steps will work in the Mekong, which is unique for its high biodiversity and biomass. Similarly, it has not explained any other steps it may have taken to use its influence to mitigate other troubling aspects of the dam, such as the violations of international law and norms, resettlement problems, and issues involving sedimentation and water flow.

Instead, Andritz has declared that it is content to allow these issues to be worked out in "the course of the further process," i.e. when the dam construction is already underway, and it is too late to make major design changes. As noted in Part III.C above, the Strategic Environmental Assessment commissioned by the Mekong River Commission concluded that this approach is inadequate to address impacts that are as severe as those expected in the case of the Xayaburi Dam.¹⁹⁷

In fact, Andritz's response to any suggestion that it is responsible for the impacts of the dams that are powered by its turbines and generators appears to be to profess powerlessness, as CEO Leitner did when referring to the company's role in the Belo Monte Dam.¹⁹⁸ But Andritz does in fact have a number of options to ensure that its participation in the Xayaburi Project will not entail contributing to severe environmental damage or violations of human rights and international law.

Most simply, Andritz could refrain from providing equipment to the Xayaburi Project as currently designed. It is not clear that other suppliers would be willing to provide components for the Xayaburi Project – or would provide components in the same manner, without conducting due diligence or pushing for design changes. For example, two other European suppliers withdrew from the Ilisu project after European export credit agencies decided to divest from the project because the dam, much like the Xayaburi, breached international standards and posed a serious threat to biodiversity and communities in the region.¹⁹⁹ As with Xayaburi, Andritz's continued involvement alone allowed construction on the dam to continue.²⁰⁰ Because Andritz's

¹⁹⁶ *ANDRITZ to Supply Electromechanical Equipment for Xayaburi Hydropower Plant*, *supra* note 3.

¹⁹⁷ MRC Pöyry Comments, *supra* note 43, at ii, 22, 27.

¹⁹⁸ *Andritz criticized because of Belo Monte hydroelectric power plant*, *supra* note 154.

¹⁹⁹ *See European export credit agencies abandon Turkey's 1,200-MW Ilisu Dam*, *supra* note 153.

²⁰⁰ *Construction of Ilisu dam restarted – Austrian Andritz the only European company to remain in the project*, BANKTRACK (May 18, 2010),

http://www.BankTrack.org/show/news/construction_of_ilisu_dam_restarted_austrian_andritz_the_only_european_company_to_remain_in_the_project.

hydropower equipment is necessary for the project to proceed and the Xayaburi developers could not easily obtain this equipment from other suppliers, Andritz has significant leverage over the project. The company should have used this leverage to mitigate the dam's environmental and social harms.²⁰¹

Alternatively, the OECD Guidelines dictate that an enterprise should seek to promote conduct compatible with the Guidelines among its business partners.²⁰² Andritz could have agreed to provide the equipment only after further details on environmental and social impacts were made available, the outstanding studies were completed to the satisfaction of the other MRC member states, or all four MRC countries could agree that the prior consultation process was complete. This is the position the World Bank Group has taken.

Andritz could also have insisted on assurances from the developer that it is taking steps to prevent the expected environmental and social consequences of the Xayaburi Project and that the developer is providing maximum transparency as to the project designs and their transboundary impacts. This is not merely a hypothetical exercise in Laos; for the Thako Dam Project, the Lao PDR agreed with the project consortium to create a Panel of Experts including the World Wildlife Fund. This Panel had access to all technical documents, a seat at all technical meetings, and a section on the project website where it could post uncensored comments.²⁰³

Andritz could also commit now to participating in remediation for any individuals or communities who suffer adverse human rights impacts to which its activities have contributed. Or, at a very minimum, it could unilaterally disclose information about the environmental and social risks that it is taking into account in designing the components it will contribute to the project. But instead, far from taking active steps to reduce the risk of contributing to severe environmental damage, Andritz does not appear to have taken any steps prior to or since signing its contract with the Xayaburi developers that would reduce these risks.

B. Chapter IV: Human Rights

1. Human Rights 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.

²⁰¹ The Commentary to the Guidelines acknowledges that in some cases there may be “practical limitations on the ability to effect change in the behavior of [companies’] suppliers,” which may be “related to product characteristics, the number of suppliers, the structure and complexity of the supply chain, the market position of the enterprise vis-à-vis its suppliers or other entities in the supply chain.” See OECD Guidelines, *supra* note 130, Commentary ¶ 21. These limitations do not appear to apply here. Nothing about the product characteristics of hydropower equipment constitutes a practical limitation on Andritz’s ability to remedy ongoing human rights violations. The “structure and complexity” of the equipment supply chain does not overwhelm Andritz’s monitoring abilities, as it is a direct supplier. In fact, Andritz is in a very strong market position in the Lao PDR, as it has supplied components to Laotian dams previously. See Andritz Group, *Annual Review 2008 – Major Orders*, available at <http://reports.andritz.com/2008/index/business-areas/ba-hp/ba-hp-major-orders.htm> (announcing USD 42 million order for the Xekaman 3 hydropower station).

²⁰² See OECD Guidelines, *supra* note 130, General Policies A.13.

²⁰³ Personal Communication, Marc Goichot, World Wildlife Fund Greater Mekong to Georg Scattolin, World Wildlife Fund Austria, March 3, 2014.

Like General Policy A.2 and General Policy A.11, this paragraph requires that enterprises avoid contributing to human rights violations. The recommendation draws upon the UNGPs, which recognize the corporate responsibility to protect human rights. The founding principles of this framework require all business enterprises to “Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur.”²⁰⁴

This recommendation should be interpreted broadly. For example, the Commentary emphasizes that ““activities”” should be read to include both actions and omissions.²⁰⁵ If an enterprise contributes to adverse human rights impacts, it should “take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.”²⁰⁶

As outlined above, Andritz is providing key components to a project that has displaced hundreds of people without adequate safeguards, and will jeopardize the livelihoods of many more, through the degradation of fisheries throughout the basin. The project will also lead to loss of significant fish biomass and the extinction of several fish species. Despite widespread and public criticism of the project, the company has failed to take steps to cease its contribution or attempt to use its leverage to mitigate the project’s negative impacts.

2. Human Rights 4: Enterprises should have a policy commitment to respect human rights.

Andritz’s lack of a policy commitment to respect human rights may have contributed to its involvement in many harmful development projects. The company has shown a consistent pattern of supplying crucial, custom-built industrial components and operational assistance to highly controversial hydropower projects and pulp and paper mills that have environmentally and socially devastating impacts on local populations. In the case of the Xayaburi Project, Andritz has agreed to supply integral components for the dam, despite the conflict it raises with Lao PDR’s international obligations and the opposition of international civil society, regional partners, academics, and scientists. The company’s corporate responsibility policies evince a lack of internal controls and a willingness to profit from lucrative development opportunities, regardless of the social and environmental cost. As a result of this lack of risk management, Andritz has become responsible for the devastation that will likely result from the Xayaburi Project.

As noted above in Part III.C, the Ethos Fund has concluded that “[a]s an equipment supplier, Andritz does not consider the environmental and social sustainability of large dam projects in which it is involved to be its responsibility.”²⁰⁷ The company’s limited conception of what environmental protection means has contributed to a failure of due diligence and a policy of willful blindness towards the effects of the Xayaburi Project. This narrow policy is certainly a factor in the company’s commitment to supply crucial components to the project as currently

²⁰⁴ UNGPs, *supra* note 132, Principle 13(a).

²⁰⁵ OECD Guidelines, *supra* note 130, Commentary on Human Rights ¶ 42.

²⁰⁶ *Id.*

²⁰⁷ *See supra* Part III.C & note 151.

proposed. Mr. Leitner's statement with respect to the Belo Monte Dam²⁰⁸ illustrates the logical consequence of the company's inadequate policies: a belief that Andritz can and should do business without regard to the consequences of the projects it enables through its custom-built components.

As outlined above, Andritz's refusal to assume responsibility for the use of the products that it customizes for destructive dams and other projects has led repeatedly to predictably devastating consequences and can be expected to continue to cause severe damage to communities in the future. It has failed to mitigate these consequences and, indeed, declined to adopt policies that would dictate a more responsible course going forward.

3. Human Rights 5: Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.

In light of the very public criticism of the Xayaburi Dam and other mainstream Mekong dam projects by the World Bank – as well as by the governments of Vietnam and Cambodia – and the negative press Andritz has received, it is unquestionable that Andritz aware of the human rights violations likely to result from mainstream dams on the Mekong River. For this reason, Andritz was on notice that it should conduct a comprehensive due diligence process directed at identifying and mitigating precisely the human rights impacts described in this complaint.

The due diligence process “entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.”²⁰⁹ Knowing that participating in the Xayaburi Project could harm the Mekong River and those who depend on it, Andritz should have engaged in a due diligence process, beginning with assessing the actual and potential impacts. Such a process would have revealed the human rights impacts discussed herein; even if Andritz were unaware of all the facts, simply knowing that millions of people rely on the Mekong River for vital life support should have raised questions about potential adverse impacts. Because the assessment phase would have revealed actual and potential adverse impacts, Andritz should have then acted upon these findings, taking steps to ensure that the adverse impacts were remedied and that similar impacts harms do not happen in the future. If Andritz found that it could not address these expected impacts through its own leverage, it should not have agreed to supply crucial components to the project.

4. Human Rights 6: Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

The OECD Guidelines expect multinational corporations to provide or cooperate in the provision of remedial mechanisms for affected persons or communities. Andritz, however, has not acted to provide a remedy for communities located along the Mekong River, nor has it tried to ensure that the Lao PDR Government or the project developer engage constructively with the local

²⁰⁸ See *Andritz criticized because of Belo Monte hydroelectric power plant*, *supra* note 154.

²⁰⁹ OECD Guidelines, *supra* note 130, Commentary on Human Rights ¶ 45.

population.

To implement this provision of the guidelines, Andritz should participate in the remediation of any adverse impacts, cooperate with non-judicial mechanisms – such as the NCP specific instance process – and use its leverage to require that the project developer provide an operational-level grievance mechanism for persons suffering negative human rights impacts as a result of the dam. The Commentary to the Guidelines states that “operational-level grievance mechanisms for those potentially impacted by the enterprises’ activities can be an effective means of providing for” legitimate processes in the remediation of adverse human rights impacts.²¹⁰

Although lawmakers in Lao PDR have begun debating a new National Land Policy which, if approved, would require market value compensation for people displaced by commercial investment projects, the unavailability of information on market prices and the lack of clearly distinctions between public and commercial projects may render the new policy ineffective.²¹¹ Furthermore, it is not clear that the courts will effectively enforce the new law. The U.S. Department of State has recognized that Lao courts continue to be plagued by corruption and bribery, and the enforcement of court orders remains problematic.²¹² And if the Lao courts are not available to them, it is not clear that any other formal judicial system can provide a remedy; notably, when community representatives tried to bring claims in an Administrative Court in Thailand to challenge the Thai agreement to buy power from the Xayaburi project, the court dismissed the case for lack of standing and on jurisdictional grounds.²¹³ Because people displaced by the Xayaburi Project have no effective remedies in the judicial systems of Lao PDR or neighboring countries, Andritz has a responsibility to ensure that they can access other effective remedies. As such, Andritz should require the developer to provide a transparent dispute resolution mechanism or establish such a mechanism itself for those who may be harmed. Moreover, this should be a general policy that Andritz implements across all its projects.

C. Chapter VI: Environment

1. Environment 3: Enterprises should assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them.

Under this Guideline, Andritz had the responsibility to examine the potential adverse effects of the Xayaburi Project before agreeing to supply crucial hydropower components to the project developer. However, there is no indication that Andritz assessed the foreseeable environmental and social impact of its supply contract – an oversight that is especially irresponsible given the

²¹⁰ OECD Guidelines, *supra* note 130, Commentary on Human Rights ¶ 46.

²¹¹ Land Issues Working Group, *Land Compensation Tops Parliament Debate* (July 26, 2013), available at <http://www.laolandissues.org/2013/07/26/land-compensation-tops-parliament-debate/>.

²¹² U.S. Dep’t of State, *Country Reports on Human Rights Practices for 2012 Lao*, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204213#wrapper>.

²¹³ Post of Evelyn Chuang, *supra* note 51.

conclusions of the SEA Report on the known and unknown impacts of mainstream dams on the Mekong. Moreover, Andritz acknowledged that there were significant environmental risks but concluded that it was sufficient to address them during (and, presumably, after) the construction phase, rather than seeking effective mitigation measures beforehand.

To satisfy its responsibility to assess and address foreseeable environmental impacts, Andritz should revise its corporate policies and its approach to the Xayaburi Project. First, Andritz should require the project developer to acknowledge and address the results of independent MRC and other scientific, environmental and social impact assessments. Second, if it cannot verify that the developer has taken adequate steps to mitigate the project's expected consequences, Andritz should decline to participate in the project, such as by not providing hydropower components for the Xayaburi Dam. At this stage, by providing key components to a project with such well-documented environmental harms without any effective efforts at prevention or mitigation, Andritz is in breach of the Guidelines.

V. REQUEST FOR NCP ASSISTANCE

In light of the foregoing, the complainants request the NCP to offer its good offices to resolve their dispute with Andritz over the failure of the latter to comply with OECD Guidelines. The complainants ask the NCP to engage Andritz in a dialogue with them and the communities whose interests they represent, with the aim of working with Andritz to:

- Investigate and assess both the localized and transboundary impacts of the Xayaburi Dam on community members' lives, property, and livelihoods as well as on the Mekong River and the surrounding environment,
- Ensure that the project developer releases the final design of the dam to the public in a timely fashion and that its opened up to scientific oversight.
- Commit to using its leverage to encourage the Lao PDR government and the project developer to mitigate or prevent any negative human rights impacts identified,
- Commit to participating in the remediation of any impacts that have been identified and cannot be mitigated or prevented,
- Use its leverage to encourage the Lao PDR government and the project developer to allow access to the Xayaburi site for civil society organizations and other external monitoring groups, including the National Contact Point, and to refrain from intimidating local community members from communicating with such outside groups,
- Develop corporate group-level policies on displacement, conservation of threatened species, and other relevant human rights and environmental violations,
- Develop due diligence procedures to ensure that Andritz is not currently contributing and will not later contribute to development projects that will cause human rights or environmental violations,

- Require the Xayaburi project developer and any other developers with which Andritz contracts for future projects to establish a transparent, legitimate, and credible grievance mechanism with adequate safeguards to protect the safety and privacy of complainants and, failing that, directly provide a remedial mechanism itself,
- Use its leverage to encourage the Xayaburi developer to adopt a credible, comprehensive mechanism with independent expert support to monitor and mitigate the human rights impacts of the Xayaburi Dam and ensure that the lives and livelihoods of affected community are not prejudiced by the project, consistent with relevant IFC Environmental and Social Performance Standards, and
- Require that future contracts with developers contain clauses instructing the developer to conduct transparent and unbiased assessments of a project's environmental and social impacts – including transboundary and cumulative impacts – and mitigate potential risks, as well as reserving Andritz's right to pull out of the project if the developer does not meet these requirements.

VI. CONCLUSION

For the foregoing reasons, we conclude that Andritz's ongoing role in the construction and operation of the Xayaburi Project is contributing to severe environmental damage and displacement that will result in impacts to the livelihoods and food security of hundreds of thousands of people in the Mekong region, and thus violates the OECD Guidelines. Specifically, Andritz is in violation of the following Guidelines:

- General Policy A.1: Enterprises should contribute to economic, environmental, and social progress with a view to achieving sustainable development.
- General Policy A.2: Enterprises should respect the internationally recognized human rights of those affected by their activities.
- General Policy A.10: Enterprises should carry out risk-based due diligence, for example by incorporating it into their enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts as described in paragraphs 11 and 12, and account for how these impacts are addressed. The nature and extent of due diligence depend on the circumstances of a particular situation.
- General Policy A.11: Enterprises should avoid causing or contributing to adverse impacts on matters covered by the Guidelines, through their own activities, and address such impacts when they occur.
- Human Rights 2: Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
- Human Rights 4: Enterprises should have a policy commitment to respect human rights.

- Human Rights 5: Enterprises should carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
- Human Rights 6: Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.
- Environment 3: Enterprises should assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them.

For administrative matters in this Specific Instance Process, ECA Watch Austria will serve as the coordinating complainant, but all correspondence should be sent to all complainants at:

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