

# Specific Instance to OECD National Contact Point in Finland: the role of Pöyry Group services in the process of the Xayaburi hydropower project in Lao PDR

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**Finnish Asiatic Society, Friends of the Earth Finland, Siemenpuu Foundation, Buddhist Association for Environmental Development (BAED), NGO Forum on Cambodia, Towards Ecological Recovery and Regional Alliance (TERRA), Community Resource Centre Thailand, Focus on Global South, Vietnam Rivers Network, Centre for Water Resources Conservation and Development (WARECOD), People and Nature Reconciliation (PanNature), Mekong Energy and Ecology Network (MEE Net), International Rives, The Corner House, Berne Declaration<sup>1</sup> vs. Pöyry Group**

Specific Instance submitted on June 11<sup>th</sup> 2012

## **Meeting with the Ministry of Employment and the Economy officials April 3<sup>rd</sup> 2013<sup>2</sup>**

**The Complainant requests that this document and its annexes are distributed to all the members of the Committee on Social and Corporate Responsibility (CSCR) before the next CSCR meeting on April 11<sup>th</sup> 2013 and before the CSCR statement for the Complaint is prepared.**

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<sup>1</sup> See Annex I for the Specific Instance, updated on July 6<sup>th</sup> 2012.

<sup>2</sup> In this meeting, the Complainant is represented by Ms Liisa Uimonen (Siemenpuu Mekong Group), Mr Otto Bruun (Friends of the Earth Finland), Ms Mira Käkönen (Chair of Siemenpuu Board), and Mr Timo Kuronen (Siemenpuu Mekong Program Coordinator).

In this meeting with the Ministry of Employment and the Economy (MEE) officials, the 15 NGOs from 7 countries, together as the Complainant, would like to give their responses to

1. The presentation given by Pöyry on its statement to the Complaint, Dec 17<sup>th</sup> 2012
2. The statement of the Finnish Ministry of Environment, Jan 10<sup>th</sup> 2013
3. The statement of the Finnish Ministry of Foreign Affairs, Jan 28<sup>th</sup> 2013
4. Pöyry's responses to the ME and MFA statements, Feb 15<sup>th</sup> 2013.

As the handling of the case is mainly concentrated only in the Compliance Review that Pöyry conducted for the Lao Government in 2011, we would also like to remind that after submitting the Compliance Review in August 2011 there have been some important new developments that should be considered as direct consequences of Pöyry's activities prior to June 2012 and indicators of Pöyry's continued irresponsibility, and thus considered when investigating whether breaches of the OECD Guidelines for Multinational Enterprises by Pöyry have taken place.

Furthermore, the Complainant would like to discuss some procedural problems which have arisen during the handling of the case. The Complainant considers these problems important to resolve in order to strengthen the Finnish National Contact Point's ability to uphold the OECD Guidelines for Multinational Enterprises and the current Finnish Government goal of becoming the forerunner in social and corporate responsibility issues.

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## **Comments on the Mr Mika Pohjonen's presentation on the Pöyry response in the Committee on Social and Corporate Responsibility (CSCR) meeting, December 17<sup>th</sup> 2012**

**Pohjonen/Pöyry: "Pöyry has a hundred-year experience on hydropower all over the world"; "In the Xayaburi project, we reviewed the project documents etc. using the knowledge we have on hydropower"; "We only used the information that the Lao Government / Xayaburi Power Company gave us, we did no additional studies."**

As a company with a "hundred-year experience on hydropower", and acting in a river as large, diverse and significant as the Mekong, Pöyry's reviewing only the documents provided by the client without any additional research in a baseline knowledge poor environment is irresponsible. As an experienced professional, Pöyry should have recognized that the information provided by the Lao government was insufficient to reach a scientifically valid conclusion on whether the Xayaburi Dam is environmentally and socially sustainable, and should have insisted that adequate time be set aside for proper studies to be completed. Pöyry's experience on hydropower is based mainly on rivers in Europe and North America. These rivers are not comparable to the Mekong.

Pöyry acknowledged in its Compliance Review that there's a lack of baseline data. Pöyry should have given this much more emphasis, and demanded that all the studies need to be conducted before any construction begins and even before its own technical recommendations could be adapted into the dam's design. Given the high risks posed by the Xayaburi Dam, it was inappropriate for Pöyry to recommend that construction proceed before further impact studies were carried out.

**Pöyry is clearly aware of its reputation as a leading engineer on hydropower in the global markets.**

As we stressed in the Complaint, Pöyry's reputation was one of the key services it provided to the Lao Government. Thus in conducting its Compliance Review and other services, it should have acknowledged this. Pöyry should not have downplayed the potential transboundary impacts by suggesting a "build now, adapt later" approach, and it should have clearly listed all the areas of non-compliance with the MRC Preliminary Design Guidance for Proposed Mainstream Dams. It should have made all in its power to prevent its services being used as a justification to proceed with the dam unilaterally and against the 1995 Mekong Agreement. (See the Complaint p. 24-25.) We note that the Lao government has repeatedly referred in public to Pöyry's work as its primary justification for proceeding with the dam's construction, despite ongoing opposition from neighboring governments and scientific experts in the region.

**Pohjonen/Pöyry: "Pöyry has no say in how its services are used by its clients – once the reports etc. have been submitted to the client, all the rights to it are turned over to the client as well."**

Another company, also involved in the Xayaburi hydropower project, namely Compagnie Nationale du Rhône (CNR) from France, has set a dissenting example on how a consulting company can act.

CNR was hired by the Lao Government to review Pöyry's work, and its Peer Review was submitted to Laos in April 2012 (see the Complaint, page 21). By using this report, both Laos and Pöyry have claimed that Pöyry's work has been verified. However, in a press release in August 2012, CNR

distanced itself from Pöyry's report, reminding that it had not reviewed the fisheries and dam safety issues, and emphasising that the "solutions have been proposed at the conceptual level by the CNR, based on its experience of operator of run of river dams. These solutions need to be developed and their costs evaluated".<sup>3</sup>

If Pöyry saw its work had been misused or misinterpreted, why did it not try to correct such behaviour? As we'll discuss later in this document, Pöyry had a conflict of interest in conducting the Compliance Review, which might have prevented it from taking action.

**Pohjonen/Pöyry: "Pöyry's involvement in the project started after the completion of the Prior Consultation Process in April 2011."**

As is discussed in the Complaint (e.g. pages 17-18), the PNPCA was not over by the time Pöyry got involved.

MRC's official position in April 2011 of the state of the PNPCA was that "there is still a difference in views from each country on whether the prior consultation process should come to an end," and that the MRC's Joint Committee "agreed that a decision on the prior consultation process... be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project."<sup>4</sup>

In this situation, a responsible company would have insisted that more time be set aside to resolve the diplomatic dispute before recommending that construction proceed.

**Pohjonen/Pöyry: "Pöyry is not a decision-maker in this project."**

As brought up in the Complaint, Pöyry has had a significant leverage over the project. By its services, including both the Compliance Review and Pöyry's reputation, it could have affected to the proceeding with the dam, e.g. by clearly listing all areas of non-compliance, by asking Laos to delay construction while additional studies were conducted, and by asking Laos to fully comply with the 1995 Mekong Agreement and the 2003 PNPCA. As the November 2011 MRC review on the Pöyry Compliance Review concludes, the project still does not fully comply with these requirements.

According to global standards for corporate responsibility, consulting companies are expected to respect human rights and the environment, even if they are not the lead developers on a project. This reflects the reality that modern infrastructure projects often involve the participation of multiple companies. For example, the OECD Guidelines on Multinational Enterprises require all companies to avoid contributing to human rights and environmental harm. Similarly, the UN Guiding Principles on Business and Human Rights require all companies to take precautionary steps to avoid becoming complicit in human rights violations<sup>5</sup>.

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<sup>3</sup> See the CNR August 2012 Press release at [http://www.internationalrivers.org/files/attached-files/2012\\_08\\_02\\_press\\_release\\_cnr\\_xayaburi\\_dam\\_project.pdf](http://www.internationalrivers.org/files/attached-files/2012_08_02_press_release_cnr_xayaburi_dam_project.pdf) and more at <http://www.internationalrivers.org/blogs/267/as-consultant-distances-itself-cracks-appear-in-laos%E2%80%99-portrayal-of-xayaburi-dam>

<sup>4</sup> See <http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level/>

<sup>5</sup> See the UN Guiding principles at [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

**Pohjonen/Pöyry: “MRC has reviewed Pöyry’s report in November 2011 and supports Pöyry’s recommendations, but highlights issues, which it recommends to be investigated more or with different timing.”**

Pöyry has attempted to mischaracterize the MRC Secretariat’s November 2011 review. Also the Ministry of Foreign Affairs, in its statement to the Specific Instance, emphasizes that the Secretary for the MRC has found inadequacies in the Pöyry Compliance Review. We invite members of the CSCR to read the attached review for themselves<sup>6</sup>. For example, the MRC Secretariat concluded that “even if all the recommendations in the Pöyry Report were incorporated in the Xayaburi Project, the concerns of the Member Countries would not be fully addressed, especially with reference to the request to defer the construction of all mainstream dams (until knowledge gaps are filled).” (p. ii)

The report also concluded, “It is the opinion of the MRC review team that conducting specific investigations before (rather than in parallel with) dam construction will reduce risks, including those of transboundary and cumulative impacts, and avoid “regret measures”, actions that may ultimately be inappropriate and lead to expensive and/or irreversible unintended negative impacts.” (p. ii)

The report also clearly states that “due to the major challenges involved it is the MRC Review Team’s observation that even if the recommendations in the Pöyry Report are followed, the Xayaburi Project would be considered only partly compliant in the area of fish bypass facilities and fisheries ecology as well as in terms of dam safety.” (p. ii)

All of these findings are central to the MRC Secretariat’s review, as well as to the concerns raised by neighboring governments.<sup>7</sup>

**Pohjonen/Pöyry: “The complaint is based on a wrongful understanding of the procedures agreed in the Mekong Agreement.”**

To our knowledge, Pöyry has not elaborated this claim in any detail.

Key elements of the 1995 Mekong Agreement include:

1. Laos is required to seek agreement with its neighbors before beginning the project: To balance the rights of upstream and downstream countries, the Mekong Agreement requires all four governments to make a “good faith” effort to reach agreement on whether a project goes forward. Instead of trying to reach agreement on the Xayaburi Dam, Laos claimed that it only must consider comments of the other governments. Laos made no efforts to compromise on its position or to reach a mutually agreeable solution.
2. Laos must provide other governments with opportunity to evaluate the project’s impacts: The MRC’s “prior consultation” is the process where the four governments try to reach an agreement. As clearly stated in the Mekong Agreement, the primary purpose of the prior consultation is to provide the governments with an opportunity to evaluate the project’s transboundary impacts. Yet for the Xayaburi Dam, Laos did not provide neighboring governments with an opportunity to evaluate the project’s transboundary impacts. In

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<sup>6</sup> The MRC’s review has been sent to the MEE already earlier via e-mail, but we have attached it here once more.

<sup>7</sup> See the MRC’s review on Pöyry’s Compliance Review attached, or at

[http://www.internationalrivers.org/files/attached-files/mrcs\\_comments\\_on\\_poyry\\_report\\_nov\\_2011.pdf](http://www.internationalrivers.org/files/attached-files/mrcs_comments_on_poyry_report_nov_2011.pdf)

particular, Laos did not assess the transboundary impacts before starting the prior consultation in September 2010.

3. Laos is not permitted to implement the project while consultations are still underway: International law and the Mekong Agreement prohibit the governments from implementing a project while the governments are still discussing it—this is part of the obligation to negotiate “in good faith.” Laos and developer Ch. Karnchang began implementing the Xayaburi Dam in late 2010 before the Mekong governments even met to discuss the project. Later, Laos incorrectly claimed that “preparatory work” was allowed under the Mekong Agreement while the consultations are underway.
4. Laos is required to study the project’s transboundary impacts before consultation can take place: Under international law, governments are required to prevent significant harm to other countries, which includes setting aside enough time to assess the project’s transboundary impacts. After failing to assess the Xayaburi Dam’s transboundary impacts in 2010, Laos refused to delay project implementation after Cambodia and Vietnam requested these studies during the prior consultation. Instead, Laos claimed that untested technologies proposed by consulting company Pöyry were sufficient to mitigate any harm.
5. Cambodia, Vietnam, and Thailand have a right to extend the prior consultation’s timeframe: The default timeframe for the prior consultation is six months, but under international law the downstream governments have a right to extend it<sup>8</sup>. Laos claims that the Xayaburi Dam’s prior consultation ended automatically after six months. During this initial six month period, Laos failed to provide the information that other governments needed to evaluate the project’s impacts. This undermined the primary purpose of the prior consultation. Laos also began project implementation during this initial period.
6. Cambodia, Thailand, and Vietnam have a right to seek compensation for any harm caused: Laos has an obligation under international law to stop the project immediately if it causes harm to neighboring countries. Downstream governments Cambodia, Thailand, and Vietnam can seek compensation for any harm that the dam causes. Cambodia, Thailand, and Vietnam will have difficulty seeking compensation, however, because there is insufficient baseline data at this time to measure how the Xayaburi Dam will change the Mekong River. All three countries now face the difficult task of closely monitoring the impacts caused by the dam.

The Complainant’s interpretation of the Mekong Agreement is in line with this analysis.

For a more comprehensive analysis, please read the report by International Rivers, which is also attached<sup>9</sup>.

**Pohjonen/Pöyry: “The complaint is based on a wrongful understanding of how the recommendations given in the OECD Guidelines for Multinational Enterprises (“Guidelines”) apply to service providers such as Pöyry.”**

To our knowledge, Pöyry has not elaborated this claim in any detail.

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<sup>8</sup> PNPCA procedures 5.5; international water law as stated by the UN International Law Commission.

<sup>9</sup> [http://www.internationalrivers.org/files/attached-files/intl\\_rivers\\_analysis\\_of\\_mekong\\_agreement\\_january\\_2013.pdf](http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf)

In the complaint, we show in a very elaborate manner, how these Guidelines are applicable to service providers such as Pöyry. For example:

[T]he updating of the Guidelines in 2011 reflects changes in the global economy, placing more emphasis on service sector companies. The Preface of the updated Guidelines (2011) states in paragraph 2: “With the rise of service and knowledge –intensive industries and the explosion of the Internet economy, service and technology enterprises are playing an increasingly important role in the international marketplace”. The Guidelines also state elsewhere that a precise definition of a multinational enterprise is not needed. The companies for whom the Guidelines are relevant “operate in all sectors of the economy.” The Guidelines go on to note that many businesses have “called upon consulting [and other] services, contributing to the accumulation of expertise” in the area of good corporate citizenship, good practices and good business conduct. This suggests that the Guidelines consider service providers to be a part of the applicable sectors when they operate on a multinational scale.’

**Pohjonen/Pöyry: “A large part of the allegations made by the complainants are based on a scientific disagreement on mitigation measures proposed by Pöyry in its report. The complainants are entitled to a differing scientific opinion, but that does not mean that Pöyry would have breached the OECD Guidelines.”**

There is no indication that Pöyry followed a scientific method in reaching its conclusions. Pöyry concluded with confidence that the dam would not have negative environmental and social impacts, despite lacking the basic baseline data on which to base this conclusion. To our knowledge, no Mekong River Basin scientists have publicly supported Pöyry’s work.

Pöyry’s “build now, fix problems later” approach is widely seen as a socially, ecologically and scientifically irresponsible way of acting, given the high risks of the project. Because of the lack of baseline data, additional studies cannot be completed during the early construction phase, but need a longer and undisturbed time period to conduct. This approach is against established science.

Pöyry claims a sufficient fish pass technology exists and can be adopted in the Xayaburi project, based on its experiences mainly in rivers in Europe and North America. There are no experiences of successful fish pass technology on any major tropical river anywhere in the world and certainly not on the Mekong River. The Mekong is the largest inland fisheries in the world with over 850 fish species. An estimated one-third of these species migrate long distances both up and downstream, sometimes in incredibly great numbers. There’s no dam technology to support this huge ecosystem. Pöyry concluded that it could successfully build a fish passage technology at the Xayaburi Dam without first identifying which fish species travel past the dam, what types of ecosystems and water conditions they need to survive, and what kind of swimming behaviour they have. To claim this without sufficient baseline data on fisheries and fish behaviour in the Mekong is guesswork, not science.

Pöyry’s work contradicted the findings and conclusions of the comprehensive and praised Strategic Environmental Assessment of Hydropower on the Mekong Mainstream (SEA), even though it was one of the background documents Pöyry used in its Compliance Review. The SEA was based on gathering all the existing information about Mekong’s ecology and hydrology and experiences from the dams on the mainstream north of the Chinese border. In numerous cases, Pöyry disregarded the

findings of studies such as the SEA that recommended delaying construction of the dam. Nevertheless, the Lao government upheld Pöyry's work as proof of the dam's safety, and Pöyry made no efforts to correct this mischaracterization.

This irresponsibility leads to breaching the OECD Guidelines: By downplaying the trans-boundary impacts and claiming that all the negative impacts can be mitigated, Pöyry undermined the other MRC member countries' rights to understand how the dam poses a risk to their own territories. Although construction on the dam is well underway, the risk of significant human rights and environmental impacts remains high.

**Pohjonen/Pöyry: "All the demands made by the complainants are unfounded and without basis in the Guidelines. Furthermore, most of the demands fall outside the authority of the National Contact Point, task of which is to give recommendations on the implementation of the Guidelines."**

We demand further elaboration on why our demands "are unfounded and without any basis in the Guidelines". By correcting the mistakes or breaches it has made in its Compliance Review and other services, Pöyry could mitigate the harm its services have caused. Now Laos and the Xayaburi Power Company are proceeding leaning completely on their hired consultancies, including Pöyry. By publicly stating areas of non-compliance in the project, publicly clarifying which studies are needed before any construction impacting the river takes place, and publicly endorsing the conclusions of the SEA, Pöyry would significantly reduce its contribution to the adverse human rights and environmental impacts. It is not outside the authority of the NCP to give these kinds of recommendations.

See the Complainant's demands on pages 18-19 of this document.

**Pohjonen/Pöyry: "Pöyry has been fully compliant with the recommendations given in the Guidelines in connection with the Xayaburi project."**

We demand further elaboration on how Pöyry has complied with the guidelines brought up in the Complaint.

**As a conclusion**, this presentation given by Pohjonen on December 17<sup>th</sup> 2012 is not a sufficient response to the Complaint. Pöyry does not elaborate sufficiently on how the Complainant has misinterpreted the OECD Guidelines for Multinational Enterprises or the 1995 Mekong Agreement or the situation in general. This is one of the reasons the Complainant wants to see the whole response given by Pöyry to the Complaint – is it as vaguely prepared as this presentation?

## **Comments on the Statement of the Finnish Ministry of Environment (ME) to the Complaint and to the Pöyry response, dated January 10<sup>th</sup> 2013**

**ME Statement, page 2: “companies should try to prevent or reduce adverse effects in situations in which the companies themselves have not contributed to the creation of these adverse effects but wherein the effects nevertheless are directly linked to said companies' operations, products, or services via business relationships.”**

As shown already in the Complaint and as further developments indicate, there is significant evidence that Pöyry has a strong influence over the Xayaburi Dam project, even if it is not the lead developer. We are happy to provide more specific details on each of these.

In the media, the Lao government has referred to Pöyry consistently as its primary justification for continuing construction, despite other governments' concerns.

The Lao government referred explicitly to Pöyry in letters it sent to the project developer Ch. Karnchang in June 2011 and to the Thai government in October 2011, informing them of Pöyry's finding that the MRC prior consultation was complete (see the Complaint, p. 19-20).

Delegations of foreign government officials visited the dam site in July 2012 and January 2013. On both occasions, Pöyry led the visits on behalf of the project developers.

In November 2012, Pöyry announced that it had formally taken on a greater role in the project as the Government of Lao's engineer. This role goes far beyond its original task of writing a compliance review and is consistent with Pöyry's extensive involvement in the project from May 2011 onwards.

**ME Statement, page 2: “Companies should take action to prevent or reduce the foreseeable environmental effects of their processes, commodities, and services and to prevent or minimise harm to the environment even in the event that no absolute certainty as to the effects of the actions exists.”**

Pöyry claims that it took actions to reduce the environmental effects of the project. In Pöyry's view, its involvement has improved the sustainability of the project. Yet at the same time, Pöyry's involvement has justified a dangerous and highly project going forward. Pöyry served as the Lao government's primary justification for continuing with construction, contrary to the recommendations of the MRC and scientific experts. This harm cancels out any benefits that Pöyry's involvement might provide.

**ME Statement, page 3: “In order to comply with the directives, a company should, in the opinion of the Ministry of the Environment, even restrict its freedom to agree on the content or duration of a business relationship, in some cases.”**

This is an important point. Pöyry has a responsibility not to become involved in environmentally and socially harmful projects. This responsibility exists independently of the Lao government. If Pöyry believed that its recommendations were not followed by the Lao government, it should have withdrawn. A responsible company would not stay involved in a project if it determined that the host government was acting inappropriately.

Instead, Pöyry's actions indicate clear support for the project. This was evident in November 2012 when Pöyry took on official role as the Government of Lao's engineer. It was also clear when Pöyry did not object to the numerous media articles and Lao government public statements that relied upon Pöyry's work to justify moving forward with the project.

## **Comments on the Statement of the Finnish Ministry of Foreign Affairs (MFA) to the Complaint and to the Pöyry response, dated January 28<sup>th</sup> 2013**

We have attached the following documents to provide you with further information on the matters discussed below. The first two have already been referenced in the Complaint.

- (i) Lao government letter to Ch. Karnchang, which specifically references Pöyry
- (ii) Lao government letter to Thai government (and English translation), which specifically references Pöyry
- (iii) Historical record of the Mekong Agreement negotiations, written by the UN Development Programme
- (iv) 1994 United Nations International Law Commission commentary on international water law. The language in the Mekong Agreement is drawn directly from this commentary

**MFA statement: “The complaint on Pöyry’s actions...applies especially to the compliance review report produced by Pöyry in 2011, the main objective of which was to assess whether the government of Laos has fulfilled the requirements specified in the 1994 Mekong Agreement...and whether the member-country consultation obligation, for instance, has been fulfilled.”**

Pöyry claims that it only provided technical advice to the Lao government. However, Documents (i) and (ii) demonstrate that Pöyry advised Laos that its legal obligations under the Mekong Agreement had been completed. Laos then relied primarily on Pöyry's advice to inform the project developer Ch. Karnchang and the Thai government that the prior consultation process was complete and the project could proceed. This led directly to the continuation of construction, as well as Thailand's signing of the power purchase agreement. Both steps advanced the project construction while the status of the MRC prior consultation was still in dispute.

**MFA Statement: “The [Mekong] Agreement's procedure-related provisions are multi-layered; this includes several sections that are open to interpretation, which has also resulted in disputes between the parties. According to our information, there is no previous case law or legal praxis on the interpretation of the Agreement, which could be the base for addressing further interpretation of the agreement in this case.”**

The relevant international law precedents are quite detailed. The treaty requires all four governments to make a good faith effort to reach a consensus. Laos misinterpreted the treaty when it claimed that it had the sovereign right to proceed with the project unilaterally, at a time of its own choosing, without first making a good faith effort to reach consensus.

Please see the attached Document (iii) by the UN Development Programme which describes the parties' intent when they signed the Mekong Agreement. Additionally, Document (iv) by the UN International Law Commission which describes the meaning behind the language used in the Mekong Agreement, which was developed by the UN International Law Commission.

For an analysis of these two documents in the context of the Xayaburi Dam, please read International Rivers' report (by Kirk Herbertson) attached<sup>10</sup>.

**MFA Statement: “The Xayaburi project involves year-round water use within the catchment area, in which case a six-month consultation period, aimed at reaching consensus, must be undergone, as a rule. However, the final decision-making power lies with each country.”**

According to the Mekong Agreement, the primary purpose of the prior consultation is to “allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses and of water and any other affects, which is the basis for arriving at an agreement.”

The 6 months is the default timeframe for the prior consultation, but the downstream governments have a right to extend the timeframe if the primary purpose of the prior consultation cannot be achieved. In the case of the Xayaburi prior consultation, the downstream governments never had an opportunity to evaluate the impact of the project on their own countries. The EIA submitted by Laos at the beginning of the prior consultation only examined impacts 10 kilometers downstream from the dam site. No transboundary impact assessment was ever conducted. Without such studies, the neighboring countries were unable to determine in the 6 month timeframe how their rights would be affected by the project. As a result, the primary purpose of the prior consultation was never achieved.

For more discussion on this topic, please read International Rivers' report (by Kirk Herbertson) attached<sup>11</sup>.

**MFA Statement: “...ultimately, if the consultation process fails to produce mutual understanding, the opinions of the member states will be recorded, while the continuation of the project is left for the notifier to decide.”**

International law explicitly prohibits the notifying government from implementing the project while the prior consultation is still underway. Please see the UN International Law Commission's analysis of this in Document (iv).

In the case of the Xayaburi Dam, project implementation began in late 2010, while the first 6-month prior consultation period was still underway. The 2010 annual report of project developer Ch. Karnchang clearly indicates that project implementation began at this time.

For more discussion on this topic, please read International Rivers' report (by Kirk Herbertson) attached<sup>12</sup>.

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<sup>10</sup> [http://www.internationalrivers.org/files/attached-files/intl\\_rivers\\_analysis\\_of\\_mekong\\_agreement\\_january\\_2013.pdf](http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf)

<sup>11</sup> [http://www.internationalrivers.org/files/attached-files/intl\\_rivers\\_analysis\\_of\\_mekong\\_agreement\\_january\\_2013.pdf](http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf)

<sup>12</sup> [http://www.internationalrivers.org/files/attached-files/intl\\_rivers\\_analysis\\_of\\_mekong\\_agreement\\_january\\_2013.pdf](http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf)

**MFA Statement: “The complaint claims that the technical analyses presented by Pöyry in the report underestimate the effects of the Xayaburi power station in the downstream region of the Mekong River and, moreover, that the report fails to present all of the technical challenges related to the project.”**

Pöyry’s report concludes that the transboundary impacts of the Xayaburi Dam will be insignificant. Yet Pöyry did not have sufficient data to reach this conclusion. The project’s original EIA only examined impacts 10 kilometers downstream from the dam site. Pöyry did not collect other data before reaching this conclusion. For example, the migratory patterns of fish species traveling near the dam site remain unknown.

Pöyry and the Lao government also argued that it was unlikely that the dam’s impacts would extend over 100 kilometers into Thailand, Cambodia, and Vietnam. However, the impacts of large dams often extend hundreds of kilometers downstream. For example, villagers in Chiang Khong, Thailand have reported significant fluctuations in water levels after the completion of several dams on the Upper Mekong / Lancang River in China, which are located much farther north than the Xayaburi Dam.

**MFA Statement: “In its report to Laos, Pöyry proposed that the comments of these countries be taken into account and also recommended that the project not be carried out if technical solutions were not found for certain problematic issues. In Pöyry’s opinion, such solutions can, however, be identified.”**

Pöyry’s main finding in the August 2011 report is that construction on the Xayaburi Dam should proceed while these technical solutions are still being explored. By proceeding with construction, it will be too late to stop the project even if viable technical solutions cannot be found. Many scientists are sceptical that any technical solutions exist.

The credibility of Pöyry’s findings in its August 2011 is diminished by a conflict of interest. As Pöyry acknowledges in page 10 of its report, at the time it was conducting its compliance review, it had “been nominated as Government of Laos Engineer.” In other words, Pöyry had a clear financial incentive—the promise of further work—if it provided the Xayaburi Dam with a positive review. In November 2012, Pöyry announced that it had indeed accepted the new role as Government of Laos Engineer.

**MFA Statement: “It is unclear whether investigations performed during the construction project can influence the sustainability of the project.”**

Pöyry’s investigations are based on the assumption that technical solutions can be found after construction is already underway. On the issue of fisheries, construction has presumably already influenced fish species. Construction disturbs local habitats, changes water quality and current flows, and disrupts sediments in the river. All of this can reduce fish populations.

The MRC Secretariat reached a similar conclusion in its March 2011 analysis of the Xayaburi project, saying “Fisheries will potentially be heavily impacted during the construction phase. Construction impacts have been given little attention in the submitted documents.”<sup>13</sup>

**MFA Statement: “Laos commissioned another company specialising in hydropower (Compagnie Nationale du Rhône) to conduct a peer assessment that assesses the quality and recommendations of the Pöyry report. This report, completed in March 2012, proposes additional improvements to the project, some of which should be made during the planning phase of the project. Similarly to Pöyry, CNR concludes that additional investigations may be performed and solutions developed during the construction phase.”**

Laos and Pöyry have claimed repeatedly that CNR has verified Pöyry’s work. This is not accurate. First, the CNR report primarily examines the issues of sediments. It does not address the important issues of fisheries and dam safety.

Secondly, in an August 2012 press release, CNR distanced itself from Pöyry’s and Laos’ claims. CNR emphasized that it had not examined the fisheries issue, one of the most controversial parts of Pöyry’s work. On the issue of sediments, CNR emphasized that its proposed solutions were “conceptual” and “need to be developed and their costs evaluated.” Furthermore, CNR did not examine Pöyry’s work on dam safety. As a result, much of Pöyry’s work remains unsupported.<sup>14</sup>

**MFA Statement: “Working on the basis of the available written material, the Ministry of Foreign Affairs has been unable to assess the extent to which Pöyry plc has fulfilled and/or neglected the due-diligence obligation for companies, the obligation of adequately assessing the impact on human rights, or the obligation to consult possible local victims of human-rights violations.”**

The United Nations Guiding Principles on Business and Human Rights describe in detail the responsibility of companies to conduct due diligence in order to avoid becoming involved in human rights violations. The Finnish government has endorsed the UN Guiding Principles. These Principles, including their “protect, respect, remedy” framework, serve as the basis for the OECD Guidelines’ section on human rights.

As evidence of the explicit link between the UN Guiding Principles and the OECD Guidelines, please see the following memorandum of understanding: [http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/OECD\\_ICC\\_MoU\\_Eng.pdf](http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/OECD_ICC_MoU_Eng.pdf)

**MFA Statement: “At this point, it is too early to assess whether Pöyry’s actions have had an effect on Finland’s development-policy objectives in the Mekong region or whether they will have one.”**

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<sup>13</sup> See page 32 of <http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>

<sup>14</sup> For more information and a copy of the CNR August 2012 press release, please see <http://www.internationalrivers.org/blogs/267/as-consultant-distances-itself-cracks-appear-in-laos%E2%80%99-portrayal-of-xayaburi-dam> and [http://www.internationalrivers.org/files/attached-files/2012\\_08\\_02\\_press\\_release\\_cnr\\_xayaburi\\_dam\\_project.pdf](http://www.internationalrivers.org/files/attached-files/2012_08_02_press_release_cnr_xayaburi_dam_project.pdf), respectively.

This statement is true in the sense that the environmental and human rights impacts of the Xayaburi Dam are not yet understood. Many of the impacts have not yet happened. However, Pöyry's actions have already had a negative impact on the governance and decision-making process that underlies the Mekong River Commission. Pöyry's actions have contributed significantly and directly to undermining the Mekong River Commission's prior consultation process. This has set a dangerous precedent that now threatens the future of Mekong cooperation.

**As a concluding point**, we would like to stress that as a direct result of Pöyry's involvement: (1) the Lao government claims that the MRC prior consultation is complete, (2) the Lao government claims that it has already addressed neighboring governments' concerns, (3) construction is underway even though the transboundary impacts have not been assessed. Without Pöyry's involvement, it is less likely that a water dispute would exist right now.

## **Comments on the Pöyry's responses to the statements given by ME and MFA, dated February 15<sup>th</sup> 2013**

First of all, Pöyry keeps saying it is not in a position, where it can make decisions about the project (response to the ME statement, p. 1 and 2; response to the MFA statement, p. 2). However, as the Complainant has repeatedly demonstrated, Pöyry has had considerable influence over the project, e.g. through its Compliance Review. The Lao Government has repeatedly stated in the media that it follows completely its renowned and independent consultancies, including Pöyry. Furthermore, it does not matter if Pöyry is the lead developer or the decision-maker of the project; in the OECD Guidelines, it is for example stated that the companies are expected to "seek to prevent or mitigate an adverse impact where they have not contributed to that impact, when the impact is nevertheless directly linked to their operations, products or services by a business relationship" (see the Complaint, p. 31-33). Also as the Ministry of Environment wrote in its statement: "companies should try to prevent or reduce adverse effects in situations in which the companies themselves have not contributed to the creation of these adverse effects but wherein the effects nevertheless are directly linked to said companies' operations, products, or services via business relationships."

Secondly, in the response to the ME statement Pöyry claims that its involvement in the project has led to numerous and expensive improvements in the project design. As we wrote above and have demonstrated in the Complaint, Pöyry's involvement has justified a dangerous and highly project going forward. Pöyry served as the Lao government's primary justification for continuing with construction, contrary to the recommendations of the MRC and scientific experts. This harm cancels out any technical benefits that Pöyry's involvement might provide.

Thirdly, in the response to the ME statement (p. 2) Pöyry claims there is scientific disagreement about its approach of "build now, adapt later". As we explained above, this is a very relativistic claim and does not suffice as an explanation for this irresponsible approach (see p. 7-8 of this document).

Fourthly, Pöyry writes both in its response to the ME statement (p. 2) and in its response to the MFA statement (p. 2): "The Guidelines are very clear about the fact that they are not intended to shift responsibility from the entity potentially causing an adverse impact to an enterprise that it has a

business relationship with. Pöyry was, therefore under no obligation to engage stakeholders of the project on its clients...behalf". However, the Guidelines are also very clear about the fact that even though an enterprise is not causing an adverse impact, it is expected to not to contribute to such behaviour through its business relationship and also to try to mitigate the impact through the business relationship. Thus we have written in the Complaint (p. 33-34):

‘Companies are in the environmental chapter obliged under the Guidelines to "engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation". The companies further should “engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities”. However, Pöyry has undermined a process of further consultation instead of supporting or recommended it to go on. Particularly, the Pöyry report has been used to stop the consultation process and fast-track financing, approval and construction of the Xayaburi hydropower project, without the company using its leverage to mitigate or hinder this usage. Instead of improving opportunities of stakeholders to participate, as the complaint recommends, Pöyry thus undermines the possibilities of stakeholders, at all levels, to participate in a key process regarding the future of the Lower Mekong Region.’

Fifthly, in its response to the MFA statement (p. 1), Pöyry writes: “Pöyry’s assignment was not to assess whether the Government of Laos (“GOL”) had fulfilled its obligation to consult the neighboring countries.” However, Laos has repeatedly used Pöyry’ services to claim that the Prior Consultation was over and that it had adequately answered to the concerns raised during it. The attached documents 1 and 2 demonstrate that Pöyry advised Laos that its legal obligations under the Mekong Agreement had been completed. Laos then relied primarily on Pöyry’s advice to inform the project developer Ch. Karnchang and the Thai government that the prior consultation process was complete and the project could proceed. This led directly to the continuation of construction, as well as Thailand’s signing of the power purchase agreement. Both steps advanced the project construction while the status of the MRC prior consultation was still in dispute. (See also the Complaint, p. 19-20.)

Finally, in its response to the MFA statement (p. 2) Pöyry once again claims that by the time Laos hired Pöyry the PNPCA had already ended. As we have repeatedly demonstrated, this was not case: Pöyry entered a situation, where there was a clear diplomatic dispute over the use of the Mekong River.

## **Development of the situation after June 2012, when the Complainant submitted the Specific Instance to the Finnish NCP**

We would like to remind you that Pöyry's role did not end in submitting the Compliance Review to the Lao Government, despite what Pöyry claims, and that there is clear evidence that both the Compliance Review and Pöyry's role in general have had direct and clear negative impacts on the decision-making process and on the way the Xayaburi project has been proceeding. We have discussed many of these impacts or consequences in Complaint already, but much has happened after the Complaint was written and submitted in June 2012. . All of these developments are directly related to actions that Pöyry took prior to the submission of the Complaint. It is important to take these developments into account when investigating the negative and OECD Guidelines-breaching impacts that Pöyry has had in the Mekong.

We have already brought these up above, but will summarize them here again. See also the attachment of the Timeline of the Xayaburi Dam, by International Rivers.

For the direct consequences of Pöyry's involvement in the project before June 2012, see the Complaint, p. 19-20. In the Complaint, we also raised the concern of weakening of the 1995 Mekong Agreement and the MRC due to Lao's unilateral and irresponsible behaviour in the first PNPCA process for a Proposed Mainstream Dam ever (p. 28). Pöyry's services have been Laos' primary justification in proceeding the way it has, as we have shown here and in the Complaint. As the first mainstream dam ever to go through the PNPCA, Xayaburi also sets an important precedent for future mainstream dams.

For example, September 7<sup>th</sup> 2012, the President of Vietnam warned that constructing a dam at Xayaburi creates a risk of regional conflict. On September 13<sup>th</sup> 2012, Cambodia's MRC representative told reporters that its concerns with the project remain unanswered. In October 2012, Cambodian and Vietnamese government delegations separately visited the Xayaburi Dam site and heard presentations by Pöyry. Despite continuing concerns, on November 5<sup>th</sup> 2012 Laos' Vice Minister for Energy and Mines told reporters on the sidelines of the Asia Europe Summit in Vientiane that the Xayaburi Dam's ground-breaking ceremony would take place on November 7<sup>th</sup> 2012.

Delegations of foreign government officials visited the dam site also in July 2012 and January 2013. On both occasions, Pöyry led the visits on behalf of the project developers. Pöyry has also worked with the Xayaburi Power Company to redesign the project, but the final design has not yet been fully disclosed to the neighboring governments or to the MRC. On November 9<sup>th</sup> 2012, Pöyry announced that it had formally taken on a role as the Government of Lao's engineer for the project.<sup>15</sup>

Most of the meetings after June 2012 that have been held between the riparian countries have been held outside the scope of MRC and PNPCA. However, in January 2013 the 19<sup>th</sup> MRC Council Meeting was held and concerns of the Xayaburi dam were raised again in the MRC. According to participants at the meeting, MRC governments disagreed about the prior consultation procedures and how they had been applied in the case of the Xayaburi Dam. The Cambodian delegation asserted that Laos had misinterpreted the Mekong Agreement and that the prior consultation process had never

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<sup>15</sup> See Pöyry's Press release at <http://www.poyry.com/news-events/news/poyry-supervises-construction-xayaburi-hydropower-project-government-lao-engineer>

been completed. Meanwhile, Vietnam requested that no further developments on the Mekong mainstream occur until the Mekong mainstream dams study agreed upon at least year's Council Meeting is completed. The official opening statements from Council members reveal that Cambodia and Vietnam have not changed their opposition to the Xayaburi Dam and other mainstream dams. Also the MRC Development Partners raised concerns. They recommended in their joint statement that all ambiguities in the prior consultation process be resolved before any other mainstream project proceeds. It's noteworthy that Laos refused to sign the official minutes of the meeting.<sup>16</sup>

Before and after announcing the Xayaburi ground-breaking ceremony, the Lao Government used Pöry's services as proof that there would be no transboundary impacts and that all the concerns of the neighboring countries were taken into account. Thus the Lao government has referred to Pöry consistently as its primary justification for continuing construction, despite other governments' concerns. See the Timeline attached. We are happy to provide more specific details on request.

### *Pöry had a conflict of interest in conducting the Compliance Review*

Already in the Complaint, we also raised the concern of possible conflict of interest in Pöry's services. On page 23, we wrote:

‘[T]here is significant confusion regarding the role of Pöry and its actions. While a Pöry's representative argues that the company has “only reviewed major project documents”, the Pöry Hydropower brochure describes the role of the company in the Xayaburi process as follows: “Review of major project documents, regular site visits, review of project construction progress, financial status, environmental compliance”.’

Also in the Pöry Compliance Review completed in August 2011, page 10, it is announced that “Pöry Energy AG has been nominated as Government of Laos Engineer for the Xayaburi run-of-river Hydropower Scheme in Lao PDR”.

Another reason for conflict of interest, at the time Pöry was hired to conduct the Compliance Review on the project, was that Pöry had close business ties to Xayaburi Dam builder Ch. Karnchang, the company it was hired to evaluate. As of May 2011, Pöry and Ch. Karnchang were jointly involved in another hydropower project in Laos, the Nam Ngum 2 Dam. In other words, Pöry agreed to evaluate the performance of a company with which it was already doing business. (See the Complaint, p. 29.)

Later development of the project and Pöry's involvement have indeed showed a clear conflict of interest. On 9 November 2012, only two days after Laos held the official ground-breaking on the Xayaburi Dam, Pöry announced that it had formally taken on a role as the Government of Lao's engineer for the project. This role goes far beyond its original task of writing a compliance review and is consistent with Pöry's extensive involvement in the project from May 2011 onwards.

If Pöry concluded that the Xayaburi project complied with the MRC's standards, then construction could proceed and Pöry would receive additional contracts to help implement the project. If Pöry

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<sup>16</sup> See more at <http://www.internationalrivers.org/resources/cambodia-vietnam-and-donors-challenge-laos-on-mekong-dams-7802>, where the statements by Vietnam, Cambodia, Thailand and Development Partners can also be read. The Joint Development Partner Statement is also attached to this document.

concluded that the project did not comply with the MRC's standards, then Pöyry would not receive those additional financial benefits. This is a clear example of a conflict of interest. Unsurprisingly, Pöyry's August 2011 report recommended that the project can move forward.

### *Conclusion*

As we demonstrated here and already in the Complaint, Pöyry's services have an essential role in the way Xayaburi hydropower project has proceeded. All of these developments presented here have to be taken into account as evidence of direct negative impacts of Pöyry's involvement, when examining the extent to which Pöyry has influenced in causing adverse impacts and thus breached the OECD Guidelines for Multinational Enterprises.

## **The Complainant's Demands on Pöyry**

In the Complaint, the following demands on Pöyry are set (p.39-40):

The Complainant demands that Pöyry

- 1) publicly states areas of non-compliance in the Xayaburi dam project;
- 2) publicly clarifies which studies are needed before any construction that would impact the river basin takes place;
- 3) publicly endorses the Strategic Environmental Assessment commissioned by the MRC;
- 4) enters a meaningful dialogue with civil society partners on what kind of consultancy and services a responsible company can engage in; with regards to hydropower development in the Mekong region;
- 5) commits itself not to get involved in any further Mekong mainstream dams
- 6) should fund a performance bond to be set aside immediately for those harmed by the Xayaburi Dam;
- 7) should repay the Finnish government to the total amount of Finnish support to the MRC and the support to the drafting of the SEA report over the last 5 years.

The first three demands are set to correct the mistakes or breaches Pöyry has made in its Compliance Review and other services. By following these three demands, Pöyry could mitigate the harm its services have caused. As we have demonstrated here and in the Complaint, the Government of Laos and the Xayaburi Power Company are now proceeding leaning completely on their hired consultancies, including and especially Pöyry. By (1) publicly stating areas of non-compliance in the project, (2) publicly clarifying which studies are needed before any construction impacting the river takes place, and (3) publicly endorsing the conclusions of the SEA, Pöyry would significantly reduce its contribution to the adverse human rights and environmental impacts.

For example, and as we have stated above, the redesign of the Xayaburi has not yet been fully disclosed to the MRC or other experts and decision-makers, which directly prevents MRC and the neighboring countries to assess the project and its potential transboundary impacts. Also the Joint Development Partner Statement on January 17<sup>th</sup> 2013 raised this issue<sup>17</sup>. Pöyry should act to get the

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<sup>17</sup> See the Joint Statement attached.

redesign disclosed. It cannot hide behind the authoritarian government of Laos and still claim to be socially responsible.

Pöyry's actions and behaviour both in the Mekong and in the Specific Instance process indicate that Pöyry does not truly respect international standards and agreements, such as the UN Guiding Principles or the 1995 Mekong Agreement, or the OECD Guidelines for Multinational Enterprises and Finnish National Contact Point. A responsible company would engage into dialogue and not only disregard all allegations as wrong and unfounded.

The fourth demand on Pöyry to enter a meaningful dialogue with civil society partners refers to strengthening Pöyry's social and corporate responsibility. As Pöyry portrays itself as a socially responsible enterprise, it should be willing to discuss what this actually means for an actor in the service sector with civil society partners. Pöyry's unwillingness to engage in any meaningful dialogue even with the Complainant in the Specific Instance process indicates a disregarding attitude towards social and corporate responsibility.

This kind of dialogue on social responsibility expectations towards consultancies and service providers is especially important in Laos. There's severe lack of democracy, and the space for public discourse is very narrow, especially when it comes to dams. In this kind of situation, responsibility falls upon the multinational enterprises practising business in them.

The fifth and sixth demands are extensions or specifications on the fourth demand. If Pöyry cannot reach agreement with the civil society on how a socially responsible service sector actor should behave e.g. in the Mekong, it should then (5) commit itself not to get involved in any further Mekong mainstream dams. This is the case also when Pöyry continues to disregard and breach international guidelines and guiding principles, such as the ones set by the OECD and the UN: in such a diverse and significant ecosystem, no irresponsible approach can be tolerated in planning mainstream dams. If it acknowledges its responsibilities regards to the Xayaburi project, and it still wants to be involved in and assist the construction, it should (6) fund a performance bond to be set aside immediately for those harmed by the Xayaburi Dam, either by itself or together with the Lao Government.

The seventh demand is to remind that Pöyry's activities in the Mekong are directly at odds with the Finnish development goals in the Mekong region. As we have demonstrated here and in the Complaint, Pöyry's services have been used by the Lao Government as the primary justification for proceeding with the project in a way that breaches the 1995 Mekong Agreement. The MRC, which was founded by the 1995 Mekong Agreement, is Finland's main development partner in the Mekong region. Finland is also the greatest supporter of the MRC. If the Xayaburi project leads to weakening of the 1995 Mekong Agreement and thus the MRC, Pöyry can be held partly responsible. We acknowledge that demanding for Pöyry to (7) repay the Finnish government to the total amount of Finnish support to the MRC and the support to the drafting of the SEA report over the last 5 years falls outside of the authority of the OECD National Contact Point. However, we would like to remind the Finnish Government of the work there is to be done to make the multinational enterprises act in consistency with the national development cooperation plans and not undermining them.

## Procedural Issues

This Specific Instance is the first ever to be investigated in the Finnish OECD National Contact Point, which is currently formed by the Ministry of Employment and the Economy (MEE) and the Committee on Social and Corporate Responsibility (CSCR). Thus it also sets a precedent for possible future complaints.

During the process of handling and investigating this Specific Instance, some procedural problems have arisen. We consider these problems important to resolve in order to strengthen the Finnish National Contact Point's ability to uphold the OECD Guidelines for Multinational Enterprises and the current Finnish Government goal of becoming the forerunner in social and corporate responsibility issues.

### *Non-disclosure of the Pöyry response to the Complainant*

First and foremost we would once again like to criticize how the Pöyry response to the Complaint is being fully undisclosed to the Complainant, despite numerous reasoned requests via e-mail. We still think that we as the Complainant are entitled to see the Pöyry response at least for those parts that do not include business secrets. Pöyry's announcement that the Terms of Reference between the Lao Government and Pöyry prevent Pöyry and even the MEE as an NCP from sharing the Pöyry response to the Complaint with the Complainant is not a sufficient explanation. Pöyry should have to specify and elaborate further to the MEE and the CSCR which parts of its response include business secrets that are not already publicly available.

As discussed above, Pöyry's unwillingness to engage in a meaningful dialogue with the Complainant, including the non-disclosure its response to the Complainant, indicates alarming disregard towards corporate social responsibility, and first and foremost towards the tools of correcting socially irresponsible behaviour. Pöyry's unwillingness to truly engage in the Specific Instance process indicates disrespect towards the Finnish NCP and the spirit of the OECD Guidelines for Multinational Enterprises.

It is noteworthy that the Norwegian NCP has been very clear that business sensitivity is not a valid reason for not sharing documents with all parties within in the case. Another important example or precedent was set by the UK NCP a few years back. The UK NCP originally made a decision based on information provided by the company, but which the company insisted not be shared with the complainants. The decision was eventually overturned by the UK NCP's Steering Board, which ruled that it was unacceptable for the NCP to do so. See [http://oecdwatch.org/cases/Case\\_31](http://oecdwatch.org/cases/Case_31).

Thus the NCPs should not base any decision on information that has not been shared with all parties. This is a major indicator of impartiality for NCPs – basically if the Complainant is not allowed to see the response, the Finnish NCP should treat it as if it does not exist.

Furthermore, it is questionable how much of Pöyry's response consists of actual business secrets. This is because a lot of Pöyry's role and activities, including the Terms of Reference on the Compliance Review, is already known in the public domain. For example, the Compliance Review and the Pöyry presentations given to delegates in July 2012 and January 2013 in Luang Prabang, Laos, are published on a Lao Government's website [www.poweringprogress.org](http://www.poweringprogress.org), as was stated also in the MFA Statement to the Complaint. Pöyry's involvement is also followed closely on International

Rivers' and Save the Mekong Coalition's websites (<http://www.internationalrivers.org/resources/media-kit-on-the-xayaburi-dam-3412> and <http://www.savethemekong.org/>), disclosing even more of Pöyry's actions at Xayaburi. In light of this publicity, it would be even more justified to demand Pöyry to specify the business secrets in its response.

### *Communication and information distribution*

We are concerned whether the communication and distribution of relevant information is impartial and fair between the parties. This concern has risen as it seems that Pöyry has received the relevant documents straight away, whereas the Complainant has received some of them only by request. For example, Pöyry had received the MFA and ME statements automatically but the Complainant received them only after particularly asking for them.

Second concern is the use of Finnish language in relevant NCP/Ministry documents and slow translation processes. Due to the international composition of the group of Complainants, we requested in the Complaint (page 10) that the Specific Instance be handled in English. Still we have found ourselves asking for these English translations.

Thirdly, the Complainant has been kept unaware also of the time schedule of the investigation. It has been unclear for long periods of the investigation, what is actually going on and on what issues are decided at each time. The clarity of the schedule and mechanisms of the investigation is important for both parties to best participate in the handling of the Specific Instance.

Fourthly, we would like to remind the MEE officials of the MRC's October 2011 review of the Pöyry Compliance Review, which is referred here several times and is also attached. We wish it has been distributed to all the members of the CSCR, as requested by the Complainant, and taken into account in the investigation.

## **List of Attachments**

1. Lao government letter to Ch. Karnchang/Xayaburi Power Company Limited, which specifically references Pöyry, dated June 8<sup>th</sup> 2011
2. Lao government letter to Thai government (and English translation), which specifically references Pöyry, dated October 26<sup>th</sup> 2011 and January 30<sup>th</sup> 2012
3. Commentary & History: Agreement On The Cooperation For The Sustainable Development of The Mekong River Basin, Prepared by Dr. George E. Radosevich MWG Senior Advisor/UNDP, 1995 – Historical record of the Mekong Agreement negotiations, written by the UN Development Programme
4. 1994 United Nations International Law Commission commentary on international water law: "Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater" – the language in the Mekong Agreement is drawn directly from this commentary.
5. Mekong River Commission Secretariat: Observations and Comments on the Pöyry Report on the Xayaburi Hydropower Project, November 25<sup>th</sup> 2011

6. Joint Development Partner Statement, MRC Council Meeting, January 17<sup>th</sup> 2013<sup>18</sup>
7. Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement, by Kirk Herbertson, International Rivers, January 2013
8. Timeline of the Xayaburi Dam, by International Rivers, February 2013
9. Factsheet: Pöyry's role in the Xayaburi Dam controversy, International Rivers, February 2013  
(This is not referred to in this document, but sums the issue up nicely.)

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<sup>18</sup> In the official version for distribution, i.e. in the one attached here, there's a typo in the date. Despite this distributable statement is dated January 17<sup>th</sup> 2012, the actual meeting took place January 2013, when this statement was also written. See <http://www.mrcmekong.org/news-and-events/events/the-19th-meeting-of-the-mekong-river-commission-council/>