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Statement by the Ministry for Foreign Affairs: Complaints regarding the OECD's guidelines for multinational companies; Pöyry plc, and the Xayaburi dam project in Laos.**Summary**

The Ministry of Employment and the Economy has requested the Ministry for Foreign Affairs to provide its opinion on the matter of the complaint referring to the OECD's guidelines for multinational companies – 'particularly concerning the Mekong agreement and the Mekong River Commission (MRC)'s provisions with regard to the actions of the Laotian government and Pöyry in relation to the project's environmental effects and how Pöyry's actions relate to Finland's development co-operation in the region'.

The parties to the Mekong agreement have diverging views as to the phase in which the consultation process related to the Xayaburi dam project is at present. The Mekong agreement includes several regulations – especially in relation to the settlement of disputes – that are open to interpretation. The Pöyry report states that the PNPCHA consultation process was concluded at a Joint Committee meeting in April 2011 where additional time was not requested.

Pöyry has identified environmental risks associated with the project and proposed improvements to the solutions related to these risks. The assessment of the adequacy of the quality and quantity of the proposed technical solutions requires in-depth technical expertise and experience in addressing environmental questions, along with obtaining familiarity with the detail-level plans for the dam. The MRC secretariat has found inadequacies in the report.

One of Finland's long-term goals in the Mekong area and in supporting the Mekong River Commission is to increase regional co-operation and support the water institutions in the region. The PNPCHA process demonstrates that the Mekong agreement is open to interpretation. If the MRC member countries wish to enhance the process, donor countries such as Finland may offer the MRC technical support.

Background

The OECD's guidelines for multinational companies comprise recommendations issued by states to multinational companies. The recommendations consist of principles and norms of responsibility, based on voluntary action, and of the application of law to international business. Finland is committed to promoting compliance with the OECD's guidelines. The guidelines are supported by National Contact Points, established by governments of OECD member countries, that inform the relevant parties of the guidelines and apply them in practice. The liaison bodies serve as a liaison but also offer a forum for mediation or conciliation of issues with regard to the application of the guidelines in individual cases.

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The application of the guidelines to an individual case refers to a situation in which some party wishes to find out whether a specific multinational company has acted in compliance with the Guidelines. The National Contact Point in Finland is the Ministry of Employment and the Economy, acting in collaboration with the Committee on Social and Corporate Responsibility. At the request of the Ministry of Employment and the Economy, the Committee on Social and Corporate Responsibility will provide its opinion on whether the company in question has acted in compliance with the instructions.

If the parties fail to reach agreement on the matter during its processing, the liaison body will prepare a final statement on the matter, considering whether the company has acted in contravention of the guidelines. This statement may also include recommendations for the company pertaining to application of the instructions.

In June 2012, the Siemenpuu Fund, Friends of the Earth Finland, and 13 other NGOs submitted a complaint to the National Contact Point about Pöyry plc's actions in the Xayaburi dam project in Laos. The complaint on Pöyry's actions that was submitted to the Committee on Social and Corporate Responsibility 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 1995 Mekong Agreement ('Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin') and whether the member-country consultation obligation, for instance, has been fulfilled. The objective, therefore, was to investigate whether the government of Laos and the Xayaburi Power Company had fulfilled the Prior Consultation (PC) conditions, specified in the agreement, with respect to both questions related to the content, such as compliance with the planning instructions of the MRC, and procedure-related questions, including that of whether the PNPCA (Procedures for Prior Notification, Consultation and Agreement) process, related to the agreement, was completed after the 19 April 2011 meeting of the Joint Committee.

As part of the processing of this individual case, the Ministry of Employment and the Economy has requested (in its request for statement of 5 November 2012) that the Ministry for Foreign Affairs provide its opinion, '*particularly concerning the Mekong agreement and the MRC's provisions with regard to the actions of the Laotian government and Pöyry in relation to the project's environmental effects and how Pöyry's actions relate to Finland's development co-operation in the region*'. The Ministry for Foreign Affairs offers the following as its opinion:

The Mekong Agreement and compliance with the PNPCA regulation

The Mekong Agreement is a regional agreement between governments. The countries in the region are the parties to this agreement. The donor governments providing funding to the organisation are not parties to this agreement. According to Article 31 of the Vienna Convention on the Law of Treaties (SopS 32-34/1980), a treaty must be interpreted in good faith and by giving the phrasing used in the treaty the usual meaning in its appropriate context – in view of both the treaty's purpose and its objective. When interpreting a treaty, one must also take into account all later practices complying with the treaty that show the parties' mutual understanding of the interpretation of the treaty as well as all provisions of international law pertinent to the matter and applicable to relations between the parties. The 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.

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The PNPCA is one of the sets of procedures of the Mekong Agreement, determining the rights and responsibilities of countries with regard to the implementation of national projects in the Mekong catchment area. The progress of the PNPCA process is detailed in the Procedures for Notification, Prior Consultation and Agreement regulations. 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.

Other member states; the secretariat; and, especially, donors of the MRC have no mandate to intervene in the decision-making of an individual member state. The PNPCA regulations define the consultation process in the following manner: it may not be used as an entitlement to veto; neither may it be used as an entitlement to utilise the river region unilaterally without regard for the rights of the other countries along the river.

According to the PNPCA regulations, notification, consultation, and attempts to reach agreements all occur on the Joint Committee level. According to sections 5.5.1 and 5.5.2, the consultation process lasts for six months from the date on which the documentation related to the consultation process is received. At this point, the Joint Committee should issue a statement on the matter. In the event that such a statement is not issued, the Joint Committee may extend the period, but, 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. The other member states may submit a dispute arising from application of any agreement for settlement in accordance with the provisions for dispute settlement laid out in the Mekong Agreement and described later in this document.

Provisions pertaining to dispute settlement between parties can be found in Section c of Article 18 and Section f of Article 24 and in articles 34 and 35 of the Mekong Agreement. The Mekong River Commission will attempt to settle any disputes that arise. Attempts must be made to resolve the dispute within the council or the Joint Committee in accordance with the procedures specified in Section c of Article 18 and Section f of Article 24. Should the river commission be unable to settle the dispute in a timely manner, the matter shall be transferred to the governments for settlement. The governments will try reach a settlement, and they may inform the council of their decision for enforcement purposes. If the governments consider it necessary, they may also request mediation from an entity or party mutually agreed upon, after which they must proceed according to the principles of international law (Article 35).

The provisions related to the settlement of disputes include several regulations that are open to interpretation. For instance, Article 34 fails to state when, within the framework of the Mekong River Commission, 'every effort' has been exerted, while Article 35 leaves open how one is to define 'timely manner' – i.e., how much time the Mekong River Commission has for settling a dispute before it is transferred to the governments. Moreover, what happens if the governments fail to reach a solution but are not ready to submit the dispute jointly to arbitration is not without ambiguity.

The parties to the Agreement have diverging views as to the phase in which the consultation process related to the Xayaburi dam project currently is and what should happen after this process. The question of whether the consultation process is still in progress or has instead been completed or perhaps been transferred over to the dispute-settlement mechanism is unclear on account of the agreement's openness to interpretation, the non-existent case law, and the diverging opinions of the

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parties to the agreement. Following a 19 April 2011 meeting of the Joint Committee, Laos considered the consultation process to have ended after the six-month period, with no unanimity reached on the matter. Thailand has not clearly expressed its opinion on the matter, but it emphasises Laos's right to make decisions regarding its projects. Thailand has also publicly stated that it will accept the project, after previously objecting to it. Cambodia and Vietnam have stated that Laos has not provided enough information within the process framework and that it also has failed to respond properly to their questions and requests for additional information. In December 2011, the Council of Ministers, while not making an official statement on the status of the PNPCA process, decided to commission an extensive development impact study on the Mekong.

Statements made by Cambodia and Vietnam in a meeting of the MRC Council of Ministers on 17 January 2013 refer to the importance of the extensive development impact study of the Mekong, jointly agreed upon in November 2011 (see <http://www.mrcmekong.org/news-and-events/events/the-19th-meeting-of-the-mekong-river-commission-council/>).

A Pöyry report, made public by the government of Laos at http://www.poweringprogress.org/index.php?option=com_content&view=category&id=87:reports&Itemid=50&layout=default, describes the status of the consultation process at the end of Section 3.1. According to this description, the meeting of the Joint Committee on 19 April 2011 decided to conclude the process, since the member states did not agree on any extension of the period and all additional subjects related to the project were directed to processing at the ministerial level. In its report, Pöyry does not describe the disputes that have arisen between the parties to the agreement over the interpretation of the agreement.

Pöyry operations with regard to the environmental and human-rights effects of the power station

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.

Lively international discussions are under way about the 12 power stations planned for the trunk of the Mekong River. The dispute about the Xayaburi power station's environmental effects can be placed in appropriate context if one understands that this project will be followed by other power stations, built closer to the region downstream, and also that large reservoirs will be created for these power stations. Those who take a critical view of the construction of the dams present the following views, among others: a) The sediment composition and flow of the Mekong River are of a type that makes it impossible to prevent negative effects in the downstream region; b) whether even the multiple systems planned for the Xayaburi power plant will ensure upstream access for fish is yet to be studied; and c) projects entailing large reservoirs make it impossible for the larvae and spawn resulting from spawning to travel downstream, resulting in a reduced fish stock in the downstream region. Insofar as the special arrangements associated with the Xayaburi power plant are concerned, it has been claimed that there is insufficient experience of similar power plants from other countries.

The comments submitted to Laos by the countries in the downstream region are based on an assessment of the accumulated strategic environmental effects (i.e., an SEA) for the 12 dam projects, commissioned by the MRC in 2010. 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

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solutions were not found for certain problematic issues. In Pöyry's opinion, such solutions can, however, be identified. As a result of Pöyry's recommendations, the budget of the project has increased by 100 million USD. The proposed alternative is to conduct a comprehensive study of sediment and fish behaviour in the Mekong catchment area in order to enable design of a fitting technology with regard to these issues. It is unclear whether investigations performed during the construction project can influence the sustainability of the dam project.

In its report, Pöyry has identified the environmental risks and the associated proposed technical improvements to the solutions. Assessment of the adequacy of the quality and quantity of the improvements to the technical solutions for power-plant design proposed by Pöyry requires in-depth technical expertise and also expertise in environmental matters and an opportunity to become familiar with the detail-level plans for the dam.

In November 2011, Vietnam requested the MRC secretariat to draw up an assessment of the final decisions and recommendations of the Pöyry report. The assessment by the MRC secretariat was completed on 24 November 2011. In its assessment, the MRC stated that the Pöyry report, including its recommendations for changes to the dam plans and the proposed additional investigations, provides additional information on the planned dam and that, were Pöyry's recommendations to be taken into account, the dam plans associated with the MRC's Design Guidance would be improved. However, the MRC considers problematic Pöyry's proposal for the surveys, monitoring, and modelling that are to be performed during the construction. In the opinion of the MRC secretariat, it would be better for these to be carried out before construction commences, instead of simultaneously with construction; the MRC secretariat recommends that, at minimum, two years be reserved for additional investigations. The MRC secretariat states in its report that, even if all of Pöyry's recommendations were to be incorporated into the project, this would not answer all the concerns of the countries – especially the concern that no construction should be carried out on the trunk of the river before adequate investigations have been performed. The MRC secretariat states that the dam's impact on Tonle Sap Lake in Cambodia and the Mekong Delta in Vietnam should be studied especially.

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.

These expert reports have advanced the international discussion, yet they have failed to eliminate all of the divergence of views apparent in the discussion or the uncertainties as to the scope of the environmental effects of the Xayaburi power station and the several power stations to be built after it.

Assessing whether the carried out and/or planned actions related to the Xayaburi dam project will have a significant adverse effect on the local population's ability to enjoy 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', as articulated in the UN's International Covenant on Economic, Social and Cultural Rights, would require sufficient information on the environmental effects of the dam project. On the basis of the available material, it is, however, reasonable to expect that, in the absence of appropriate preventive or mitigating measures, the possibility of an adverse impact on human rights does exist.

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Working on the basis of the available written material, the Ministry for 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. In contrast, Pöyry plc has not demonstrated, on the basis of the material available to the Ministry for Foreign Affairs, that it has fulfilled these obligations. The Ministry for Foreign Affairs proposes that, in connection with further processing of the matter, the Committee on Social and Corporate Responsibility request Pöyry to provide additional reports related to the questions mentioned above.

In the context of the OECD's guidelines, the due-diligence obligation is understood as an assessment process through which companies can identify and prevent definite or potential adverse effects in their systems and mitigate these effects. According to Section A14 of the guidelines, companies should contact the relevant interest groups in order to provide meaningful opportunities to take their views into account with respect to plans or decisions related to projects or other functions that may have a significant impact on local communities. The participation of interest groups, as referred to in the guidelines, is considered particularly useful with regard to the planning and decision-making associated with projects or other operations in cases wherein the project encompasses power-related use of land or water that may have a significant impact on local communities.

Pöyry's actions in relation to Finland's development-policy goals and projects in the Mekong

Finland uses development co-operation funds to support sustainable development in the Mekong region through the promotion of natural-resource and environmental management and cross-border collaboration, while also attempting to foster an orientation toward human rights, development toward constitutional statehood, good administration, and transparent practices. Finland supports regional programmes and bilateral projects in Laos and Cambodia and a peace-mediation-related project in Myanmar.

Sustainable energy supply is a development pillar of the highest importance, and so it is in the Mekong, in which the majority of the population in the region's poorest countries live beyond the electricity grid. In the development of energy, the countries in the region rely largely on hydropower, the huge potential of which is only beginning to be harnessed. In its promotion of development, Laos places a strong emphasis on export income obtained via electricity imports. The majority of the 12 power stations planned for the trunk of the Mekong River are to be situated in Laos. The countries in the region would have great potential to develop renewable energy but are hamstrung by a low level of knowledge and low capacity for long-term energy planning. Finland supports more widespread adoption of renewable energy through the Energy and Environment Partnership (EEP) programme.

The Mekong River Commission is the most important regional organisation for the management of water resources in the Mekong region. The MRC attempts to promote regional co-operation and co-ordination and attention to environmental and social factors with regard to hydropower construction. Finland's long-term goal in supporting the Mekong River Commission with development co-operation funds is to increase regional collaboration and support the water institutions in the region. The objective is to ensure that the river commission has sufficient authority and capacity for its member states to resolve issues in the region systematically in a peaceful manner and in accordance with the goals of sustainable development.

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Finland and the other donors have – in high-level meetings and otherwise – expressed their concerns over the hydropower construction planned for the trunk of the Mekong River, while also stressing the comprehensiveness, transparency, and cautious rate of progress of the planning and dam-impact assessment processes. Finland funded a strategic environmental assessment (SEA), commissioned by the MRC, and finds the observations therein deeply troubling. Finland has appealed to the governments in the region to take the recommendations of the SEA into account in their decision-making related to the dams. Finland has emphasised that the dam projects should not move forward before the cumulative effects of the dams planned for the catchment area have been comprehensively assessed. In addition to the trunk of the river, the assessments and planning should take its tributaries into account. However, the ultimate right of decision lies with the countries themselves.

Matters related to boundary waters, including the catchment area, are often very difficult and sensitive. Reaching solutions that support sustainable development in answering these questions requires all parties, including the donor community, to commit to co-operation in the long term. At this point, it is too early to assess whether Pöyry's actions have had or an effect on Finland's development-policy objectives in the Mekong region or whether they will have one.

Xayaburi is the first test case of the PNPCA process in the history of the MRC, and it has demonstrated that the Mekong Agreement may not function optimally, on account of its provisions being so open to interpretation. If the member states jointly decide to specify the PNPCA process further, the donors, including Finland, may provide technical support for this process, should the member states so desire.