

COMPLAINT TO THE HUMAN RIGHTS COMMISSION OF MALAYSIA (SUHAKAM) AGAINST MEGA FIRST CORPORATION BERHAD, PROJECT DEVELOPER OF THE DON SAHONG DAM, LAO PDR

Complainants: Community Resource Centre (CRC) (Thailand), EarthRights International (ERI) (United States), International Rivers (IR) (United States), NGO Forum on Cambodia (Cambodia), Northeastern Rural Development (NRD) (Cambodia) and Cambodian Rural Development Team (CRDT) (Cambodia)

Date: 20 October, 2014

1. Executive Summary

Mega First Corporation Berhad (“Mega First”) is the owner and operator of the Don Sahong Hydropower Project, a dam and power plant in Southern Laos (less than 2 kilometers from the border with Cambodia). When construction is finished – which, according to the Government of Lao PDR (“GoL”), will be sometime in early 2018 (with commercial operations beginning in May 2018) – the dam will have completely blocked the Hou Sahong channel on the Mekong River’s mainstream. The Hou Sahong is the **main** Mekong channel through the Khone Falls area that sustains year-round fish passage. Damming the Hou Sahong, therefore, endangers the Mekong’s migratory fish and the communities not only in Laos but also in Cambodia, Thailand, and Vietnam that rely upon them.

If fish passage on the Hou Sahong is disrupted, local populations that depend on fish catch will be in peril. Fish catch is a critical component of the diet and livelihoods of Mekong River communities. By threatening the fish supply, Mega First endangers their lives and livelihoods. Many of these people already suffer malnourishment and live in (or are close to living in) poverty.

In spite of the well-recognized risk to food security, Mega First has done little to understand the likely impacts of Don Sahong, done less to minimize its harms, and done next to nothing to inform and consult with the communities that will be affected. And even as concerns over the dam have grown – with calls from neighboring countries, Thailand, Cambodia and Vietnam for suspension of the dam – Mega First pushes forward with construction.¹

Mega First’s actions are contrary to accepted principles of international law, including: the duty to consult with and inform affected communities; the duty to adequately investigate likely significant harms; and the duty to mitigate the harmful consequences of development projects. So we are asking SUHAKAM to investigate:

- The likelihood and severity of violations to Mekong communities’ human rights to health, life and livelihood that result from harm to fish stocks;
- The past and continuing violations to Mekong communities’ right to information regarding the Don Sahong Project and its likely consequences; and

¹ See e.g., Mekong River Commission (“MRC”), *MRC takes Don Sahong Project discussions to ministerial level* (16 Jan. 2014) (noting objections and concerns of ministers from Cambodia, Thailand and Vietnam to the proposed Don Sahong Project) available at <http://www.mrcmekong.org/news-and-events/news/mrc-takes-don-sahong-project-discussions-to-ministerial-level/>; Joshua Lipes, *Lao Official, Developer Contradict on Don Sahong Dam Construction*, RADIO FREE ASIA (20 Aug. 2014) (discussing Mega First’s statements that construction will continue in spite of assurances from GoL that construction has been suspended) available at <http://www.rfa.org/english/news/laos/dam-08202014162840.html>.

- The past and continuing violation of Mekong communities’ right to participate in the decision-making and approval of projects that affect their interests.

This submission is made by non-governmental organizations working to ensure that the voices of communities in the Mekong region are heard and that their rights are respected. It is made on behalf of Cambodian communities from Kratie and Stung Treng provinces² and Thai communities from Ubon Ratchathani, Chiang Rai, Nong Khai and Bueng Kan provinces.³ And while this submission reflects the concerns of those communities, they are by no means the only ones who will be impacted and to whom Mega First owes a duty of diligence and consultation.

2. **Recommendations**

As noted above, we are asking SUHAKAM to investigate Mega First with respect to probable violations of human rights. Specifically, we ask SUHAKAM to call on Mega First to cease all preparatory and actual construction of the Don Sahong Project, along with any on-going contract negotiations, until it:

1. Conducts a comprehensive transboundary and peer-reviewed impact assessment that meets national and international standards. Specifically, this assessment must include: the collection of baseline environmental, species and community information; detailed exposition of mitigation efforts; and publication of both the underlying data and Mega First’s analysis of it.
2. Provides *all* affected communities, including those in Cambodia and Thailand, with their rightful opportunity to receive information about the Don Sahong Project and participate in decision-making related to the project.
3. Seeks the “free, prior and informed consent” of *all* indigenous communities that will be affected by the Don Sahong Project.
4. Establishes an independent, adequate and funded grievance mechanism through which affected persons and communities may voice concerns and have complaints remedied.
5. Discloses information regarding other parties involved in the construction and financing of the Don Sahong Project, including contractors, sub-contractors, investors and banks.

We also request that SUHAKAM take the following steps (to the extent it is able to under its mandate):

1. Conduct its own inquiry of the Don Sahong Project’s likely health, social and environmental impacts, with its own investigators. If SUHAKAM is able to visit the dam site and/or the

² In June and July of 2014, the Culture and Environmental Preservation Association (CEPA), CRDT, ERI and NRD conducted community consultations with Cambodian communities from 33 villages – across 12 different communes and 3 districts – in Kratie and Stung Treng provinces. Most of these communities have had no contact with Mega First and strongly oppose construction of the dam. A copy of a letter of representation for the Cambodian communities is included as Annex A.

³ In August and September 2014, CRC, ERI and IR conducted community consultations with communities from the Thai provinces listed above the line. People from these communities have not been consulted with or provided any information in connection with the Don Sahong Project. A copy of a letter of representation for the Thai communities is included as Annexes B1, B2 and B3.

areas affected upstream and downstream, we also request that it provide affected community members with an opportunity to speak directly with SUHAKAM investigators.

2. Open a channel of communication between the affected communities and Mega First, perhaps through on-going mediation that will continue *if* the Don Sahong Project is constructed.
3. Engage with other offices or agencies of the Malaysian Government to ensure that Malaysia upholds its responsibilities to ensure Mega First satisfies its human rights obligation including in its overseas operations.

Finally, we would like to emphasize the urgency of this request. While the GoL has agreed to consult with Thailand, Cambodia and Vietnam on the basin-wide impacts of the Don Sahong Project according to the 1995 Mekong River Agreement,⁴ Mega First has publicly stated that construction will not be suspended.⁵ The further construction progresses the harder it will be to protect affected peoples from harm. We therefore respectfully request that SUHAKAM begin a public inquiry into Mega First's involvement and responsibilities as soon as possible.

3. **Background Information**

3.1. **The Dam**

The proposed Don Sahong Project is located in Champassak Province of southern Lao PDR – it will be built on the Hou Sahong channel on the main course of the Mekong River. The dam will cross the full length of the channel at a height of 32 meters and be located 130 m from the mainstream Mekong and less than 2 km from the Laos-Cambodian border.⁶

The Don Sahong Project is expected to have substantial impacts on hydrology and fisheries. The Khone Falls area – where the Don Sahong Project will be built – is a “complex ecological system” consisting of “large number of small to large channels separated by many large and small islands.”⁷ The Khone Falls area includes large waterfalls (which never sustain upstream fish migration) and smaller rapids and waterfalls (which are impassable for fish migrating upstream during dry seasons.) As Professor Ian Baird of the University of Wisconsin-Madison reports, “there is only

⁴ Under the 1995 Mekong Agreement, projects implementation, including construction, should not commence prior to consultation between MRC countries. See Mekong River Commission, *Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement* (31 Aug. 2005) at 5, n.15 available at <http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf>.

⁵ Joshua Lipes, *Lao Official, Developer Contradict on Don Sabong Dam Construction*, RADIO FREE ASIA (20 Aug. 2014) (discussing Mega First's statements that construction will continue in spite of assurances from GoL that construction has been suspended) available at <http://www.rfa.org/english/news/laos/dam-08202014162840.html>. Ongoing construction contract negotiations with Sinohydro also are a good indication that Mega First is not intending to suspend construction. See Daniel Pye and Laignee Barron, *Dam promises are 'a façade'*, THE PHNOM PENH POST (4 Oct. 2014) available at <http://www.phnompenhpost.com/national/dam-promises-are-%E2%80%98fa%C3%A7ade%E2%80%99>.

⁶ International Rivers, *The Don Sabong Hydropower Project* (Feb. 2014) available at http://www.internationalrivers.org/files/attached-files/don_sahong_briefing_sheet_2.7.14.pdf.

⁷ Ian G. Baird, *The Don Sabong Dam: Potential Impacts on Regional Fish Migrations, Livelihoods and Human Health* (Aug. 2009) at 9 (hereinafter “Baird 2009”) available at http://polisproject.org/PDFs/Baird%202009_Don%20Sahong.pdf.

one channel in the Khone Falls area through which fish can easily pass upriver year round: the Hou Sahong Channel.”⁸

It is also the second dam in a planned cascade of up to eleven dams on the Mekong River mainstream in the Lower Mekong Basin.⁹ The cumulative impacts of this proposed cascade are widely recognized as threats to the flows and fish of the Mekong River, which support the livelihoods and culture of millions of people.¹⁰

3.2. Approval, Design and Other Project Background

The Don Sahong Project is owned by the Don Sahong Power Co. Ltd., a subsidiary of Mega First.¹¹ In 2006, GoL gave Mega First exclusive rights to study the feasibility of the Don Sahong Project.¹² In February 2008, Mega First entered into a “Project Development Agreement” with GoL setting construction in motion.¹³ As of November 2013, Mega First still contended that no concession agreement with GoL had been signed.¹⁴ However, media reports that a concession agreement has been drafted; the agreement was to be finalized last May (2014); and that preparatory construction for the Don Sahong Project has begun.¹⁵ No such agreement has been made public.

While engineering reports are vague as to where Don Sahong power will be sold,¹⁶ recent evidence indicates the power will be used domestically (though older reports indicate that it may be sold to Thailand or Cambodia)¹⁷. However, the terms of any power purchase agreement and plans for related infrastructure have not been made public.

⁸ *Id.* Since Professor Baird's report in 2011 (*see n 17*) there have been measures including banning local fishing that might make upstream migration through other channels possible, although to a far lesser extent. There is no evidence that this can make up for the closing of the Hou Sahong channel. There are efforts to improve fish migration on other channels but the extent of these improvements remains unclear. There remains no basis for believing that such improvements can make up for the blockage of the Hou Sahong.

⁹ See International Centre for Environmental Management, *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream (Summary of the Final Report)* (s) (hereinafter “MRC SEA”) available at <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-FR-summary-13oct.pdf>.

¹⁰ See *e.g. id.* at 14-18.

¹¹ Don Sahong Power Co. Ltd is incorporated in the British Virgin Islands. *Company Overview of Don Sabong Power Company Limited*, BLOOMBERG BUSINESSWEEK available at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=113537932>.

¹² A (revised) feasibility study was completed by AECOM (USA) in November 2009. The study was conducted by the New Zealand subsidiary of AECOM.

¹³ AECOM also completed an Engineering Status Report for Don Sahong in 2011. AECOM, “Don Sahong Hydropower Project Vol. I” (Sep. 27, 2011) available at <http://www.mrcmekong.org/assets/Other-Documents/Don-Sahong/DSHPP-Engineering-Status-Report-2011.pdf>; AECOM, “Don Sahong Hydropower Project Vol. II” (Sep. 27, 2011) available at <http://www.mrcmekong.org/assets/Other-Documents/Don-Sahong/DSHPP-Engineering-Status-Report-Drawings-A3-2011.pdf>. Any subsequent changes to the engineering design have not been made public.

¹⁴ Mega First, “Hydropower development in Laos: Don Sahong experience in addressing social and environmental issues” (3d Mekong Forum on Water, Food, and Energy November 2013) available at <http://www.slideshare.net/CPWFMekong/hydropower-development-in-laos-don-sahong-experience-in-addressing-social-and-environmental-issues>.

¹⁵ Radio Free Asia, *Laos to Break Ground on Don Sabong Dam in December* (Mar. 12, 2014) available at <http://www.rfa.org/english/news/laos/dam-03122014170938.html>.

¹⁶ *Id.*

¹⁷ Ian G. Baird, *The Don Sabong Dam*, CRITICAL ASIAN STUDIES, 43:2, 212 (2011) (hereinafter “Baird 2011”).

PEC Konsult Sdn. Bhd. (“PEC”) and Australian Power & Water (“APW”) drafted an initial environmental impact assessment (“EIA”) in July 2007. That EIA was not approved by GoL.¹⁸ A new EIA was submitted to GoL in 2010 and was apparently finalized in 2013.¹⁹

3.3. Construction Schedule

According to engineering documents, the “Construction Phase” is scheduled to begin after financial closing (i.e., after the signing of the concession and power purchase agreements).²⁰ According to Mega First, the plant should be commissioned in 2016.²¹ But, before it is operational, there is supposed to be a 1-2 year monitoring period.²² According to GoL, “commercial operation is set to begin in May 2018.”²³ It is clear, however, that construction is already underway. As reported by International Rivers in June, “developers had already begun developing a bridge to create an access route for dam construction;”²⁴ and GoL confirmed, in their letter of notification to the Mekong River Commission, that full construction would begin in 2013 (Annex C).

3.4. The Affected Communities: “We don’t raise fish, fish raise us.”²⁵

The Mekong River is the foundation of life for millions of people in Laos, Cambodia, Thailand and Vietnam. Indeed, “[i]n many parts of the region – including above and below the Khone Falls – wild fish and other aquatic animals [from the Mekong] make up over 80 percent of the animal protein the local populations consume.”²⁶ The Don Sahong Project imperils long-distance migratory fish that pass through the Khone Falls. Importantly, “the vast majority of fish caught [by fishermen above the Khone Falls] are *highly migratory* and originate below the Khone Falls.” (Emphasis added).²⁷

Many of these people that rely on fish for their nutrition and health are already living in or close to poverty. Therefore disruptions to the Mekong (like the Don Sahong Project) are of serious concern. Professor Baird at the University of Wisconsin-Madison has found that expected “loss of migratory fish would badly affect efforts [in Cambodia and Laos] to meet the United Nations Millennium Development Goals . . .”²⁸ Similarly, the Mekong River Coalition (MRC)’s strategic environmental assessment found that:

¹⁸ World Wildlife Fund, *Don Sahong Brief: Very High Risk for Cambodia* (January 2014) available at http://awsassets.panda.org/downloads/don_sahong_brief_final_05feb.pdf.

¹⁹ The second EIA was prepared by National Consulting Company (Lao PDR) and included a Social Impact Assessment and Cumulative Impact Assessment. These documents are available on the MRC website at <http://www.mrcmekong.org/highlights/don-sahong-hydropower-project/>.

²⁰ See AECOM, *Don Sahong Hydropower Project – Engineering Status Report Vol. I* (27 Sept. 2011) § 13 available at <http://www.mrcmekong.org/assets/Other-Documents/Don-Sahong/DSHPP-Engineering-Status-Report-2011.pdf>.

²¹ Cumulative Impact Assessment – Don Sahong Hydropower Project (January 2013) available at <http://www.mrcmekong.org/assets/Other-Documents/Don-Sahong/DSHPP-CIA-FINAL-2013.pdf>.

²² *Id.*

²³ <http://www.mrcmekong.org/news-and-events/news/lao-pdr-submits-notification-on-don-sahong-hydropower-project/>

²⁴ Laignee Barron, *NGO Says Work on Don Sahong Under Way*, THE PHNOM PENH POST (19 June 2014) available at <http://www.phnompenhpost.com/national/ngo-says-work-don-sahong-dam-under-way>.

²⁵ Baird 2011 at 212.

²⁶ *Id.* at 213.

²⁷ Baird 2009 at 4.

²⁸ Baird 2011 at 214. See also Baird 2009 at 26-28 (“[L]osing large quantities of fish protein could have a devastating effect on nutritional standards of rural populations in Laos as well as in Cambodia, but also in parts of Thailand and maybe even Vietnam as well. While it is hard to estimate what percentage of the fish that rural people normally consume would be lost, even if just 10% were taken from the millions of people, the results would be devastating.”).

Fishers [] are over represented in poor and vulnerable LMB communities . . . Poorer households would also be adversely affected by the direct impacts of hydropower development including resettlement, loss of land, and impacts during the contract period. Loss of fisheries and associated proteins would lead to declines in nutritional health in LMB populations, particularly in Cambodia and Lao PDR where up to 30% of the national protein supply would be at risk if all mainstream dams were to go ahead.²⁹

3.4.1. The Field Work Reports – Communities in Thailand and Cambodia

Fieldwork conducted by the Complainants between June and September of 2014³⁰ shows that the Mekong River is a critical component of life for Cambodian and Thai communities. First, a substantial percentage of the people interviewed reported that a large portion of their diet consists of fish they catch themselves. Second, many of these fishing communities also reported supplemental but necessary income from fish-catch. Third, many people also subsist in part on rice paddies and vegetable gardens that are fertilized by the Mekong River. Finally, the presence of Irrawaddy dolphins nearby has created important a tourism industry that supports communities in Cambodia.

3.4.2. The Field Work Reports – Indigenous Peoples in Cambodia

Fieldwork undertaken by CRDT in 2010 also shows that there are indigenous communities in Cambodia that will be threatened by the Don Sahong Project. The Kuy (Kuoy) – an indigenous peoples – make up substantial portions of the population of certain communities in Kratie and Stung Treng province; for example, 76% of the people from Dom Rea (Domrey) village are Kuy.³¹ Like many indigenous communities, Kuy life and tradition is closely connected to the natural world, including the Mekong.³² Harm to the Mekong (and its fish) will be acutely felt by the Kuy.

4. Attempts to Engage with Mega First

On November 19, 2013, Complainants ERI and CRC, together with The Law and Policy of Sustainable Development Research Center (Vietnam), wrote a letter to Mega First (Annex E) expressing concern with the Don Sahong Project and requesting that Mega First:

- Conduct an adequate transboundary Environmental Impact Assessment (EIA) of the project;
- Provide stakeholders and affected communities (in all relevant countries) with their rights to access information and public consultation;
- Make readily available to the public assessments of the dam and underlying documents;
- Provide details about prior consultations with potentially affected communities;
- Clarify its corporate social responsibility policy and comply with the UN Guiding Principles on Business and Human Rights and human rights best practices, including the requirements of human rights due diligence; and

²⁹ MRC SEA, *supra* n. 9.

³⁰ *Supra* n. 1 & 2.

³¹ CRDT, 2010/2011, *Summary of Data for Villages in Social Assessment*, Annex D.

³² Neal Keating (2012), *Spirits of the Forest: Cambodia's Kuy People Practice Spirit-Based Conservation*, Cultural Survival Quarterly, 36/2, available at: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/spirits-forest-cambodias-kuy-people-practice-spirit-based>.

- Adopt and perform human rights due diligence and make its human rights due diligence policies and procedures publicly available.

Mega First did not respond to the letter of November 19, 2013.

The same NGOs wrote to Mega First again on September 29, 2014, reiterating their concerns. (Annex F). This letter specifically requested publication of:

- Current mitigation plans, including the proposed electrical barriers, “trap-and-transport” systems, the fish monitoring program and compensation programs;
- Data collected and the latest results of the fishery monitoring program; and
- All relevant documents and evidence showing the efficacy of proposed channel modifications and other mitigation measures.

Again, Mega First did not respond.

4.1. The MRC Process

The risks created by Don Sahong have been taken up – though left unresolved – by the Mekong River Commission.³³ In 2007 GoL asked the MRC Secretariat (MRCS) to review the 2007 EIA. The MRCS review identified problems with the proposed mitigation efforts, inadequate diligence regarding the probable impacts (particularly transboundary impacts) and poor disclosure of project design details and relevant information.³⁴ Notably, while the 2013 EIA purports to respond to concerns voiced by the MRCS, the same problems persist.³⁵

In September 2013, GoL told the MRC it planned to move forward with the Don Sahong Project, resisting calls to submit the project to the more robust “Prior Consultation and Agreement” processes under the 1995 Mekong Agreement.³⁶ Recently, GoL reversed its position, submitting to

³³ The MRC is an intergovernmental organization established under the *1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (1995 Mekong Agreement) by Cambodia, Lao PDR, Thailand and Vietnam.³³ The purpose of the MRC is to coordinate use of the Mekong River for the “countries’ mutual benefit and people’s well-being.” However, the MRC lacks any independent mechanism for regulating river uses, adjudicating disputes or enforcing compliance with the 1995 Mekong Agreement by member nations or companies like Mega First. For more information see <http://www.mrcmekong.org/about-mrc/history/>.

³⁴ See MRCS, “Environmental Impact Assessment Report Don Sahong Hydropower Project, Lao PDR” (19 Nov. 2007) available at <http://www.internationalrivers.org/resources/a-2007-review-of-the-don-sahong-dam-s-environmental-impact-assessment-eia-report-8116>.

³⁵ For example, the MRC noted the plans to mitigate the impacts of blocking the Hou Sahong channel by altering adjacent channels were problematic because: (1) there was no precedent for using channel modifications on this scale and (2) fish diversion would be unlikely because the turbines would serve as attractants. *Id.* at ¶ 64. These fundamental problems remain and the recent assessments have presented little improved information to allay these concerns.

³⁶ See MRC, “Lao PDR submits notification on Don Sahong Hydropower Project” (3 Oct. 2013) available at <http://www.mrcmekong.org/news-and-events/news/lao-pdr-submits-notification-on-don-sahong-hydropower-project/>; MRC, “MRC takes Don Sahong Project discussions to ministerial level” (16 Jan. 2014) available at <http://www.mrcmekong.org/news-and-events/news/mrc-takes-don-sahong-project-discussions-to-ministerial-level/>. The 1995 Mekong River Agreement provides different procedures for addressing different water uses depending on the type of impact and location of the project. See “Agreement on the cooperation

the “Prior Consultation” process.³⁷ Unfortunately, this does little to reduce the risk to affected communities. The “Prior Consultation” process is not a substitute for respecting the human rights of communities, as it has no provision for community participation and includes no compliance mandate if GoL refuses to cooperate.

5. Expected Project Impacts

The Don Sahong Project is poorly conceived for many reasons: it threatens Mekong biodiversity and food supplies; it poses unacceptable risks to endangered species; and it will provide a small and likely unreliable amount of energy that fails to justify its costs.³⁸ Most crucially, by disrupting critical fish migrations it jeopardizes the livelihoods and lives of thousands.³⁹

5.1. The Threat to Fish and Aquatic Life

It is difficult to precisely predict the impacts of the Don Sahong Project because Mega First used incomplete baseline data to analyze those impacts, has provided few details and/studies demonstrating the efficacy of proposed mitigation measures, and has made only extremely limited efforts to meet with likely affected communities in order to understand the social impacts of Don Sahong. But even with incomplete data, international observers and independent scientific experts are alarmed that: (1) the Don Sahong Project *will* block the main viable, full-year fish passage (the Hou Sahong channel); (2) Mega First’s current design and mitigation plans are based almost wholly on conjecture; and (3) even if the efficacy of these plans were somehow established in the abstract, Mega First cannot be sure of their success here because they have no or at best incomplete baseline data on local fish populations and such a method of re-engineering fish passage has not been tried elsewhere in the Mekong River Basin.

Direct Fish Kill – An Incomplete Picture

Fish kill is a common consequence of dams. Fish may die in dam turbines or because of stress that results from changes to the flow of rivers caused by the dam. Moreover, fish survival, with respect to any given dam, may vary by species and size. Mega First has not studied or predicted fish survival by species.

Mega First claims that the Don Sahong Project will meet the MRC Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin (PDG), which requires fish passage after the dam to be no worse than 95% of original levels.⁴⁰ But it offers little support for this proposition. And it is hard to trust the claim because Mega First has not collected enough baseline data to know all the species contained at that point in the Mekong River; even if Mega First collected

for the Sustainable Development of the Mekong River Basin” (5 Apr. 1995) Art. 5 *available at* <http://www.mrcmekong.org/assets/Publications/agreements/95-agreement.pdf>.

³⁷ Radio Free Asia, *Laos Agrees to Consult with Neighbors on Don Sahong Dam Project* (26 June 2014) *available at* <http://www.rfa.org/english/news/laos/dam-06262014215523.html>.

³⁸ See Compagnie National du Rhone, *Thakho Hydropower and Tourism Development Project, Complementary Hydraulic Study about the Don Sahong Dam* (May 2011) (observing that electricity generation from Don Sahong has likely been overestimated).

³⁹ It is also important to remember that the Don Sahong Project is part of a planned cascade of hydropower dams that create an existential threat to the lives and livelihoods of Mekong people. MRC SEA, *supra* n. 9.

⁴⁰ According to Article 61 of the PDG, a project developer must ensure that 95% of fish are able to pass upstream and downstream of a dam (see <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/Preliminary-DG-of-LMB-Mainstream-dams-FinalVersion-Sept09.pdf>).

the relevant baseline data (which could take years), it would still have to offer species-by-species survival rates.

Without species-by-species data there is no way to understand the likely social impacts. While one species might pass through with 98% survival, another species might pass through with only 50% survival. If communities rely on the species with only 50% survival, the harms of Don Sahong would be devastating. There is evidence that this will be the case as experts expect that larger fish species (upon which communities are heavily dependent) face greater risk of death and injury when passing through turbines.⁴¹ Even if 95% of individual *fish* survive, that does not necessarily translate to 95% of fish *biomass*.

Finally, even assuming away the problems mentioned above, the basis for Mega First's prediction of 95% survival is still problematic. As independent experts have observed, Mega First's analysis relies only on "[t]urbine blade strike and direct mortality," without factoring in "how stress from passage or non-lethal injuries might subsequently affect survival."⁴² By leaving these out, Mega First's studies likely underestimate overall fish kill and therefore negative project impacts.

Fish Larval Death

The Don Sahong dam also endangers fish larvae that migrate downstream. First, under the estimation of the Don Sahong Project's own EIA, up to 30% of the current larval flow would be lost if the project goes forward.⁴³ This is an unacceptably high percentage, which will create long-term and compounding problems for fish populations. Second, the 30% larval death number likely underestimates the overall decline because it only accounts for larvae passage through the turbines and fails to account for larvae that do not reach the turbines because of the slower moving water created by the Don Sahong Project.⁴⁴

Finally, there is no supporting evidence to show that Mega First can suspend turbine operations during peak larval flows – as it says it will in the EIA – to achieve the 30% figure. Mega First has not studied when larval flow peaks, and in reality there is no one specific peak point because different species have different flow peaks. Even if such time frames existed, it is unclear how Project operations could be curtailed while still meeting the requirements for minimum energy production.⁴⁵

Upstream Impasses

As stated above, most of the fish caught above Khone Falls originate below the Falls.⁴⁶ The Don Sahong Project will block the entire Hou Sahong channel, which is the main the upstream fish channel that is passable throughout the year.⁴⁷ Mega First admits that "the Project will completely block upstream migration in the Hou Sahong channel, and [...] current fishway technology cannot be

⁴¹ Baird 2011 at 224.

⁴² WWF, *Summary of Scientific Reviews from Three International Fish Passage Experts on the Don Sabong Dam EIA and Technical Reports Related to Project Design and Mitigation Measures* (February 2014) at 9 available at http://awsassets.panda.org/downloads/wwf_scientific_review_by_3_fish_passage_experts_finalrevised12mar.pdf.

⁴³ 2011 EIA at 5-22.

⁴⁴ Baird 2009 at 21; Baird 2011 at 224.

⁴⁵ International Rivers, *Trial and Error Too Risky for the Don Sabong Dam: A Technical Review of the Don Sabong's 2013 Environmental Impact Assessment* (January 2014) available at http://www.internationalrivers.org/files/attached-files/donsahongdameiareview_english.pdf.

⁴⁶ Baird 2011 *Id.* at 221.

⁴⁷ Baird 2009 at 9.

relied upon to provide an acceptable level of fish passage at the dam site.⁴⁸ If fish cannot pass upstream, then millions of people upstream and downstream are likely to be affected.⁴⁹ As discussed below, present plans for mitigating the complete blockage of the Hou Sahong channel have not been proven and will be very unlikely to work.

As Prof. Baird notes, many fish that pass through the Khone Falls during long-distance migrations sustain vital wild-capture fisheries downriver.⁵⁰ So, while the Don Sahong Project's blockage of upstream migration will most directly affect upstream fish catch, it will inevitably reduce downstream fish populations as well.⁵¹ These ripple effects cannot be perfectly forecast, but to wait on construction would be to wait too long.⁵²

Harm to the Irrawaddy Dolphin

An estimated 85 Irrawaddy dolphins remain in the Mekong river,⁵³ and the tourism they generate provides critical supplementary income to many communities in Laos and Cambodia.⁵⁴ This population is considered critically endangered. The Don Sahong Project is only two kilometers from the core habitat – a pool overlapping Cambodia and Lao PDR – for a sub-population of the last six dolphins remaining in Laos.⁵⁵

Excavation and boat traffic related to the Don Sahong Project threatens the Irrawaddy habitat in Lao PDR. To increase power generation, 2.5 million cubic meters of rock will be removed from the entrance, body and exit of the Hou Sahong channel.⁵⁶ Explosive devices will be detonated – a few hundred meters from the core dolphin habitat – to excavate the rock.⁵⁷ Explosive devices threaten dolphins not only for the obvious reason (direct death), but also because the concussive force may damage the dolphins' ability to locate food by injuring their sensitive hearing-based sonar systems.⁵⁸ Further, by threatening fish populations (and altering water and sediment flows), the Don Sahong Project imperils the small population of Irrawaddy dolphins remaining in the Mekong downstream of the dam site.⁵⁹ The extirpation of this species from the Mekong will further harm communities along the river.

5.2. The Dubiousness of Mitigation Plans

⁴⁸2011 EIA Annex C (Fisheries Report 2010) at 3.

⁴⁹ Baird 2011 at 224 fn. 80.

⁵⁰ Baird 2011 at 221-22 (noting that substantial percentages of downstream fish catches come from upstream).

⁵¹ Baird 2011 at 224-25 (negative impacts on upstream migration will “lead to smaller fish populations above the Khone Falls, and ultimately fewer fish to migrate downstream”).

⁵² *Id.* at 225.

⁵³ Ryan, G.E., Dove, V., Trujillo, F. & Doherty Jr., P.F. 2011. Irrawaddy dolphin demography in the Mekong River: an application of mark-resight models. *Ecosphere* 2(5), art. 58, available at http://awsassets.panda.org/downloads/irrawaddy_dolphin_demography_in_esajournals.pdf.

⁵⁴ Ryan, G.E., 2013, Is the extirpation of Irrawaddy dolphins *Orcaella brevirostris* in Laos imminent: an assessment of status and recommendations for conservation, Int'l Whaling Comm'n Scientific Committee Annual Meeting 2013, paper SC/65a/SM05, available at <https://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/227/364/SC-65a-SM05>.

⁵⁵ WWF, *The Don Sahong Dam and the Mekong Dolphin: An Updated Review of the Potential Impacts of the Don Sahong Hydropower Project on the Mekong River's Critically Endangered Irrawaddy Dolphins* (2014), available at: http://wwf.panda.org/about_our_earth/search_wwf_news/?221750/Stop-the-Don-Sahong-dam-and-save-Mekong-dolphins.

⁵⁶ *Id.* at 7.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Mega First has acknowledged (though minimized the import of) many of the negative impacts that will result from the Don Sahong Project. They simply believe that they can and will reduce the likelihood and severity of resulting harms. The evidence suggests that this is not the case.

Low Bulb Turbines Have Not Been Tested on the Mekong and Theoretical Studies are Unreliable

Mega First posits that fish harm will be low because it is employing low-head bulb turbines. Such turbines have, however, never been studied or used on the Mekong. Mega First has no real-world basis for extrapolating success here.⁶⁰ What they do rely upon are theoretical studies, which predict fish survival based on whether dyed beads can pass through the turbines.⁶¹ But fish do not move like beads and these models are notoriously non-predictive. For example, while bead testing for the Bonneville Dam on the Columbia River in the United States predicted 100% survival, in fact, less than 40% of fish were able to pass the dam.⁶²

Mega First Provides No Information About Purported Fish Screens and Other Diversion Measures

In its preliminary review, the MRC was concerned about increased fish kill because of the “fish-attractant feature of outflow from turbines”⁶³ – in other words, that fish migrating upstream are likely to be attracted to the water coming out of the turbines, rather than to routes that bypass the dam (a known problem with fish passage). Mega First dismisses this legitimate concern, summarily asserting that “this should not be an issue.” The company simply states that, if it becomes an issue, they will address the problem when it arises.⁶⁴ If the problem does arise, the possible mitigation measures that are apparently under consideration are a “pre-designed fish screen and bypass channel system” and “an additional behavioral or electrical barrier at the entrance to the Hou Sahong.”⁶⁵ No details have been provided to test the efficacy of these hypothetical measures, giving little confidence that Mega First is prepared to effectively mitigate fish kill from the dam.

Alternative Fish Channels Are Unlikely to Support Fish Migration

Mega First also assumes that “the impacts of blocking the [Hou Sahong] channel can be mitigated through expanding the Hou Sadam and Hou Xang Peuak channels . . . [diverting] additional water into the Hou Sadam so as to attract more fish into the channel has also been proposed . . .”⁶⁶ As Prof. Baird notes, the track record for this type of fish diversion plan “is very poor” and there is no example of it working in the Mekong Basin.⁶⁷ “[T]he conditions of the Hou Sahong Channel, with its continuous flow of water and great width, could never be duplicated through implementing the proposed mitigation measures.”⁶⁸

Catch-and-Release Programs Are Unlikely to Preserve Fish Populations

⁶⁰WWF, *Summary of Scientific Reviews from Three International Fish Experts on the Don Sahong Dam EIA and Technical Reports Related to Project Design and Mitigation Measures* (Feb. 2014), at 8 available at http://awsassets.panda.org/downloads/wwf_scientific_review_by_3_fish_passage_experts_finalrevised12mar.pdf.

⁶¹*Id.* at 9.

⁶²*Id.*

⁶³ 2011 EIA Annex A (Response to Comments from Mekong River Commission) at A-5 available at <http://www.mrcmekong.org/assets/Other-Documents/Don-Sahong/DSHPP-EIA-FINAL.pdf>.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶ Baird 2011 at 223.

⁶⁷*Id.*

⁶⁸*Id.*

Finally, Mega First also proposes a “trap-and-transport” system, whereby fish that do not use the alternative channels would be physically caught and moved upstream above the dam.⁶⁹ However, scientific reviews show that these types of “trap-and-transport” systems are ineffective at reducing large species mortality.⁷⁰

5.3. Incomplete Study of Project Impacts

An overarching problem with Don Sahong is the inadequate study conducted by Mega First and the omission of critical project details. For example:

- Mega First has not provided disaggregated fisheries data or measured project impacts on a species-by-species basis. This makes it exceedingly difficult to know the actual impact of the project.²¹
- Mega First has provided extremely limited and inadequate community data. Indeed, the community data collected (and upon which impact assumptions are made) is limited to six communities in the immediate vicinity of the project. Without more full community data the full impacts of the projects are entirely speculative.⁷¹

In sum, if further and independent study is not conducted, then the full scale of the impacts will only be known after construction is complete and operation started. It is very likely this will be too late to mitigate the magnitude of the impacts outlined above.

5.4. Communities Depend on Fishing and Dolphin Tourism

Local communities depend heavily on fishing for subsistence and income, supplemented in many cases by dolphin tourism as well. Any significant decline in fish and dolphin populations will devastate the communities.

In Preah Romkel - a commune in Thalaborivath district in Stung Treng province - people depend on fisheries and Irrawaddy dolphin-driven tourism⁷² as well as local farming practices to earn a living. For example, in Loe village (Preah Romkel) – which is near the Irrawaddy dolphin pool - tourists contribute to the local economy by renting boats for dolphin viewings and using homestays in the village.⁷³ Similarly, in Boeung Char commune, people rely on fishing and rice farming for their

⁶⁹ 2011 EIA Annex C (Fisheries Report 2010) No. 60, Table 2.

⁷⁰ WWF, *Summary of Scientific Reviews from Three International Fish Passage Experts on the Don Sahong Dam EIA and Technical Reports Related to Project Design and Mitigation Measures* (February 2014) available at http://d2ouvy59p0dg6k.cloudfront.net/downloads/wwf_scientific_review_by_3_fish_passage_experts_finalrevised12mar.pdf.

⁷¹ Mega First has almost entirely ignored communities in Cambodia and completely disregarded communities in Thailand and Vietnam. The staff of the National Consulting Company, charged with preparing the EIA, Social Impact Assessment (SIA) and Cumulative Impact Assessment (CIA), reportedly met with a limited number of Cambodian authorities and community leaders of Preah Romkel commune in Stung Treng province during a preliminary field investigation that occurred in October and December 2009 [CIA 2013, Appendix C at 46]. However, no details of the meetings or the information provided to community leaders are provided. The CIA itself acknowledges that an official public workshop in Cambodia was not carried out and that further consultations are needed if the project is to proceed. [*Id.* at 35].

⁷² CRDT data from 2012, 348 families shows that 30% of households participate in tourism. CRDT, 2012, *Statistics of the Thalaborivath District, Preah Romkel commune*, Annex G.

⁷³ According to Mr Huot Seng, vice- chief of Loe village and the chief of eco-tourism community, homestays and dolphin viewings can bring up to 150-200 USD per month on a community level, which is an important sum of money for communities such as Preah Romkel (Field interview, August15, 2014).

livelihoods.⁷⁴ And again, in Dom Rea (Domrey) village – a predominantly indigenous community – 90% of people engage in rice farming and 80% in fishing (catching up to 5kg of fish/day). The situation is much the same in Thailand. For example, in Ubon Ratchathani, 52% of 260 households interviewed reported as fishing households.⁷⁵

As noted above, fish consumption is the most important source of protein for many Mekong communities; indeed, the MRC estimates “that Cambodians consume 32.4 kg of inland fish per capita/year [and Laos communities consume] . . . 24.5 kg of inland fish [per capita/year].”⁷⁶ The reduction in migratory fish is likely to generate significant food and health security issues,⁷⁷ and the loss of an essential food and protein source will result in heightened poverty and malnutrition. These impacts will be felt sharply in Cambodia, a country where 80% of the rural population already falls under the national poverty line, and where 33% of the entire population is undernourished.⁷⁸ A recent study found that the reduction of long-distance migrating fish – that are an important supply of iron – “would have a strong detrimental impact on the rural population . . . and pos[e] a risk to public health.”⁷⁹ Unfortunately, children will experience diminishing food supplies, severely exacerbating their already fragile existence – in Stung Treng, 45% of children are reported to be underweight⁸⁰ and in Laos, 50% of rural children are already malnourished.⁸¹

This data is consistent with field reports. For example, the chief of Kandal village (also chief of the fishing community) reported that fish are one of the most important sources of food (as well as a means of income supplementation).⁸²

5.5. Summary of Impacts

In spite of the Mega First’s failure to collect adequate baseline data or perform comprehensive analysis of Don Sahong’s likely impacts, enough data exists to confirm that communities along the Mekong face serious threats. What seems clear at the moment is: (1) the Don Sahong Project is being built on a critically important fish channel; (2) it will wholly block upstream fish migration on that channel; (3) the data supporting the continued viability of downstream fish migration is dubious and incomplete; and (4) none of the proposed mitigation measures are tested or likely to preserve current fish migration patterns and biomass. The Don Sahong Project is thus likely to impose an unacceptable risk to the lives and livelihoods of upstream and downstream communities in Cambodia and Thailand by threatening the fish upon which they depend.

⁷⁴ CRDT, 2010/2011.

⁷⁵ Nature Care Foundation, Ubon Ratchathani Riverside Community Network and Mekong Riverside Communities in Ubon Ratchathani: *Towards Ecological Recovery and Regional Alliance: Community Research of the Adaptation Capability from Mega Projects and Climate Change*, 2012, p.36, available at http://www.boell-southeastasia.org/sites/default/files/mekong-river3_2.pdf.

⁷⁶ Baird 2011 at 226.

⁷⁷ Farrell, Tracy A. "Opinion: Mekong River Dam Threatens Livelihoods and Ecosystems." Cable News Network, 19 Dec. 2012. Web. 4 June 2013. <<http://edition.cnn.com/2012/12/18/opinion/opinion-mekong-river-dam>>.

⁷⁸ MRC. *State of the Basin Report 2010 Summary*. Publication. Vientiane: Mekong River Commission, 2010, at 43-4

⁷⁹ IFRDI 2012. *Food and nutrition security vulnerability to mainstream hydropower dam development in Cambodia*. Synthesis report of the FiA/Danida/WWF/Oxfam project “Food and nutrition security vulnerability to mainstream hydropower dam development in Cambodia”. Inland Fisheries Research and Development Institute, Fisheries Administration, Phnom Penh, Cambodia at 7.

⁸⁰ Department of Planning. 2003. *Second five year socio-economic development plan in Stung Treng*, 2001–2005. Stung Treng Province, Cambodia. (in Baird, 2011, at 227).

⁸¹ Krahn, Jutta. 2007. *Lao PDR: Comprehensive food security and vulnerability analysis*. Vientiane, World Food Program. (in Baird, 2011, at 227).

⁸² Field interview, August 16.

6. Mega First's Actions Violate Rights Within SUHAKAM's Mandate

The impacts set forth above demonstrate that Mega First's construction of the Don Sahong Dam is likely to severely threaten the rights to life, health, and livelihood of Mekong River communities. Furthermore, Mega First has failed to respect the right of the communities to participate in development decisions that affect them, and failed to consult with the affected communities. Although taking place in other countries, these rights violations fall squarely within SUHAKAM's mandate to investigate the conduct of Malaysian entities. Furthermore, although Mega First's actions in Laos threaten communities in Cambodia and Thailand, its international human rights obligations extend to these transboundary harms.

6.1. Standards and Violations of International Human Rights Law

The Right to Life and an Adequate Standard of Living

The Universal Declaration of Human Rights (UDHR), which SUHAKAM has recognized “is a common standard of achievement for all peoples and all nations,” establishes that “[e]veryone has a right to life” and “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food”⁸⁹ These rights (to life, livelihood and health) are recognized universally, including in the ASEAN Human Rights Declaration.⁹⁰

Violation: The Don Sahong Project endangers vitally important migrating fish. If, as seems likely, the dam causes a significant decline in fish stocks, community health and community livelihoods will be substantially harmed. Similarly, the likely extirpation of the Irrawaddy dolphins will further harm the livelihoods of these communities. SUHAKAM has previously suggested that flawed Environmental Impact Assessments, which do not adequately consider the harms to local communities, present concerns for violations of human rights. Mega First's deeply inadequate EIA is no different. By depriving these communities of their food source and threatening their ability to generate income, Mega First violates their substantive human rights.

Supplemental Procedural Rights Ensure the Survival of Substantive Human Rights

These universal rights do not exist in a vacuum. They are frequently tested by development projects, such as the Don Sahong dam. In such circumstances, procedural rights are triggered to safeguard the fundamental rights to life, health and livelihood.⁹¹ As Professor John Knox, the UN expert on human rights and environment put it, procedural and substantive rights “create a kind of virtuous circle: strong compliance with procedural duties produces a healthier environment, which in turn contributes to a higher degree of compliance with substantive rights such as rights to life, health, property and privacy.”⁹² SUHAKAM has previously recognized, in the context of hydropower dams, that communities (especially indigenous communities) have the right to participation, access to information, and informed consent.

⁸⁹ UDHR, Arts. 3, 25(1).

⁹⁰ ASEAN Human Rights Declaration (Nov. 9, 2012) *available at* <http://www.mfa.go.th/asean/contents/files/other-20121217-165728-100439.pdf>.

⁹¹ “Report of Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,” (hereinafter “Knox Report”), A/HRC/22/43 ¶ 42. *See also id.* ¶ 41 (collecting international human rights mechanisms recognizing link).

⁹² *Id.*

The procedural protections - recognized under international law and by international law experts – include rights for potentially affected communities and corresponding duties owed by States and private parties/developers.⁹³ These complementary and reinforcing protections include:

- A duty, on the part of a project developer, to carry out adequate human rights due diligence about the social and environmental impacts of a project.⁹⁴ In so doing, a project developer must collect the best and most complete data on the environment and the communities that will potentially be affected.⁹⁵

Violation: Mega First has failed to collect baseline data with respect to: which species migrate along the Mekong through the Khone Falls; the likelihood that each species of fish will be able to safely through the dam’s turbines or migrate upstream on diverting channels; which species of fish make up Mekong communities’ diet; and which species of fish are sold by those communities. Without this data, Mega First is in breach of its duty of adequate diligence.

- A developer must, of course, consult with and learn about the communities it will impact in order to conduct adequate human rights due diligence regarding a project’s impacts on those communities’ lives and livelihoods. But, to be useful, affected communities must have access to and understand the project. Therefore, those communities have rights to information (and developers have corresponding duties to provide that information).⁹⁶

Violation: As field reports show, Mega First has not provided Cambodian and Thai communities with any information about the Don Sahong project or its likely impacts. It is therefore in breach of its duty to inform affected communities.

- The right to information is a precursor to the right of affected people’s to participate in decision-making with respect to the projects that will impact their lives, livelihoods, environment and human rights.⁹⁷ As ASEAN and SUHAKAM

⁹³ Footnote re: private parties obligation to carry-on human rights and environmental norms.

⁹⁴ See e.g., Rio Declaration on Environment and Development,” (hereinafter the “Rio Declaration”), A/CONF.151/26 Principle 17 (requiring environmental impact assessment for activities likely to create negative impacts); UN Guiding Principles on Business and Human Rights,” (hereinafter “UN Guiding Principles”), HR/Pub/11/04 Principles 15 and 17 (businesses have a duty to carry out human rights due diligence).

⁹⁵ See e.g., International Union for the Conservation of Nature, “Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management” available at http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (all relevant information should be transparently collected with a focus on “the best available scientific information”).

⁹⁶ The right to full, free and impartial information is guaranteed by Article 19 of the UDHR. See also e.g., Rio Declaration Principle 10 (“each individual shall have appropriate access to information concerning the environment . . .”); United Nations Environment Programme. “Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters” available at http://www.unep.org/civil-society/Portals/24105/documents/Guidelines/GUIDELINES_TO_ACCESS_TO_ENV_INFO_2.pdf (“all information relevant for decision-making related to the environment [should be] made available, in an objective, understandable, timely and effective manner, to the members of the public concerned”);

⁹⁷ The right to participation in public life is guaranteed by Article 21 of the UDHR. See also Rio Declaration, Principle 10 (“each individual shall have . . . the opportunity to participate in decision-making process” with respect to environmental matters affecting them); UN Guiding Principles, Principle 18 (businesses should engage in “meaningful consultation with potentially affected groups”).

both recognize, public participation in the process of development is essential and must be protected⁹⁸: “The right to development is an inalienable human right by virtue of which every person and the peoples of ASEAN are entitled to participate in, contribute to, enjoy and benefit equitable and sustainably from”⁹⁹

Violation: In part because they failed to furnish communities with any information, Mega First has engaged in virtually no effective consultations with affected communities in Cambodia. It has also wholly ignored affected communities in Thailand. It is therefore in breach of its duty to seek and obtain community participation.

These “process rights” – due diligence, dissemination of information, consultation and participation – are inter-related. For human rights due diligence to be adequate, a developer must understand the full social, environmental and demographic setting into which a product is introduced; to get that full picture, affected populations must be made aware of the project be provided with relevant information and be given the opportunity to participate in project decision-making.

The Rights of Indigenous Peoples

SUHAKAM rightly identified that international law “has explicitly and implicitly recognized the importance of indigenous peoples’ lands, territories and resources, and their significance in the enjoyment of other human rights.”¹⁰⁰ Indigenous peoples, like all peoples, enjoy the right to self-determination,¹⁰¹ by virtue of which they freely pursue their economic, social and cultural development.¹⁰² They also have a right to participate in decision-making processes in matters that would affect their rights.¹⁰³

Among other rights and protections – including sovereignty concerning the use of their natural resources – projects that affect indigenous peoples’ lands, way of life and interests are subject to their free, prior and informed consent (“FPIC”).¹⁰⁴ “[F]ree, prior and informed consent” (“FPIC”) is a

⁹⁸ See UN Declaration on the Right to Development, Art. 1(1), which Malaysia has endorsed.

⁹⁹ ASEAN Human Rights Declaration, Principle 35; SUHAKAM, Report of the National Inquiry into the Land Rights of Indigenous Peoples (2013) (“The right to development in an inalienable right, which belongs to everyone, individually and collectively, with no discrimination and with their full participation.”)

¹⁰⁰ SUHAKAM, *Report of the National Inquiry into the Land Rights of Indigenous Peoples* (2013), Executive Summary p. X. See also *The Maya Indigenous Communities Cases* Case 12.053, Inter-Am. Comm’n H.R., Rep. No. 40/04, OEA/Ser.L/V11.122 doc. 5 rev. 1 (2004) ¶ 114 (Noting that “indigenous peoples enjoy a particular relationship to with the lands and resources traditionally occupied and used by them,” which is integral to the “physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.”); *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, (Ser C.) No. 70, Inter-Am. Ct. H.R., Rep. No. 75/02 ¶ 128 (2001) (Recognizing the “particular connection between communities of indigenous peoples and the lands and resources they have traditionally occupied and used” and “that continued utilization of traditional . . . control and use of the territory [is] in many instances essential to the individual and collective well-being, and indeed the survival of, indigenous peoples.”)

¹⁰¹ See International Covenant on Civil and Political Rights (“ICCPR”), Vol. 999 No. 14668 (23 Mar. 1976), Art. III; International Covenant on Economic, Social and Cultural Rights (ICESCR), U.N.T.S. Vol. 993 No. 14531 (3 Jan. 1976) Art. I.

¹⁰² United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”), A/61/L. 67 and Add. 1 (13 Sept. 2007), Art. 3.

¹⁰³ UNDRIP, Art.18.

¹⁰⁴ UNDRIP Art. 32(2) (“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent *prior* to the approval of any project *affecting* their lands or territories and resources, particularly in connection with development, utilization or exploitation of mineral, water or other resources.” (Emphasis added)); Art. 32(3)

means of effectuating the substantive rights of indigenous peoples, including self-determination and the preservation of their culture/way of life.¹⁰⁵ As the risk to indigenous peoples and their way of life is substantial, the need for *actual* and *prior* consent is recognized.¹⁰⁶ The obligation to obtain prior consent is “presumptive[]” for extractive or similar operations that might affect “natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.”¹⁰⁷

Violation: Here, Don Sahong threatens the way of life of indigenous people in Cambodia: the Kuoy. The fish and the natural flow of the Mekong River are a critical component of Kuoy life, which will be affected by the Don Sahong Project. In spite of that, Mega First has made no attempt to obtain the free, prior and informed consent of the Kuoy.

6.2. SUHAKAM’s Power Extends to Extraterritorial Violations of Human Rights

As expressly stated in its enabling act, SUHAKAM has the power to investigate alleged violations of human rights by Malaysian entities.¹⁰⁸ SUHAKAM’s authority to investigate has no geographical limitation and extends to human rights violations committed by private parties (including corporations).

On the question of extraterritoriality, SUHAKAM’s only express jurisdictional limitation is that it should decline (or dismiss) cases pending before other judicial tribunals. This lends to the conclusion that SUHAKAM’s investigative power does not have any implied geographical limitation. Adding further support for this proposition, several international instruments that Malaysia has signed onto – including the United Nations Guiding Principles on Business and Human Rights and the 2010 Edinburgh Declaration – explicitly invoke the duty of States to ensure that their citizens (including corporate citizens) obey human rights norms in their extraterritorial operations.¹⁰⁹ The authority to review human rights violations committed outside of Malaysia is also cemented its adoption of the UDHR, which establishes obligatory norms of conduct that do not have territorial limitation.¹¹⁰

calls upon States to provide mechanisms for redress and to take measures to mitigate adverse environmental, economic, social, cultural, or spiritual impacts.

¹⁰⁵ James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/21/47 ¶¶ 48-51 (6 July 2012)

¹⁰⁶ *Id.* ¶ 65 (“[W]here the rights implicated are essential to the survival of the indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant, indigenous consent to the impacts is required, beyond simply being an objective of consultations.”).

¹⁰⁷ *Id.* See also James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, A/HRC/24/41 (1 July 2013) ¶¶ 81-84.

¹⁰⁸ SUHAKAM Act 12(1). Under the terms of the act, “an aggrieved person or group of persons or a person acting on behalf of an aggrieved person or group of persons” can lodge a complaint. The Act prohibits inquiry only if the subject matter is pending in any court, has been finally determined by a court, or becomes the subject matter of any court proceeding during an inquiry. None of these exclusions apply to this complaint.

¹⁰⁹ Principles 1, 2 and 25-27 creates State obligations to investigate, enforce and remedy human rights violations committed by their corporate citizens overseas. See Office of the High Commissioner on Human Rights, *UN Guiding Principles on Business and Human Rights: Implementing the Protect, Respect, Remedy Framework* (2011), available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. Similarly, the Edinburgh Declaration calls on states to “promote a greater awareness of the impact of business enterprises on the realisation of human rights, and the relevant State obligations with regard to the promotion and protection of human rights in their own jurisdiction and *extra-territorially*.” The Tenth International Conference of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (8-10 October 2010), *The Edinburgh Declaration*, available at <http://nhri.ohchr.org/EN/ICC/InternationalConference/10IC/Pages/default.aspx> (last accessed on 13 October 2014) (emphasis added).

¹¹⁰ *Id.* 4(1) (referencing section 12).

SUHAKAM would not alone by investigating human rights abuses conducted by its companies abroad. The National Human Rights Commission of Thailand has accepted jurisdiction over extraterritorial complaints against corporations in several instances.¹¹¹ Thailand's courts have also recognized the need to oversee their companies that provide assistance to Mekong River dams (largely in Lao PDR) because these projects are widely known to “cause impacts to the environment, water quality and quantity, the flow of water, and the ecological balance of the Mekong basin as well as other transboundary impacts on riparian countries [...], which may bear extensive impacts on environmental quality, public health, sanitation, livelihoods, or community interests.”¹¹²

The reality is that there are few independent forums where community complaints against Mega First can be raised. Lao PDR does not have a human rights commission, its courts are not independent and there are few (if any) lawyers that could bring a case there.¹¹³ The MRC does not have a community complaint mechanism nor does ASEAN. Bearing in mind Article 8 of the UDHR – under which everyone has a right to a remedy before competent tribunals for human rights violations – we ask SUHAKAM to accept jurisdiction.

6.3. Transboundary Obligations

While Mega First is building the dam in Lao PDR, it must respect the human rights of all potentially affected communities, including those in Cambodia and Thailand. The obligation to consider transboundary impacts is a well-established component of international law, which prohibits countries from causing environmental harm in other countries.¹¹⁴ According to the International Court of Justice, “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”¹¹⁵

Mega First's transboundary obligations are further established under the UN Guiding Principles. Under the Guiding Principles, Mega First “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”.¹¹⁶ This responsibility

¹¹¹ National Human Rights Commission of Thailand (NHRCT), *Findings of the Subcommittee on Civil and Political Rights on the Koh Kong Sugar Cane Plantation Case in Cambodia*, July 25, 2012 (Annex H). In July 2012, NHRCT's Sub-Committee on Civil and Political Rights (SCCPR) released a preliminary finding in the case stating that the Thai company against which the complaint had been filed for its alleged human rights violations in Cambodia “... has a responsibility under the UNGPs [UN Guiding Principles on Business and Human Rights] to respect human rights obligations in their business enterprise operations through subsidiaries in Cambodia, independent of Cambodian government's obligations to protect human rights”.

¹¹² Supreme Administrative Court of Thailand (17 April 2014), Decision to Hear the Appeal Submitted by the 8 Mekong Provinces in Order to Challenge the Xayaburi Dam Power Purchase Agreement (decision no. KS8/2557) (unofficial partial translation; Annex I) Several holdings by the Court show immense progress towards environmental justice by the Thai legal system, including the invocation of international law in adjudication.

¹¹³ See 2013 Investment Climate – Lao PDR, U.S. State Department (April 2013), *available at* <http://www.state.gov/e/eb/rls/othr/ics/2013/204674.htm> (noting judicial system is not independent).

¹¹⁴ Oppenheim on International Law (1912: 243-44) Chapter Eight p. 220. *See also* Convention on the Law of the Non-navigational Uses of International Watercourses, A/51/49 (Adopted by the General Assembly of the United Nations May 21, 1997). *See also* Mekong River Agreement Principles 5-8.

¹¹⁵ *Pulp Mills on the River Uruguay*, 2010 ICJ Reports ¶ 204. In its opinion, the Court also reinforced the principle that the duty of “due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the regime of the river . . . did not undertake an environmental impact assessment . . .” *Id.*

¹¹⁶ Principle 11.

cannot be avoided: it applies to all business enterprises, regardless of location or operational context¹¹⁷ and independently of compliance with national laws.¹¹⁸

¹¹⁷ Principle 14

¹¹⁸ Principle 11. The Project is not in compliance with either Malaysian law. According to Section 34A of the Malaysian *Environmental Quality Act (EQA) 1974*, projects which may involve particularly significant impacts, shall undergo the Detailed EIA Procedures that incorporate public participation and comment.

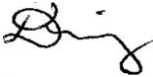
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List of Annexes

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Copy of a letter of representation for the Cambodian communities

Annex B1, B2 and B3

Copies of a letters of representation for the Thai communities

Annex C

GoL, Notification of the Don Sahong Hydropower Project MRCS, 30 September 2013

Annex D

CRDT, 2010/2011, Summary of Data for Villages in Social Assessment

Annex E

Letter to Mega First of November 19, 2013

Annexe F

Letter to Mega First of September 29, 2014

Annexe G

CRDT, 2012, Statistics of the Thalaborivath District, Preah Romkel commune

Annex H

National Human Rights Commission of Thailand (NHRCT), Findings of the Subcommittee on Civil and Political Rights on the Koh Kong Sugar Cane Plantation Case in Cambodia, July 25, 2012

Annexe I

Supreme Administrative Court of Thailand (17 April 2014), Decision to Hear the Appeal Submitted by the 8 Mekong Provinces in Order to Challenge the Xayaburi Dam Power Purchase Agreement (decision no. KS8/2557) (unofficial translation)