

Mandates of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur in the field of cultural rights; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right to food; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and the Special Rapporteur on the rights of indigenous peoples

REFERENCE: AL
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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Chairperson of the Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur in the field of cultural rights; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right to food; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; and Special Rapporteur on the rights of indigenous peoples pursuant to Human Rights Council resolutions 25/17, 26/22, 28/9, 28/11, 22/9, 24/6, and 24/9.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning allegations of human rights violations against the population living along the banks of the Lower Mekong River (which spans Laos, Cambodia, Thailand and Vietnam) as a result of the Don Sahong dam project, carried out by Mega First Corporation Berhad (Mega First), currently under construction in the territory of Lao People's Democratic Republic (Lao PDR). The right to an adequate standard of living, including the rights to food and adequate housing, the right to the highest standard of physical and mental health, cultural rights and the rights to information and participation appear to be at particular risk, as do the rights of indigenous peoples living in the area.

According to the information received:

The Don Sahong Dam, a hydroelectric facility, is under development on the Hou Sahong Channel along the main course of the Mekong River, crossing the full length of the channel at a height of 32 meters. The dam will be located 130 meters

from where the channel separates from the body of the Mekong River and less than 2 kilometers from the Laos-Cambodian border, in the territory of Lao PDR. It is reported that the cumulative impact of the proposed dam would pose threats to some of the planet's most endangered wildlife species, as well as the world's most productive inland fishery, which supports the livelihoods, food security and culture of approximately 29.7 million people living along the Mekong in Lao PDR, Thailand, Vietnam and Cambodia. It is still unclear how Don Sahong power will be used. Some reports indicate that the power will be used domestically and others that it will be sold to neighbouring countries.

In March 2006, Lao PDR granted Mega First, a Malaysian engineering and construction company, exclusive rights to study the feasibility of the Don Sahong Dam.

The four Lower Mekong River governments (Cambodia, Lao PDR, Thailand and Vietnam) are party to the 1995 Mekong Agreement, which established the Mekong River Commission (MRC). The Procedures for Notification, Prior Consultation, and Agreement (PNPCA), deriving from article 5 of the 1995 Mekong Agreement, set out a joint decision-making process for projects that affect the mainstream of the Mekong River. The procedures are intended to ensure that the four member countries cooperate in the utilization and development of the Lower Mekong Basin in a “constructive and mutually beneficial manner”.¹

The 1995 Mekong Agreement defines the prior consultation procedure as follows: “Timely notification plus additional data and information to the Joint Committee, as provided in the Rules for Water Utilisation and Inter-Basin Diversion under article 26, that would allow the other member riparians to discuss and evaluate the impact of the proposed use on their uses of water and any other affects, which is the basis of arriving at an agreement. Prior consultation is neither a right to veto the use nor a unilateral right to use water by any riparian without taking into consideration other riparians’ rights.”²

In 2007, Lao PDR requested the MRC Secretariat to review an initial Environment Impact Assessment (EIA). The MRC Secretariat 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. Following this review, Lao PDR did not approve the 2007 EIA.

¹ *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (April, 1995), see Preamble.

² *Technical Review Report on Prior Consultation for the Proposed Don Sahong Hydropower Project, the Mekong River Commission* (February 2015), p. 3. Available from www.mrcmekong.org/assets/Publications/Consultations/Don-Sahong/Technical-Review-Report-DSHPP-040315.pdf.

In February 2008, Lao PDR signed a Project Development Agreement with Mega First and authorized Mega First to enter into advanced negotiations and finalize the project details with Lao PDR and potential electricity buyers.

In 2010, the MRC recommended a moratorium on dam building on the Mekong mainstream for ten years, until further studies could be carried out.

In September 2013, Lao PDR notified the MRC of its intention to build the Don Sahong dam while simultaneously releasing a new EIA, which was allegedly approved by Lao PDR in 2013. The remaining MRC members - Cambodia, Thailand and Vietnam - strongly opposed the Don Sahong project and demanded the project go through the “Prior Consultation” procedure pursuant to the PNPCA.

On 19 November 2013, a group of civil society organizations wrote a letter to Mega First expressing their concern over the Don Sahong Project and requesting that Mega First undertake the following: conduct an adequate transboundary EIA of the project; respect the rights of individuals and affected populations (in all relevant countries) to access information and public consultation; make the assessments of the dam publicly available; provide details about prior consultations with potentially affected populations; 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 adopt human rights due diligence and make its human rights due diligence policies and procedures publicly available. Mega First has reportedly not responded to this letter to date.

In June 2014, Lao PDR agreed to submit the Don Sahong project to the “Prior Consultation” process. Under this process, the MRC coordinated a technical review of the project to assess its impacts on the Mekong River mainstream’s flow regimes, water quality and other environmental and socio-economic conditions. The Technical Review Report, published by the MRC in February 2015, described the impacts of the project on the Mekong mainstream and other MRC member countries. The report concluded that the effects would be significant and substantial because “the loss of fisheries for some local and immediately upstream and downstream communities could remove their only viable livelihoods”.³

On 29 September 2014, the same group of civil society organizations that sent a letter to Mega First on 19 November 2013 wrote a second letter to Mega First, reiterating their concerns and specifically requesting public information about mitigation plans, the fish monitoring and compensation programmes, as well as relevant documents and evidence showing the efficacy of proposed channel

³ *Technical Review Report on Prior Consultation for the Proposed Don Sahong Hydropower Project, the Mekong River Commission* (February 2015), p. 46. Available from www.mrcmekong.org/assets/Publications/Consultations/Don-Sahong/Technical-Review-Report-DSHPP-040315.pdf

modification and other mitigation measures. It is reported that Mega First has not responded to the letter to date.

On 20 October 2014, concerned populations and NGOs representing them filed a complaint against Mega First to the Human Right Commission of Malaysia (SUHAKAM). Information we received suggests that the Commission has met with Mega First twice since the complaint was submitted. Reports suggest that the Commission's view on this case is still pending.

At a MRC Joint Committee meeting held in Vientiane, Lao PDR, on 28 January 2015, the Governments of Thailand, Cambodia and Vietnam submitted their final positions on the Don Sahong project. They maintained strong opposition to the Don Sahong Dam, calling for an extension to the PNPCA process and urging that the project be suspended pending further studies, including assessment of transboundary impacts. To date, Lao PDR and the MRC have reportedly not reached an agreement on how the project should be handled, and the issue has been subsequently referred to the MRC Council, to be discussed at the Ministerial level.

Reports suggest that the preparatory construction for the Don Sahong Project had already begun in December 2013. The National Assembly of Lao PDR reportedly approved the concession agreement of the project in August 2015 and the full-scale construction has reportedly started in late November 2015. On the current timeline, the dam construction is expected to be completed by early 2018 with commercial operations beginning in early 2020.

The Don Sahong Dam construction poses a number of serious concerns for the affected populations' human rights, including rights to information, participation, food, health and housing, as well as their cultural rights. The rights of the indigenous peoples living in the area are also under threat.

These allegations are described in more detail below.

Rights to information and participation

According to information received, no adequate and complete impact assessment has been conducted to date, and there are gaps in the existing information about project impacts and proposed mitigation measures. For instance, it is alleged that the project's potential impacts on food security and health, living conditions, adequate housing and livelihood sources were never fully explored nor sufficiently studied. Allegedly, Mega First has gathered limited and inadequate data on affected populations. The data collected by Mega First is limited to six communities in the immediate vicinity of the project.

Additionally, the mitigation measures proposed by Mega First appear to be ineffective and scientifically unproven at reducing mortality of large species and at preserving fish populations. For example, Mega First proposed to mitigate the impacts of blocking the Hou Sahong channel through expanding neighbouring –

(Hou Sadam and Hou Xang Peuak) channels; however, according to information received, the fish diversion plan has proven to be ineffective in general, and there is no evidence of such method working in the Mekong Basin. It is reported that the conditions of the Hou Sahong Channel, with its continuous flow of water and significant width, cannot be replicated through implementing the proposed mitigation measures. Furthermore, it is alleged that up-to-date and complete engineering details and studies that support these claims have not been provided.

In this regard, it is reported that the lack of information on the Don Sahong dam made it impossible to identify the actual social, economic, human rights and environmental impacts of the project, including its transboundary impacts.

Not only was adequate project information not produced or provided, but the affected population was also not allowed to fully and meaningfully participate in the planning and decision-making process related to the project. While some limited community engagement appears to have taken place in six of the affected villages near the proposed dam construction site in Lao PDR, many other affected communities, including those living up and downstream of the project site in Thailand, Cambodia and Vietnam, have not been properly informed about the project, consulted or given an opportunity to participate in matters related to the project.

Providing for the effective exercise of these procedural rights is important in order to ensure compliance of other rights, such as rights to food, health and housing, as well as cultural rights. Information received indicates that the enjoyment of these human rights may be threatened by the project as it is currently going forward.

Rights to food, health, housing, and cultural rights

The Mekong River's freshwater resources are vital to the people living in the lower Mekong Basin. In 2008, the Mekong River enabled the production of 3.9 million tons of fish, valued at US\$3.9-7 billion. Reports suggest that about 75 per cent of people who reside in the region depend directly on the river system for their agriculture, fisheries and livelihoods. The proposed Don Sahong dam is believed to affect approximately 30 per cent of these wild fisheries and therefore poses a serious threat to the livelihoods of millions of people, including their fisheries, with repercussions for the region's economy and for the human rights of those who depend on the river.

Fish consumption is the most important source of protein for many people living in the Mekong region. Between 47 and 80 per cent of animal protein intake for the lower Mekong basin residents comes from freshwater fisheries. For instance, the MRC estimates that Cambodians consume 32.4 kg of inland fish per capita per year and Laos communities consume 24.5 kg of inland fish per capita per year. Furthermore, Lao PDR households living in the Mekong region only purchase 3 per cent of their food items, which demonstrates the high level of dependency on natural resources. The reduction in migratory fish is likely to generate significant

food insecurity for the Mekong people and the loss of an essential food and protein source may result in malnutrition while posing a risk to their health.

It is further alleged that the decrease in fish supply will likely increase fish prices in the market, leaving people living in poverty unable to afford fish or be forced to migrate due to inadequate livelihoods. If the construction of the Don Sahong dam proceeds as planned, there is no guarantee that these people would be able to access adequate and nutritious food that is affordable and culturally acceptable (that is, respectful of their rights to conduct their own cultural practices and follow their own food consumption patterns), and to maintain or achieve the highest attainable standard of health and well-being.

Many of the people living in the Mekong region obtain supplementary income from fisheries as well as rice paddies and vegetable gardens that are fertilized by the Mekong River. The majority of the population living in this area survives outside the formal economy and depends on natural resources and the ecosystem provided by the Mekong River. The Don Sahong project will threaten the population's subsistence and income security that is generated by fisheries and small-scale farming. According to the MRC's Technical Review Report (2015), 50 per cent of rural households living in the Mekong area responded by noting that the sale of rice is the major source of income while 25 per cent of households said they earn income from the sale of fish. In Cambodia and Lao PDR, about 40 per cent of households indicated fish sales as a source of income.

Furthermore, the Don Sahong dam is located only two kilometers from the critically endangered Irrawaddy dolphins' core habitat – a pool overlapping Cambodia and Lao PDR. The likely extirpation of the Irrawaddy dolphins caused by the Don Sahong project will further harm the livelihoods of the communities whose critical supplementary income depends on dolphin tourism in Lao PDR and Cambodia.

It is further reported that the deprivation of livelihood sources and threatening the communities' ability to generate income are likely to destabilize the economy of the region and may exacerbate poverty of many who are already living in or close to poverty.

In addition, it is alleged that only 11 households in Lao PDR, who reside in vicinity of the construction site, are planned to be relocated to enable the construction of the Don Sahong dam, but many more Mekong residents would be forced to move due to the loss of access to livelihood sources caused by the Don Sahong project. For instance, the available but limited data indicates that residents of 15 villages in Cambodia (approximately 1371 households) near the Don Sahong dam expressed their concerns about possible resettlement. In particular, they were concerned that they would be forced to resettle due to the very likelihood of reduced access to food and income, if the Don Sahong project were to proceed as planned. We understand that none of these communities were officially given adequate information about the project and its impact on their homes or provided with other alternatives for possible resettlements.

Rights of indigenous peoples

Many of the people that live along the Mekong – and who will be affected by the Don Sahong dam – are indigenous peoples and ethnic minorities. For example, in Cambodia, the Kuy (Kuoy) make up a substantial proportion of the population of communities in Kratie and Stung Treng provinces, which will be affected by the Don Sahong project. Like many indigenous peoples, the cultural practices and traditions of the Kuy peoples are closely connected to natural resources, including the Mekong river. Not only are their rights to health, nutrition, lives and livelihoods threatened by the Don Sahong dam, but so are their cultural rights. Interfering with the right of indigenous peoples to the lands and resources they have traditionally occupied or used poses a threat to indigenous cultures and associated cultural rights.

Additionally, it is reported that Mega First has not provided any information about the Don Sahong project to indigenous peoples and made no attempt to obtain their free, prior and informed consent.

Business responsibility to respect human rights

According to the information received, Mega First has not abided by its responsibility to respect human rights as per the UN Guiding Principles on Business and Human Rights, including the corporate responsibility to avoid infringing on the human rights of others and to address adverse human rights impacts with which business enterprises may be involved. Mega First reportedly proceeded with their development project without taking any measures to address the grave human rights concerns. The information we received indicates that Mega First has not undertaken appropriate due diligence. In particular, it is reported that the company did not conduct adequate and complete impact assessments, did not provide meaningful consultations with (potentially) affected communities, and did not operate in a transparent manner. In addition, it is not clear if Mega First has provided for or participated in any attempts to resolve grievances held by potentially or de facto affected individuals or groups.

While we do not wish to prejudge the accuracy of these allegations, we wish to express concern about millions of Mekong river residents and communities living in Lao PDR, Cambodia, Thailand and Vietnam whose human rights appear to be threatened by the Don Sahong development project carried out by Mega First. There appears to be a serious problem in the realization of procedural rights, such as the rights to information and participation, making it impossible to identify the social, economic, human rights and environmental impacts of the project. We are deeply concerned that the affected population's rights to food, health and housing, as well as their cultural rights, would be significantly impacted, despite the non-regression principle stipulated in international human rights law. It also appears that there is a lack of international/regional cooperation, which should be put in place as a means to protect all affected population from human rights violations that are arising from transboundary harms.

In connection with the above alleged facts and concerns, please refer to the **Reference to international law Annex** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

It is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention. We would therefore be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above mentioned allegations.
2. Please provide additional information on ways that the Government of Malaysia may have directly or indirectly supported the aforementioned activities of Mega First in Lao PDR, for example through risk insurance provided by a publicly funded export credit agency or any other means?
3. What measures, including policies, legislation and regulations, has the Government of Malaysia put in place to prevent, investigate, punish and redress human rights abuses by business enterprises domiciled in its territory and/or jurisdiction?
4. What policy, legal, regulatory, and/or adjudicatory measures has the Government of Malaysia taken to encourage or require that business enterprises domiciled in its territory or jurisdiction, including Mega First, meet their responsibility to respect human rights throughout their operations (including abroad)? In addition to such measures, has the Government provided guidance to business enterprises on how to respect human rights throughout their operations? This may include measures and/or guidance on, inter alia, conducting human rights due diligence, meaningful consultations with potentially affected stakeholders, and addressing and mitigating any negative impacts.
5. What judicial, administrative, legislative or other steps has the Government of Malaysia taken to ensure that victims of business-related human rights abuse by companies domiciled in Malaysia have access to effective remedies?

We would appreciate receiving a response within 60 days.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their recurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

We may decide to publicly express our concerns about this case in due course. In any such public statement, we will indicate that we have been in contact with your Excellency's Government to clarify the issue/s in question.

We also wanted to bring to your attention that we have sent a letter concerning this case to Lao PDR, the MRC, as well as Mega First.

All letters as well as your Excellency's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

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Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

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Special Rapporteur on the rights of indigenous peoples

Annex

Reference to international human rights laws and standards

In connection with above alleged facts and concerns, we would like to draw your attention to applicable international human rights laws and standards, as well as authoritative guidance on their interpretation. These are detailed below:

While Malaysia has not signed nor ratified both the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), we note that the Universal Declaration of Human Rights (UDHR) enjoys the status of customary international law in that some of its provisions are consistently applied by States. Some specific rights in UDHR have been codified into ICESCR and ICCPR.

We wish to draw your Excellency's attention to article 25 of UDHR which recognizes the right of everyone "to a standard of living adequate for the health and well-being of himself and of his family, including food." Article 11, paragraph 1 of ICESCR stipulates that States "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions", and requires them to "take appropriate steps to ensure the realization of this right." With respect to the right to the highest attainable standard of physical and mental health, the ICESCR (article 12, para. 2(b)) provides that the steps, to be taken by States to achieve the full realization of this right, "shall include those necessary for... the improvement of all aspects of environmental and industrial hygiene". Furthermore, article 15 of ICESCR recognizes the right of everyone to take part in cultural life.

In addition, we would like to draw your Excellency's attention to the right to access information as part of the freedom of opinion and expression as established in article 19 of UDHR and article 19 of ICCPR. Furthermore, the right to take part in the conduct of public affairs is stipulated in article 21 of UDHR and article 25 of ICCPR.

Notwithstanding the principal obligation of the concerned host State, Lao PDR, to respect, protect and fulfil human rights, and to ensure that operations of business enterprises within its territory or jurisdiction respect human rights, home States to transnational corporations such as Malaysia also have an important role to play to protect human rights when such business enterprises (in this case, Mega First) engage in conduct that is alleged to violate or harm the enjoyment of human rights abroad.

Considering the transboundary nature of these allegations, we would like to particularly bring your attention to the human rights obligations pertaining to extraterritorial issues. We would like to recall that the Charter of the United Nations refers to international cooperation with regard to human rights as contained in its article 55, "[t]he United Nations shall promote higher standards of living, full employment, and conditions of economic and social progress and development; solutions of international economic, social, health, and related problems; and international cultural and educational cooperation".

It should also be noted that the Universal Declaration of Human Rights, which contains no explicit jurisdictional limitations, states that the right to freedom of expression includes the freedom “to seek, receive and impart information” (article 19) and the baseline rights of every one to participate in the conduct of public affairs (article 21). It also recognizes the right to “a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (article 25) as well as “the right to freely participate in the cultural life of the community” (article 27).

The Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4, reaffirm the foundational principle that “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations” (Principle 2), including their operations abroad.

The Guiding Principles also clarify that all business enterprises have an independent responsibility to respect human rights, regardless of whether the State in which they operate fulfils its own responsibilities. This responsibility applies to all business enterprises regardless of sector, size, operational context, ownership or structure (Principle 14). The business responsibility to respect human rights requires that business enterprises “(a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Principle 13).

To meet this responsibility requires that business enterprises have in place “policies and processes appropriate to their size and circumstance, including: a) A policy commitment to meet their responsibility to respect human rights; b) A human rights due diligence policy to identify, prevent, mitigate and account for how they address their impacts on human rights; c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute” (Principle 15). Due diligence requires processes to identify, prevent, mitigate, and address potential and actual impacts at various stages in a project or the enterprise’s operations. It should be an on-going process and should involve meaningful consultation with potentially affected stakeholders (see Principles 17-21).

We would like to note that some special rapporteurs in 2011 were part of a group, together with scholars and representatives of civil society organizations, that adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. This document suggests that all States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially. Principle 20 states that “all States have the obligation to refrain from conduct which nullifies or impairs the

enjoyment and exercise of economic, social and cultural rights of persons outside their territories.”