



# Challenges of Dam Financing for Thai Banks

## The Case of Xayaburi and XPXN Projects

November 2019

# Executive Summary

Thai companies and banks are at the forefront of growing intra-regional investment within the Mekong region. Over the past two decades, Thailand's commercial banks have increased their lending to major infrastructure projects such as hydropower dams in neighbouring countries.

Large-scale dams are risky projects. They are complex, capital-intensive, and often require the majority of financing upfront. Because large hydropower projects alter river systems, they often have significant impacts that are not confined to the project area or even within national borders. In the case of the Mekong, an important transboundary river system that sustains food security, livelihoods and local economies for populations across six countries, impacts and risks are especially extensive and complex.

Drawing on case studies of two controversial hydropower projects in the Mekong Basin in Laos financed by Thai banks, this report points to weaknesses in the Thai banks' considerations of environmental and social risks. The report outlines why Thai banks must integrate environmental, social and governance (ESG) risks into their lending decisions and conduct human rights due diligence in line with international standards. By doing so, Thai banks can better identify, prevent and mitigate adverse impacts, and minimise reputational, legal and financial risks from their lending.

The first section of the report outlines ESG risks and impacts of hydropower projects and responsibilities and commitments of financial institutions, drawing on relevant international and national standards and guidelines, including the Sustainable Banking Guidelines adopted by the Thai Bankers' Association (TBA) in August 2019. The second section examines the Xayaburi and Xe Pian-Xe Namnoy hydropower projects in Laos, describing their environmental and social risks and impacts, and the Thai banks' roles and responsibilities. The last section makes recommendations on how Thai banks can more meaningfully integrate ESG risks into their policies and practices.

This report makes the following recommendations for Thai banks to help ensure that future hydropower financing can cope with both existing and emerging risks, as well as conducted in line with the four

foundational elements in the TBA Sustainable Banking Guidelines.

## Leadership and responsible lending commitment

- ◆ Develop and issue a human rights policy, which clearly articulates banks' recognition to respect human rights, in line with UN Guiding Principles on Business and Human Rights and timebound commitments to ensure implementation
- ◆ Develop and issue sector lending policies, including for hydropower, in line with international standards.
- ◆ Strengthen the TBA Sustainable Banking Guidelines

## Stakeholder Engagement

- ◆ Stakeholder engagement should be conducted in line with UN Guiding Principles on Business and Human Rights
- ◆ Ensure that clients conduct meaningful stakeholder participation and engagement prior to finalising lending to high risk projects
- ◆ Establish direct grievance mechanism between the bank and potentially affected communities, and help strengthen existing judicial and non-judicial grievance mechanisms

## Internal implementation mechanisms

- ◆ Mandate clients to conduct human rights due diligence as a condition to hydropower financing
- ◆ Significantly increase resourcing and investment in ESG risks, including staff capacity and expertise
- ◆ Include clear environmental, social and human rights obligations as covenants and drawdown conditions in loan agreements

## Transparency

- ◆ Regularly and timely disclose project finance loans, including projects in the pipeline
- ◆ Allow opportunities for stakeholder input on current and future project financing decisions
- ◆ Provide timely and meaningful responses to stakeholders who request information about banks' involvement in projects

# Introduction

Historically, international financial institutions including the World Bank and the Asian Development Bank played a key role in financing large infrastructure projects in the Mekong region. More recently, these institutions have moved away from direct financing of large infrastructure projects and have expressed concerns over projects such as the Xayaburi dam on the Lower Mekong mainstream due to their significant environmental and social impacts<sup>1</sup>. In their place, private sector lenders, including Asian regional banks, are increasingly stepping in to fund projects such as Xayaburi that international financial institutions will not directly support.

Thai companies and banks are at the forefront of growing intra-regional investment within the Mekong region. Over the past two decades, Thailand's commercial banks have increased their lending to major infrastructure projects such as hydropower dams in neighbouring countries. Thailand's largest banks have all been involved in providing funding for risky resource projects. However, unlike the traditional international financial institutions, which have rigorous performance standards and safeguard policies, Thai banks' environmental, social and governance (ESG) standards and policies are largely weak or non-existent. The Xayaburi dam and the Xe-Pian Xe-Namnoy hydropower project in Lao PDR, discussed in this report, are examples of controversial major infrastructure projects that Thai banks have financed as part of a wider program of internationalising their activities. In another example, Thai banks are also involved in financing a major industrial complex in Dawei, Myanmar that has faced criticism for its extensive environmental and social impacts.<sup>2</sup>

This report examines the need for improved ESG policy and practice for Thai banks through the lens of hydropower

investment in the Mekong. Large-scale dams are risky projects. They are complex, capital-intensive, and often require the majority of financing upfront. They have long development timeframes and entail high socio-economic and environmental risks.<sup>3</sup> Hydropower projects frequently experience cost overruns and delays, in part due to environmental and social risks and impacts.<sup>4</sup> Because large hydropower projects alter river systems, they often have significant impacts that are not confined to the project area or even within national borders. In the case of the Mekong, an important transboundary river system that sustains food security, livelihoods and local economies for populations across six countries, impacts and risks are especially extensive and complex.

Thai banks have lent billions of dollars to multiple hydropower projects in Laos, including the Xayaburi and Xe Pian-Xe Namnoy dams profiled in this report (see Table 2 and 3). Thai banks represent a significant source of financing for hydropower in the Mekong Basin. Furthermore, Thai banks are also considering financing other hydropower projects in the region, including on the Salween River in Myanmar.

Yet, despite the risks and impacts inherent in these projects, lending policies and decisions by Thai banks to date have paid scant attention to environmental, social and governance (ESG) risks and impacts. Fair Finance Thailand's policy assessment of the nine largest Thai commercial banks found that Thai banks performed poorly in relation to ESG criteria, particularly in relation to nature (environment and social impacts and mitigation), gender equality and human rights (see **Box 2**).<sup>5</sup>

In August 2019, the Thai Bankers' Association (TBA) issued Sustainable Banking Guidelines: Responsible Lending,

1. World Bank (2010, October 22). World Bank Group Welcomes Strategic Environmental Assessment of Mekong Mainstream Dams, Press release. Available at: <https://www.worldbank.org/en/news/press-release/2010/10/22/world-bank-group-welcomes-strategic-environmental-assessment-mekong-mainstream-dams>
2. National Human Rights Commission of Thailand (2015). Report no. 1220/2558: Seaport and Dawei Special Economic Zone Development. (Bangkok: National Human Rights Commission of Thailand). Available at: <http://www.nhrc.or.th/getattachment/0564e1b7-0374-4b7d-9622-75b7383e1361/รายงานที่-1220-2558-เรื่องสิทธิชุมชน-กรณีการดำเนิน.aspx>
3. Trandem, A. (2019). *Offloading Risks & Avoiding Liabilities: How Financial Institutions Consider Hydropower Risks in Laos*. (Bangkok: Focus on the Global South). Available at: <https://focusweb.org/wp-content/uploads/2019/03/Offloading-Risks-Avoiding-Liabilities-1-1.pdf>
4. International Finance Corporation (2015). *Hydroelectric Power: A Guide for Developers and Investors*. (Stuttgart, Germany: International Finance Corporation), p. 5. Available at: [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/publications/hydroelectric\\_power\\_a\\_guide\\_for\\_developers\\_and\\_investors](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/hydroelectric_power_a_guide_for_developers_and_investors)

5. Fair Finance Guide International (2019, April). Executive Summary. *Fair Finance Thailand: 2018 Policy Assessments*. Available at: <https://fairfinanceguide.org/media/495072/fft-exec-summary-english.pdf>
6. The Thai Bankers' Association (2019, August 13). *Sustainable Banking Guidelines: Responsible Lending by The Thai Bankers' Association*. Available at: <https://www.tba.or.th/wp-content/uploads/2019/08/Guidelines-ResponsibleLending.pdf>
7. World Commission on Dams (2000). *Dams and Development: A New Framework for Decision-Making*. (London and Sterling: Earthscan Publications Ltd). Available at: [https://www.internationalrivers.org/sites/default/files/attached-files/world\\_commission\\_on\\_dams\\_final\\_report.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/world_commission_on_dams_final_report.pdf)
8. E.g. see International Centre for Environmental Management (ICEM) (2010). *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report*. (Victoria: ICEM Australia). Available at: [http://www.mekongwaterforum.org/sites/default/files/ICEM\\_2010\\_SEA\\_of\\_hydropower\\_mainstream\\_summary\\_EN.pdf](http://www.mekongwaterforum.org/sites/default/files/ICEM_2010_SEA_of_hydropower_mainstream_summary_EN.pdf); Mekong River Commission (MRC) (2017). *The Council Study: Key Findings on the Study on Sustainable Management and Development of the Mekong River Basin, including Impacts of Mainstream Hydropower Projects*, 8 December. Links to all the MRC Council Study reports can be accessed through: <http://www.mrcmekong.org/assets/Publications/the-CS-reports-cover.pdf>
9. Mekong River Commission (2017). *Thematic Report on the Positive and Negative Impacts of Hydropower Development on the Social, Environmental, and Economic Conditions of the Lower Mekong River Basin*, p. 10.
10. Mekong River Commission (2017, November 23). *The Council Study: Key Message from the Study on Sustainable Management and Development of the Mekong River Basin, including Impacts of Mainstream Hydropower Projects*, p. 4.
11. Nam, S. et al (2015). Economic Value of Lower Mekong Fisheries: Lower Mekong Fisheries Estimated to Be Worth Around \$17 Billion a Year. *Catch and Culture* vol. 21, no. 3 (December), pp. 4-7. Available at: <http://www.mrcmekong.org/assets/Publications/Catch-and-Culture/CatchCultureVol-21.3.pdf>
12. See: Hurtado, M. E. (2016, November 7). Dams Raise Global Warming Gas. *SciDevNet*. Available at: <https://www.scidev.net/global/energy/news/dams-raise-global-warming-gas.html>

which “defines minimum expectations on responsible lending practices for all banks based in Thailand” and provides guidance on integrating environmental and social risks and impacts.<sup>6</sup> While

the guidelines are a step in the right direction, much more needs to be done to ensure that Thai banks more meaningfully implement responsible and sustainable banking practices.

## Hydropower: Risks and Impacts

**Large-scale hydropower projects are complex and carry high environmental and social risks.** Large dams block fish migrations, degrade important habitats, and disrupt flows of sediment and water, which in turn impact on the availability and productivity of aquatic resources important for communities' food sources, livelihoods and economies. Dams have flooded large areas of wetlands, forests and agricultural lands, and displaced an estimated 40 to 80 million people globally.<sup>7</sup> They contribute to social unrest and conflicts over access to and use of water and land, and erosion of local cultures and identities. These risks are heightened in places like the Mekong region, where rivers and related resources sustain the lives and livelihoods of millions of people, as well as making significant contributions to national economies.

**Understanding environmental and social risks must include cumulative and basin-wide impacts.** In the Mekong Basin, there is a wealth of publicly available studies that examine cumulative and basin-wide impacts and point to risks that large-scale dams pose on the Mekong's ecology, economy and society.<sup>8</sup> Most recently, the Mekong River Commission's (MRC) Council Study, published in 2018, found that planned dams would reduce the amount of sediment reaching the Mekong Delta by 97%<sup>9</sup> and fish stocks by 40% to 80% by 2040.<sup>10</sup> Given the high economic value of the Lower Mekong River Basin's capture fisheries (valued at USD\$11 billion), and the importance of sediment to maintaining the productivity

of the agriculture sector in the Delta, the losses would equate to billions of dollars annually.<sup>11</sup>

**Large dams may contribute to climate change.** While promoted as 'clean energy' by the hydropower industry and dam proponents, a growing body of scientific evidence indicates that reservoirs in tropical areas, such as the Mekong, emit significant amounts of greenhouse gases. A 2016 study, which analysed more than 250 hydropower projects, estimates that globally dams emit around one billion tonnes of greenhouse gases annually, accounting for 1.3% of human-caused global emissions.<sup>12</sup>

**Weak regulatory regimes may exacerbate risks.** Most hydropower investments in the Mekong are located in countries with lower standards for environmental and social protection compared to those stipulated by Thai law and international best practice. Furthermore, even when relatively strong standards exist on paper, they are often not fully implemented, such as requirements for environmental impact assessment and compliance monitoring. This can present risks to projects later on, for example, projects that have secured approvals without adequate assessment of transboundary impacts. It can also mean legal risks due to non-compliance. A notable example is the collapse of an auxiliary dam at Xe Pian-Xe Namnoy Hydropower Project in July 2019 that killed dozens of people and displaced some 7,000, and damaged the homes and property of thousands more across the border in Cambodia.<sup>13</sup> There is evidence



suggesting that non-compliance on the part of developers may have caused or contributed to the dam collapse.<sup>14</sup>

**Large hydropower projects frequently experience cost overruns and delays.** A 2014 Oxford University study, which examined 245 large hydropower dams in 65 countries, found that large dams suffered average cost overruns of 96% and implementation schedules were delayed on average by 44%.<sup>15</sup> Delays in schedules and inability to meet performance targets (i.e. electricity outputs) can lead to substantial penalties for the investors if milestones and provisions stipulated in Concession Agreements and Power Purchase Agreements (PPA) are not met.

**Climate change increases risks for hydropower's future viability and safety.** Climate change can also negatively impact hydropower projects' ability to generate both electricity and income. With climate change comes more unpredictable and extreme weather events, which influences reliability of water flows, the main determinant of how much electricity a hydropower project can generate. Droughts reduce the amount of electricity a dam can produce, while extreme rainfall increases risk of dam failure and massive flooding due to sudden water releases.

These climate change risks are not hypothetical predictions of the future; they are affecting how dams operate in the Mekong region today. For example, low rainfall and water levels resulted in major and on-going power cuts in Cambodia in 2019, largely because hydropower projects – which comprise approximately half of domestic capacity – were unable to generate sufficient power.<sup>16</sup> In 2018, it was floods that caused major devastation in parts of Laos and the Lower Mekong Basin – flooding which was exacerbated by the sudden release of water by dams to cope with the large amounts of rainfall.<sup>17</sup>

### **A shifting energy landscape poses risks to hydropower's future economic viability. Project studies should include comprehensive options assessment.**

Noting the widespread and irreversible impacts hydropower development, one of the MRC Council Study's recommendations is for MRC member countries to consider other renewable energy sources such as solar and wind as alternatives to hydropower, which are becoming increasingly cost-competitive.<sup>18</sup> With the rapid changing landscape in power sector investments, there is a risk that large hydropower projects, which often take several years to build, become stranded assets. For example, an MRC summary note examining different hydropower pathways in the Mekong identifies inconsistencies in the hydropower export plans of Laos and Cambodia on the one hand, and electricity import plans of Vietnam and Thailand on the other. According to the paper, by 2040 Lao plans to export 11,739 MW of power to Thailand, while Thai plans indicate it will only import 4,274MW.<sup>19</sup> This difference of nearly 7,500 MW, which is greater than the combined installed capacity of all the seven mainstream dams planned or under construction in Laos,<sup>20</sup> points to uncertainties in the market for planned hydropower projects.

There are already signs indicating that the market for planned hydropower is becoming more unpredictable. Two planned Mekong mainstream dams, the Pak Beng and Pak Lay dams, which completed the MRC Prior Consultation process in 2017 and 2019 respectively, have yet to secure a Power Purchase Agreement. Following major power shortages due to underperforming hydropower in 2019, Cambodia is increasing investments in solar power and has recently indicated that the Sambor and Stung Treng dams planned for the mainstream are no longer part of the government's power development plan.<sup>21</sup>

**Given the significant uncertainties and risks associated with large-scale**

13. Inclusive Development International and International Rivers (2019). *Reckless Endangerment: Assessing the Responsibility for the Xe Pian-Xe Namnoy Dam Collapse*. Available at: [https://www.inclusivedevelopment.net/wp-content/uploads/2019/07/reckless-endangerment\\_final\\_for\\_web.pdf](https://www.inclusivedevelopment.net/wp-content/uploads/2019/07/reckless-endangerment_final_for_web.pdf)

14. Ibid.

15. Ansar, A., Flyvbjerg, B., Budzier, A. and Lunn, D. (2014). Should We Build More Large Dams?: The Actual Costs of Hydropower Megaproject Development. *Energy Policy* (March), pp. 1-14. Available at: SSRN: <https://ssrn.com/abstract=2406852>

16. Vida, T. (2019, March 19). Dry Spell Causing Power Cuts: PM. *Khmer Times*. Available at: <https://www.khmertimeskh.com/587742/dry-spell-causing-power-cuts-pm-2/>

17. Thai PBS (2018, July 30). Water Discharged from Lao Dams Pushes Up Water Level in Mekong. Available at: <https://www.thaipbsworld.com/water-discharged-from-lao-dams-pushes-up-water-level-in-mekong/>

18. Mekong River Commission (2017, November 23). *The Council Study: Key Message from the Study on Sustainable Management and Development of the Mekong River Basin, including Impacts of Mainstream Hydropower Projects*, p. 3.

19. Mekong River Commission (2018). *Summary note: Review and Update of Basin-wide Sustainable Hydropower Development Strategy for the Lower Mekong Basin*, Draft version 1.0, 28 August 2018, pp. 13-14. Available at: <http://www.mrcmekong.org/assets/Uploads/Summary-note-Draft-SHDS-Aug-2018.pdf>

20. Seven mainstream dams entirely within Lao territory includes Pak Beng, Luang Prabang, Xayaburi, Pak Lay, Sanakham, Phou Ngoy and Don Sahong. Pak Chom and Ban Khoum dams are planned for the Thai-Lao border.

21. Vannak, C. (2019, August 9). Solar to Make Up 15pct of Local Energy Production by 2020. *Khmer Times*. Available at: <https://www.khmertimeskh.com/631779/solar-to-make-up-15-pct-of-local-energy-production-by-2020/>; Vireak, T. (2019, July 8). Gov't to Reduce Reliance on Hydro. *Phnom Penh Post*. Available at: <https://www.phnompenhpost.com/business/govt-reduce-reliance-hydro>

22. Trandem, A. (2019). *Offloading Risks & Avoiding Liabilities: How Financial Institutions Consider Hydropower Risks in Laos*.

23. OECD (2017). *Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises*. Available at: <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

24. Santhiprabhob, V. (2019). Opening Remarks, Bangkok Sustainable Banking Forum 2019, 13 August 2019, Bangkok, Thailand. *Bank of Thailand*. Available at: [https://www.bot.or.th/Thai/PressandSpeeches/Speeches/Gov/SpeechGov\\_13Aug2019.pdf](https://www.bot.or.th/Thai/PressandSpeeches/Speeches/Gov/SpeechGov_13Aug2019.pdf)

**hydropower projects, it is vitally important for investors and lenders to comprehensively assess ESG risks at the outset and undertake regular monitoring.** Yet the scope and quality of risk assessments on large hydropower projects to date have downplayed risks, particularly environmental and social risks, which often take second place to investors' and lenders economic and strategic interests<sup>22</sup> (see **Box 1: Downplaying and offloading risks**). There is growing recognition that failure to include ESG issues into investment and lending practices not only poses significant operational, legal and reputational risks, but is also seen as a failure of fiduciary duty.<sup>23</sup> Thus,

banks should no longer focus primarily on short-term gains and profits at the expense of long-term adverse impacts of their lending decisions and activities. In the words of, Veerathai Santhiprabhob, Governor of the Bank of Thailand:<sup>24</sup>

*"...financial institutions cannot underestimate the risks that come with various aspects of ESG, as these risks can impair the long-run sustainability of the financial institutions themselves. To manage and reduce these risks, it is important that financial institutions internalize sustainability considerations and properly price potential risks into different aspects of their operations."*

## Lenders' Commitments and Responsibilities

Commercial banks and financiers play an important role as intermediaries as their decisions over where and how financial resources are allocated and invested can determine whether or not projects proceed. The financial sector's growing recognition of the importance of integrating ESG risks into lending policies and practices is evident in the number of international initiatives, standards and guidelines that have been developed. Some of these have been led by the financial sector and institutions themselves, acknowledging that adverse environmental, social and human rights impacts of their activities can increase reputational, legal and financial risks. **Table 1 below** outlines some key international initiatives, standards and guidelines covering ESG risk management in the financial sector.

While these international standards and guidelines are largely voluntary and some are more principles than operational guidelines, they can help banks better understand and manage risks and promote good practice when

considering lending to large hydropower projects. Common to all these international standards and guidelines are institutional commitments to sustainability and corporate responsibility, which includes, among others: minimising adverse social and environmental impacts; conducting due diligence and monitoring to assess and manage risks, importance of stakeholder engagement, and strengthening transparency and accountability.

There are, however, some differences in the guidelines when it comes to financial institutions' human rights obligations and ensuring effective remedy. The Equator Principles, IFC Performance Standards, and OECD Guidelines on MNEs were all updated after the adoption of the UN Guiding Principles on Business and Human Rights (UNGPs) in 2011, and include references to companies or clients' responsibilities to respect human rights and ensure access to remedy throughout their supply chains. Two important principles in the UNGPs that, if properly implemented, would go

## Box 1: Downplaying and offloading risks

Excerpt from Trandem, A. (2019). *Offloading Risks & Avoiding Liabilities: How Financial Institutions Consider Hydropower Risks in Laos*. (Bangkok: Focus on the Global South).

“Risk assessments, as currently carried out by hydropower investors and lenders, often provide a misleading picture of risks involved in dam building. There are a wide range of reasons why risk assessments are rarely accurate. Firstly, the upfront costs required to develop a project proposal, including its feasibility study and impact assessment are lost if a project is not approved. Secondly, hoping to get a project approved can serve as an incentive for an investor to exaggerate the projected benefits, while downplaying the risks. Finally, without strong independent regulatory systems in place to ensure accurate planning and accountability from investors and lenders, many unidentified and longer-term risks are simply ignored and transferred onto the public sector...

“Risks are downplayed in part because few investors and lenders really integrate comprehensive environmental, social, and governance (ESG) factors into their investment practices. And when they do, the ESG considerations may take second place to economic and strategic rationales...

“Investors and lenders, instead, often rely on environmental and social impact assessments (ESIA) to understand the risks of a dam to the environment and local population. Too often, the quality of ESIA reports is poor and many environmental and social risks are ignored. Civil society has raised concerns over many ESIA reports in Laos as simply ‘rubber-stamping’ approval of the dam. The ESIA reports, when made public, fail to achieve accurate analyses or meet international standards. Peter King, an expert on ESIA in the Mekong region who heads the Asian Environmental Compliance and Enforcement Network secretariat, stated ‘Despite generally sound laws, the EIA in the region is seen more as an administrative requirement than an excellent tool to improve project design. In general, across the region, public participation in EIA procedures is encouraged but not mandated, grievance mechanisms are often lacking and public access to EIA reports is poor.’...<sup>25</sup>

“Another obstacle to fully understanding a dam’s impacts is that meaningful consultations with affected communities are rarely held. Furthermore, when indigenous people are consulted, their rights to Free, Prior and Informed Consent (FPIC) are not respected. ESIA reports also rarely consider trans-boundary impacts and the cumulative impacts of multiple dams being built in the same basin. Other important risks are rarely considered in ESIA, including: climate change; seismic risks; debt distress and future payment challenges; growing social inequality; alternative energy options; and whether the risks inherent to the project undermine people’s rights and the country’s development goals.”

25. The Economist Intelligence Unit (2017). *Water Security Threats Demand New Collaborations: Lessons from the Mekong River Basin*. (London: The Economist Intelligence Unit), p. 16. Available at: <https://ecaccoalition.org/en/resources/water-security-threats-demand-new-collaborations-lessons-mekong-river-basin>

26. Danish Institute for Human Rights (2019). *UN Guiding Principle 18*. Available at: <https://globalnaps.org/ungp/guiding-principle-18/>

27. UN Working Group on Business and Human Rights (2017). *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/218/65/PDF/N1721865.pdf?OpenElement>

28. BankTrack (2017, December). *Human Rights Briefing Paper: How Banks Contribute to Human Rights Violations*. Available at: [https://www.banktrack.org/download/how\\_banks\\_contribute\\_to\\_human\\_rights\\_abuses/180416\\_how\\_banks\\_contribute\\_human\\_rights\\_1.pdf](https://www.banktrack.org/download/how_banks_contribute_to_human_rights_abuses/180416_how_banks_contribute_human_rights_1.pdf)

a long way in lessening social and environmental impacts from hydropower projects are *meaningful consultation* and *access to remedy*.

## Meaningful Consultation

Although companies routinely conduct various forms of stakeholder engagement, numerous grievances of affected villagers from past hydropower construction projects in the Mekong region attest to the fact that few project companies paid attention to whether their engagement is *meaningful*. Principle 18 of the UNGPs advises businesses to “involve *meaningful consultation* with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation” (italics added). For engagement to be meaningful, the guideline advises businesses to “seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement. In situations where such consultation is not possible, business enterprises should consider reasonable alternatives such as consulting credible, independent expert resources, including human rights defenders and others from civil society.”<sup>26</sup>

## Access to Remedy

Principle 22 of the UNGPs provides that where “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.” In a 2017 report to the UN General Assembly, the UN Working Group on Business and Human Rights further clarifies that “as part of their responsibility to respect human rights, business enterprises

should, in good faith, not only participate in all such legitimate processes, but also comply with their remedial decisions. Attempts to limit the scope of existing remedies or targeting affected communities with strategic lawsuits against public participation may also be regarded as inconsistent with the responsibility to “cooperate” with legitimate processes aimed at obtaining effective remedies.”<sup>27</sup>

There are also various hydropower-specific standards and tools, which can help banks better understand and manage risks related to hydropower. These include, for example:

◆ **The World Commission on Dams (WCD)**, which developed a decision-making framework based on recognition of rights and assessment of risks. WCD put forward seven strategic priorities based on a set of policy principles, and 26 guidelines for good practice that lay out actions to comply with the strategic priorities.

◆ **The Hydropower Sustainability Assessment Protocol (HSAP)**, which is an industry-led auditing tool to assess and improve sustainability of individual hydropower projects. It measures sustainability performance of hydropower projects at different stages across more than twenty topics.

◆ **The Rapid Basin-wide Sustainability Assessment Tool (RSAT)** is a multi-stakeholder dialogue and assessment tool to examine hydropower sustainability issues in a river basin context. Initial developed by MRC with ADB and WWF, it has been piloted in various river basins in the Mekong region.

Commitments to and endorsement of international standards and guidelines, however, does not guarantee compliance, as evidenced by documentation of harmful projects financed by banks, including signatories to the Equator Principles.<sup>28</sup>



**Table 1: Select international initiatives, standards and guidelines covering ESG risk management in the financial sector**

Initiatives Standards, Guidelines	Description
<b>UN Environmental Program (UNEP) Finance Initiative (FI)</b> <sup>[1]</sup>	Launched in 1992, UNEP FI is a global partnership between United Nations Environment Program and the financial sector to promote sustainable finance. Over 250 institutions, including banks, insurers and fund managers, work with UNEP to understand the impacts of environmental and social considerations on financial performance.
<b>Equator Principles (EP)</b> <sup>[2]</sup>	<p>A risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in projects. The EP reference the IFC's Environmental and Social Performance Standards and aim to provide a minimum standard for due diligence and monitoring to support responsible decision-making.</p> <p>Currently 97 financial institutions have officially adopted EP. Current version — EP3 — was adopted in 2013, but following a review, EP4 was adopted in November 2019 and will be effective from July 2020.</p>
<b>IFC Environmental and Social Performance Standards</b> <sup>[3]</sup>	The Performance Standards (PS) apply to clients of the International Finance Corporation (companies that have secured IFC financing for a project). The eight standards establish responsibilities that client must meet 'throughout the life of an investment'. The current version of PS (2012) are supported by Guidance Notes, which provide further guidance on PS requirements. <sup>[4]</sup>
<b>UN Principles for Responsible Banking (PRB)</b> <sup>[5]</sup>	Launched in September 2019, PRB outlines six principles under which adopting banks commit to aligning "business strategy to be consistent with and contribute to individuals' needs and society's goals, as expressed in the Sustainable Development Goals, the Paris Climate Agreement and relevant national and regional frameworks." <sup>[6]</sup>
<b>UN Principles on Responsible Investment (UNPRI)</b> <sup>[7]</sup>	Developed by a group of international institutional investors, the UNPRI sits alongside UN Global Compact. Launched in 2006, UNPRI assists investors to better incorporate Environmental, Social and Governance (ESG) issues into investment practices. UNPRI see that ESG issues impact investment portfolios over time, so they must be incorporated in order for investors' fiduciary responsibilities to be met.
<b>UN Guiding Principles on Business and Human Rights (UNGPs)</b> <sup>[8]</sup>	<p>The leading global framework for business and human rights, endorsed by the UN Human Rights Council in 2011, is based on three pillars: 'Protect, Respect, Remedy'. These refer to the duty of states to protect human rights from abuses by third parties, including companies; companies must respect human rights; and ensuring access to effective remedy when human rights have been violated.</p> <p>The UNGPs apply to all companies, including state-owned and commercial banks and other entities in the financial sector. To avoid and address adverse human rights impacts, banks should develop a human rights policy; undertake due diligence to assess actual and potential human rights impacts; and ensure remedy for impacts that they have caused or contributed to.<sup>[9]</sup> The Office of the High Commissioner on Human Rights has issued guidance on the application of the UNGPs to the banking sector.<sup>[10]</sup></p> <p>The UNGPs have been incorporated in updates to the Equator Principles, IFC Performance Standards, and the OECD Guidelines on Multinational Enterprises.</p>
<b>OECD Guidelines for Multinational Enterprises (MNEs) 2011 Update</b> <sup>[11]</sup>	<p>Guidelines apply to governments and MNEs, including banks, in all 36 OECD countries and 12 non-OECD countries (that have agreed to adhere to them). They are binding on governments but non-binding on MNEs. Complaints relating to breaches of the Guidelines can be made to National Contact Points (NCP), which are created by all adhering states.</p> <p>The OECD has developed further guidance on how the OECD Guidelines apply to the financial sector. In 2017, OECD released a "Responsible Business Conduct for Institutional Investors" guide.<sup>[12]</sup> In October 2019, the OECD published "Due Diligence for Responsible Corporate Lending and Securities Underwriting", which aims to provide a common global framework for financial institutions to identify, respond to and publically communicate on environmental and social risks associated with their clients.<sup>[13]</sup></p>
<b>Task Force on Climate-related Financial disclosure</b> <sup>[14]</sup>	An industry-led initiative established in 2015 to develop voluntary, consistent climate-related financial risk disclosures for use by companies, banks, and investors in providing information to stakeholders.

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- [3] Available at: [https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS\\_English\\_2012\\_Full-Documents.pdf?MOD=AJPERES&CVID=jKv-X6h](https://www.ifc.org/wps/wcm/connect/24e6bfc3-5de3-444d-be9b-226188c95454/PS_English_2012_Full-Documents.pdf?MOD=AJPERES&CVID=jKv-X6h)
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- [5] See: <https://www.unepfi.org/banking/bankingprinciples/>
- [6] UNEP Finance Initiative (2019). Principles for Responsible Banking. Available at: <https://www.unepfi.org/wordpress/wp-content/uploads/2019/07/FINAL-PRB-Signature-Documents-2-Interactive-22-07-19.pdf>
- [7] See: <https://www.unpri.org/pri>
- [8] Available at: [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)
- [9] UNEP FI and Foley Hoag LLP (2015, December). *Banks and Human Rights: A Legal Analysis*. (Geneva: UNEP FI). Available at: <https://www.unepfi.org/fileadmin/documents/BanksandHumanRights.pdf>. Also see: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>
- [10] OHCHR, Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector. Available at: <https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>
- [11] Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf>
- [12] Trandem, A. (2019). *Offloading Risks & Avoiding Liabilities: How Financial Institutions Consider Hydropower Risks in Laos*, p. 17.
- [13] Available at: <https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf>
- [14] See: <https://www.fsb-tcfd.org>

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32. Siam Commercial Bank (n.d.). Human Rights Policy. Available at: <https://www.scb.co.th/content/dam/scb/about-us/sustainability/documents/15june2018/en-human-rights-policy.pdf>

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## Thai Lenders' Commitments and Responsibilities

On 13 August 2019, the Thai Bankers' Association (TBA) issued "Sustainable Banking Guidelines: Responsible Lending by Thai Bankers' Association", which defines "minimum expectations on responsible lending practices for all banks based in Thailand" and provides guidance for banks "to establish a responsible lending strategy to manage their environmental and social (E&S) risks and impacts."<sup>29</sup> The guidelines identify four "foundational elements" which should inform banks' responsible lending strategy and practices. These include:

1. **Leadership and responsible lending commitment**, which notes that commitments by senior leadership of banks can be "powerful signals to internal and external stakeholders on banks' commitments to responsible lending."
2. **Stakeholder engagement**, which recognises that effective and broad engagement with a range of stakeholders is important to determining ESG risks and assessing potential adverse impacts of lending activities.
3. **Internal implementation mechanisms**, which outline not only the importance of establishing policies and processes, but also resourcing and building capacity of senior management and staff on ESG issues and risks and sustainability.
4. **Transparency**, which encourage banks to publicly disclose how they are implementing responsible lending guidelines.

While the TBA's Sustainable Banking Guidelines are a welcome development, there is significant room for improvement to ensure that Thai banks more

meaningfully implement sustainable and responsible lending policies and practices. Currently, the guidelines read like a list of high-level principles and aspirations. There is no substantive guidance nor concrete timebound commitments and actions, indicating when and how banks will translate the guidelines into practice. While the annex includes references to international frameworks, standards and guidelines, such as the Sustainable Development Goals and the Paris Climate Agreement, there is no reference to more substantive standards and guidelines.

Moreover, the guidelines make no reference to human rights, grievance mechanisms and remediation measures. This is a major gap, particularly in light of Thai Cabinet resolutions issued in 2016 and 2017, which made clear that Thai companies operating abroad are expected to adhere to international standards, including the UN Guiding Principles and Business and Human Rights (UNGPs).<sup>30</sup> The Thai Government recently adopted the National Action Plan on Business and Human Rights, which includes cross-border investments and multinational enterprises as one of the four priority areas.<sup>31</sup> Two TBA members – Siam Commercial Bank<sup>32</sup> and Kasikornbank<sup>33</sup> – have also issued human rights policies, which articulate a commitment to adhere to international standards, including the UNGPs. Whether this will translate into concrete implementation of their human rights commitments remains to be seen. Given that one the four foundational elements in the TBA guidelines include strengthening internal implementation mechanisms, Thai Bankers Association and its members should develop further guidance on support capacity building on how Thai banks can strengthen compliance with the UNGPs.

While important, Thai banks' adoption of the TBA Sustainable Banking Guidelines does not guarantee compliance. Major Thai banks have long articulated commitments to corporate governance, social responsibility and environmental sustainability. While commitments vary between banks, these have included: "fair treatment of stakeholders, including customers, investors, business partners, and wider society and the environment; compliance with relevant

laws; transparency and information disclosure; and environmental conservation and support for local communities."<sup>34</sup> Despite these long-standing commitments, as the hydropower case studies in the following section demonstrate, Thai banks have continued to finance large-scale dams without due consideration of environmental, social and human rights impacts (see Tables 2 and 3).

34. Middleton, C. (2009). *Thailand's Commercial Banks' Role in Financing Dams in Laos and the Case for Sustainable Banking*, p. 2. Available at: [https://www.internationalrivers.org/sites/default/files/attached-files/sustainablethaibanks\\_ir\\_dec09.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/sustainablethaibanks_ir_dec09.pdf)

## Box 2: Fair Finance Thailand's Policy Assessment of Thai Banks<sup>35</sup>

Fair Finance Thailand (FFT), a coalition of NGOs advocating for Thai banks to more meaningfully adopt and implement sustainable and responsible lending policies and practices in line with international frameworks and standards, assessed publicly disclosed policies of the nine largest Thai commercial banks: Bangkok Bank, Siam Commercial Bank, Krungthai Bank, Kasikorn Bank, Bank of Ayudhya, Thanachart Bank, Thai Military Bank, TISCO Bank, and Kiatnakin Bank.

Conducted according to Fair Finance Guide International (FFGI) criteria, the policy assessment assessed 12 topics: climate change, corruption, gender equality, human rights, labour rights, nature, weapons, tax, consumer protection, financial inclusion, remuneration, and transparency and accountability.

Overall, the FFT policy assessment revealed that Thai banks' scores are the lowest among 10 countries where assessments have been undertaken using FFGI criteria.<sup>36</sup> Thai banks received an average score of 12.6%, while the average score of the other nine countries (which include Belgium, Brazil, France, Germany, Indonesia, Japan, Netherlands, Norway and Sweden) is 46.7%. Thai banks' low scores clearly demonstrate there is significant room for improvement, especially on ensuring that lending policies take into account human rights, gender equality, as well as negative social and environmental impacts – criteria for which they scored particularly low.

35. Fair Finance Guide International (2019, April 24). Launch Fair Finance Thailand. Available at: <https://fairfinanceguide.org/ffg-international/news/2019/launch-fair-finance-thailand/>

36. FFGI methodology (2018). For policy assessments is available at: <https://fairfinanceguide.org/media/494198/2017-71-ffgi-policy-assessment-2018-methodology-180308-edits-180528.pdf>

**Table 2: List of Lao dams financed by Thai Banks**

Lender	Project value (USD million)	Loan value (USD million)	Financing closing date	Operation date	EXIM	BBL	KTB	SCB	TMB	SCIB	BAY	KBANK	TBANK	TISCO	International bank(s)
Before 21 <sup>st</sup> Century															
Theun Hinboun Power Co.Ltd. <sup>[1]</sup>	260	N/A	N/A	1998											×
Houay Ho Power Co.Ltd. <sup>[2]</sup>	220–250	N/A	N/A	1999	×										
21 <sup>st</sup> Century onwards															
Nam Theun 2 Power Co.Ltd. <sup>[3]</sup>	1,581	920	May 2005	2010	×	×	×	×	×	×	×	×			×
Nam Ngum 2 Power Co.Ltd. <sup>[4]</sup>	832	N/A	May 2006	2011			×		×	×					
Theun Hinboun Power Co.Ltd. – Expansion <sup>[5]</sup>	586	N/A	October 2008	2012	×					×	×	×			×
Xayaburi Power Co.Ltd. <sup>[6]</sup>	3,800	N/A	N/A	2019	×	×	×	×				×		×	
Xe-pian Xe-Namnoy Power Co.Ltd. <sup>[7]</sup>	1,200	738	N/A	2019	×		×				×		×		
Nam Ngiep 1 Power Co.Ltd. <sup>[8]</sup>	977	643	N/A	2019	×	×		×				×			×
Nam Theun 1 Power Company (NTIPC) <sup>[9]</sup>	US\$934.5 million	N/A	N/A	2022	×	×		×						×	

**Data sources:**

- [1] Shoemaker, B. (2000). Theun-Hinboun Update: A Review of the Theun-Hinboun Power Company's Mitigation and Compensation Program. Available at: [https://www.internationalrivers.org/sites/default/files/attached-files/theun\\_hinboun\\_update.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/theun_hinboun_update.pdf)
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- [3] BankTrack (2014). Nam Theun 2 Financing Launched. Available at: [https://www.banktrack.org/download/nam\\_theun\\_2\\_financing\\_launched/040301\\_nt2\\_financing\\_launched\\_press\\_release\\_ntpc.pdf](https://www.banktrack.org/download/nam_theun_2_financing_launched/040301_nt2_financing_launched_press_release_ntpc.pdf)
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- [5] Ibid.
- [6] BankTrack (2019). Xayaburi Dam: Financiers. Available at: [https://www.banktrack.org/project/xayaburi\\_dam#popover=financiers](https://www.banktrack.org/project/xayaburi_dam#popover=financiers)
- [7] Xe Pian Xe Namnoy Hydroelectric Power Project (2019). Available at: <https://www.power-technology.com/projects/xe-pian-xe-namnoy-hydroelectric-power-project/>
- [8] Nam Ngiep 1 (2014). Nam Ngiep 1 Hydroelectric Power Project. Available at: <https://www.power-technology.com/projects/nam-ngiep-1-hydroelectric-power-project/> and Greater Mekong Subregion Economic Cooperation Program (2018). Annex to the Regional Investment Framework 2022: First Progress Report and Update. (Metro Manila, Philippines: GMS SECRETARIAT). Available at: <https://www.greatermekong.org/sites/default/files/Annex%20to%20the%20RIF%202022:%20First%20Progress%20Report%20and%20Update.pdf>
- [9] Hydropower and Dams (2018, May 22). Nam Theun 1 Achieves Financial Closure. Hydropower and Dams. Available at: <https://www.hydropower-dams.com/news/nam-theun-1-achieves-financial-closure/>



**Table 3: Social and environmental impact context for Thai banks lending to hydropower sector**

	Social and environmental Impacts
Theun Hinboun Power Co. Ltd. <sup>[1]</sup>	<ul style="list-style-type: none"> <li>- About 30,000 villagers lost fisheries, rice fields, gardens due to fluctuating water levels and rapid erosion.</li> <li>- Loss of drinking water as a result of the project.</li> <li>- Adequate compensation not provided.</li> <li>- Populations of fish and other aquatic species declined.</li> </ul>
Houay Ho Power Co. Ltd. <sup>[2]</sup>	<ul style="list-style-type: none"> <li>- Resettled about 2,500 mainly ethnic minorities to area with insufficient agricultural land and affected others downstream.</li> <li>- Adequate compensation not provided</li> </ul>
Nam Theun 2 Power Co. Ltd. <sup>[3]</sup>	<ul style="list-style-type: none"> <li>- Approximately 6,200 indigenous people have been forcibly displaced.</li> <li>- More than 110,000 people downstream have been directly affected by the project, due to destruction of fisheries, flooding of riverbank gardens and water quality problems.</li> </ul>
Nam Ngum 2 Power Co. Ltd. <sup>[4]</sup>	<ul style="list-style-type: none"> <li>- Nam Ngum 2 dam displaced over 6,000 ethnic minorities</li> <li>- 9,000 directly affected by reduced fish stock.</li> </ul>
Theun Hinboun Power Co. Ltd. - Expansion <sup>[5]</sup>	<ul style="list-style-type: none"> <li>- Over 7,500 people have been displaced.</li> <li>- Serious impacts on the lives and livelihoods of around 30,000 people.</li> <li>- Extra erosion, sedimentation and aggravated flooding.</li> <li>- Risks to fish stocks downstream.</li> </ul>
Xayaburi Power Co. Ltd. <sup>[6]</sup>	<ul style="list-style-type: none"> <li>- Around 2,100 people resettled for the project.</li> <li>- More than 202,000 people living near the dam will suffer impacts to their livelihoods, income and food security.</li> <li>- Threats to aquatic biodiversity and fisheries productivity</li> <li>- Transboundary impacts.</li> </ul>
Xe-Pian Xe-Namnoy Power Co. Ltd. <sup>[7]</sup>	<ul style="list-style-type: none"> <li>- 71 dead or missing, and more than 7,000 are displaced due to the dam collapse.</li> <li>- 15,000 people affected by dam impacts in downstream Cambodia.</li> <li>- Affected have yet to receive adequate compensation for their losses.</li> </ul>
Nam Ngum 3 Power Co. Ltd. <sup>[8]</sup>	<ul style="list-style-type: none"> <li>- Resettlement of 523 people within their village territory.</li> <li>- Project will affect at least 2,455 people downstream and unknown numbers upstream.</li> </ul>
Nam Ngiep 1 Power Co. Ltd. <sup>[9]</sup>	<ul style="list-style-type: none"> <li>- More than 3000 people, who are primarily Hmong and Khmu, are being resettled for the project.</li> </ul>
Nam Thuen 1 Power Company (NTIPC) <sup>[10]</sup>	<ul style="list-style-type: none"> <li>- Resettlement of 3,700 mainly ethnic minorities</li> <li>- Significant fisheries impacts affecting at least 32,000 people upstream and downstream</li> <li>- Decreased agricultural productivity due to loss of sediments and nutrients</li> </ul>

**Sources:**

- [1] Source: [https://www.banktrack.org/download/thhp\\_and\\_thxp\\_downstream\\_impacts\\_report\\_2014.pdf/thhp\\_and\\_thxp\\_downstream\\_impacts\\_report\\_2014.pdf](https://www.banktrack.org/download/thhp_and_thxp_downstream_impacts_report_2014.pdf/thhp_and_thxp_downstream_impacts_report_2014.pdf)
- [2] Source: [https://www.internationalrivers.org/sites/default/files/attached-files/intl\\_rivers\\_power\\_surge.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/intl_rivers_power_surge.pdf)
- [3] Source: <https://www.internationalrivers.org/resources/report-1-nam-theun-2-world-bank-withdrawal-leaves-major-concerns-over-project-outcomes>
- [4] Source: <https://ejatlas.org/conflict/nam-ngum-2-dam-displaced-over-6000-ethnic-minorities-in-vientiane-lao-pdr>
- [5] Source: [https://www.banktrack.org/project/theun\\_hinboun\\_dam\\_expansion/pdf](https://www.banktrack.org/project/theun_hinboun_dam_expansion/pdf)
- [6] Source: <https://www.internationalrivers.org/resources/the-xayaburi-dam-threat-ening-food-security-in-the-mekong-7675>
- [7] Source: <https://www.inclusivedevelopment.net/campaign/laos-xe-pian-xe-namnoy-dam-collapse/>
- [8] Source: [https://www.internationalrivers.org/sites/default/files/attached-files/intl\\_rivers\\_power\\_surge.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/intl_rivers_power_surge.pdf)
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- [10] Source: <https://www.hydropower-dams.com/news/nam-theun-1-achieves-financial-closure/>



Figure 1: Xayaburi project as of 31 October, 2019.

Source: <https://theaseanpost.com/article/does-laos-xayaburi-dam-benefit-its-people>

## Thai Banks and Hydropower: Case Studies of Xayaburi and Xe Pian-Xe Namnoy Dams

37. Extra-Territorial Obligations (ETOs Watch) (2018). *Report on Thai direct investment abroad: impacts on communities, environment, and human rights*. Available at: <http://www.nhrc.or.th/getattachment/eeb6c10c-8870-4593-98c6-fd670a63ad1e/.aspx>

This section examines the risks and impacts of two controversial hydropower projects in Laos financed by Thai banks – Xayaburi dam on the Mekong

mainstream, and Xe Pian-Xe Namnoy hydropower project in the Sekong Basin in southern Laos.

### Xayaburi dam

#### Overview

The 1285-megawatt Xayaburi dam was the first dam to begin construction on the Lower Mekong mainstream. While located in northern Laos, it is largely a Thai project. The developer, Xayaburi Power Company Limited, is majority-owned by a consortium of Thai companies led by CK Power Public Company Limited, a subsidiary of Ch. Karnchang, a major Thai construction company. Thailand's

state-owned electricity utility, EGAT, will purchase 95% of the dam's electricity. The project received an 80 billion Baht (USD 2.6 billion) syndicated loan from six Thai banks: Siam Commercial Bank (SCB), Bangkok Bank (BBL), Krung Thai Bank (KTB), Kasikornbank (KBank), TISCO Bank and the Export-Import Bank of Thailand, the government's export credit agency.<sup>37</sup>

As a Lower Mekong mainstream dam, Xayaburi was also the first project to undergo the Mekong River Commission's (MRC) Prior Consultation process, which is required under the MRC's Procedures for Notification, Prior Consultation and Agreement (PNPCA).<sup>38</sup> During the Xayaburi Prior Consultation process, which commenced in October 2010, many stakeholders, including MRC member governments, raised concerns over the project and questioned the adequacy of the data and studies used to inform decision-making about the project's impacts and whether it should be built. Despite the fact that the Prior Consultation process was not formally concluded due to lack of agreement among MRC member countries, the project proceeded and started full operations in October 2019.

### Inadequate ESIA increases project costs

From the outset, the Xayaburi dam was a highly controversial project due to widespread concerns over its expected impacts on the river system, including transboundary impacts on neighbouring countries within the basin. Yet, the project's environmental impact assessment (EIA), completed in 2010, only assessed potential impacts in the areas to be flooded for the reservoir and up to ten kilometres downstream.<sup>39</sup> Furthermore, while the EIA was submitted to the MRC technical review teams as part of Prior Consultation process, it was not publicly disclosed for the consultation workshops.

The poor quality of the EIA and project documents is evident in MRC's Technical Review Report (TRR), which found multiple gaps and flaws, noting that the "dam design as well as management and mitigation measures as proposed in submitted documents do not yet comply with the PDG [Preliminary Design Guidance] or international best practice."<sup>40</sup> The TRR made a series of recommendations, including the need

for further data and studies. MRC member countries also expressed concerns with Vietnam, calling for Xayaburi to be suspended and a ten-year moratorium on all mainstream dams, pending further studies to better understand the river system and the impacts of proposed dam projects.<sup>41</sup>

Despite the disagreement amongst MRC member countries, the Government of Laos (GoL) pushed ahead with development of Xayaburi, with the project developers announcing a redesign of the dam and additional investment in impact mitigation measures to address concerns, which has reportedly amounted to USD\$400 million.<sup>42</sup>

### Xayaburi redesign: Expensive but questionable effectiveness.<sup>43</sup>

Serious questions and concerns remain on the extent to which the redesign measures will effectively reduce and mitigate the environmental and social impacts of the dam. In January 2019, the MRC published a 'Review of Design Changes Made for the Xayaburi Hydropower Project',<sup>44</sup> which assessed the submitted information against the findings and recommendations of the Xayaburi Technical Review Report (TRR).<sup>45</sup>

The MRC Review finds a number of shortcomings in the redesign information, both in terms of the adequacy of the mitigation measures themselves, as well as the comprehensiveness of the data provided to the review team in order to assess such adequacy. A particular concern expressed throughout the MRC Review findings is that, without information on the operational rules of the dam, it is not possible to assess the adequacy of the redesign measures.

In relation to the effectiveness of the fish pass, the MRC Review notes that nowhere in the world have these measures been tested or monitored. Xayaburi is thus in effect being used as an

38. Mekong River Commission (2010, December 15–2011, April 22). Xayaburi Hydropower Project Prior Consultation Process. Available at: <http://www.mrcmekong.org/topics/pnpca-prior-consultation/xayaburi-hydropower-project-prior-consultation-process/>

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40. Mekong River Commission (2011). *Proposed Xayaburi Dam Project: MRC Prior Consultation Project Review Report*, p. 70. Available at: <http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xayaburi-24-3-11.pdf>

41. Viet Nam National Mekong Committee (2011). *Form for Reply for Prior Consultation: Xayaburi Hydropower Project*. Available at: <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Viet-Nam-Reply-Form.pdf>

42. Mekong River Commission (2016, December). *Procedures for Notification, Prior Consultation and Agreement (PNPCA) Brochure*, p. 7. Available at: <http://www.mrcmekong.org/assets/Publications/PNPCA-brochure-11th-design-final.pdf>

43. This section is largely excerpted from *Expert Commentary on the "Review of the Design Changes Made for Xayaburi Dam"* published by International Rivers in October 2019. Available at: <https://www.internationalrivers.org/sites/default/files/attached-files/xayaburi-redesign-commentary-for-website.pdf>

44. Mekong River Commission (2019). *Review of the Design Changes Made for Xayaburi Hydropower Project*. Technical Reference Paper no. 65 (January). Available at: <http://www.mrcmekong.org/assets/Publications/Review-of-the-design-change-made-for-Xayaburi-hydropower-project-technical-ref-paper-2019.pdf>

45. Mekong River Commission (2011). *Proposed Xayaburi Dam Project: MRC Prior Consultation Project Review Report*.



Figure 2: Location of Xayaburi and other hydropower projects in Mekong River.  
Source: The Stimson Center, 2019.



experimental test case, which contravenes the fifth and final recommendation of the 2010 MRC-initiated Strategic Environmental Assessment of Hydropower on the Mekong Mainstream, which states that that: “The Mekong mainstream should never be used as a test case for proving and improving full dam hydropower technologies.”<sup>46</sup>

There are also serious concerns over sediment, with major and unexplained discrepancies between MRC and project developer’s estimates on sediment composition. This discrepancy suggests a significant scientific disagreement that has an important bearing on Xayaburi and other mainstream dams’ capacity to trap/release sediment, which in turn have major implications for the delivery of sediment to the Mekong Delta.

The USD\$ 400 million spent on the redesign have often been mentioned, but there is nothing in the documents provided that breaks down how these funds have been applied to the various components of fish passage, sediment passage, navigation and other aspects of the project’s redesign. Spending a lot of money does not guarantee effectiveness.

There is an on-going risk that the project may need to invest more to address social and environmental impacts from the dam, thereby increasing costs and potentially reducing profits, which in turn may impact on their capacity to repay loans.

## Not a Transparent dam

Xayaburi dam has been plagued by a lack of transparency, with the developer and the Government of Laos either withholding or delaying public disclosure of key project documents throughout the process. As mentioned above despite the EIA being completed in February 2010 and Lao hydropower policies requiring disclosure of EIAs, the EIA was not made publicly available during the

Xayaburi Prior Consultation Process, further constraining opportunities for meaningful public participation.<sup>47</sup>

Furthermore, despite multiple requests from stakeholders over a number of years, key documents and information relating to the redesign were not made publicly available. The Lao Government’s 2015 Policy on Sustainable Hydropower Development (PSHD) and the 2016 Implementation Guidelines also require project developers to disclose gross project revenues and spending on environmental and social safeguards.<sup>48</sup> However, there is little to no information on the Xayaburi Power Company Limited’s website on what and how much the company has spent on environmental and social safeguards.<sup>49</sup>

## Climate change and uncertainty: Potential impacts on future power generation and income

During June to July 2019, water levels along the Mekong River were among the lowest ever recorded<sup>50</sup> due to a combination of extended drought and China’s Jinghong dam located upstream reducing the amount of water released. Climate change is making weather patterns more unpredictable, which has significant implications for Mekong River flows and levels. Flows into Xayaburi reservoir, and hence electricity generation, will be influenced by climate change and operations of existing and planned dams upstream. Future extended droughts combined with upstream dams withholding water will reduce the amount of electricity that Xayaburi dam can generate, which in turn can impact on revenue. As a so-called run-of-river dam, Xayaburi dam is particularly susceptible to reductions in flows, as the dam has less capacity to store water for long periods than large-storage dams. If power generation falls below targets set out in the Power Purchase Agreement (PPA), the company may face penalties, which would further erode profits.

46. International Centre for Environmental Management (2010). *Strategic Environmental Assessment of Hydropower in the Mainstream*, p. 24.

47. The 2005 National Policy: Environmental and Social Sustainability of the Hydropower Sector in Lao PDR is applicable at time the Xayaburi EIA was conducted and completed. The 2005 Policy was replaced in 2015 by Policy on Sustainable Hydropower Development in Lao PDR (PSHD). Both policies require disclosure of EIAs.

48. Government of Laos, Policy on Sustainable Hydropower Development in Lao PDR (PSHD), 2015; and the 2016 Policy Guidelines for the Implementation of Policy on Sustainable Hydropower in Lao PDR (see 5.10 Information Disclosure, p. 13).

49. Available at: [http://www.xayaburi.com/index\\_eng.aspx](http://www.xayaburi.com/index_eng.aspx)

50. Mekong River Commission (2019, July 18). Mekong water levels reach low record, Media Release. Available at: <http://www.mrcmekong.org/news-and-events/news/mekong-water-levels-reach-low-record/>



Figure 3: A screen grab from an aerial video showing dry patches along the Mekong river downstream from the Xayaburi Dam. Source: AFP

51. International Rivers (2016, January 25). Media Kit on Xayaburi Dam Lawsuit. Available at: <https://www.internationalrivers.org/resources/9230>

52. Harris, M. (2019). Our River, Our Rights: Extraterritorial Accountability in the Mekong. In M. Mullen et al (eds.), *Navigating a New Era in Business and Human rights* (n.p.: Article 30 and Institute of Human Rights and Peace Studies, Mahidol University), pp. 125-132. Available at: [https://article30.org/wp-content/uploads/2019/08/a\\_new\\_era.pdf](https://article30.org/wp-content/uploads/2019/08/a_new_era.pdf)

53. Supreme Administrative Court of Thailand, Judgement No. KS8/2557, June 24, 2014.

54. Bangkok Biznews (2019, July 26). Mekong Villagers Asked Court for Injunction to Suspend Electricity Purchase from Xayaburi. *Bangkok Biznews* Available at: <https://www.bangkokbiznews.com/news/detail/841902>

## Legal risks: Xayaburi PPA still in the courts

As of August 2019, a lawsuit filed by 37 villagers against five Thai state agencies regarding the legality of the Xayaburi dam's PPA, is still pending. Filed in August 2012, the plaintiffs argued that the approval of the PPA is illegal under the Thai Constitution and the 1995 Mekong Agreement because it was approved without assessing the project's transboundary environmental and social impacts and without consultations in Thailand, as required under the Thai Constitution.<sup>51</sup>

While dismissed by lower courts on jurisdictional grounds, the Thai Supreme Court accepted the lawsuit on appeal in 2014.<sup>52</sup> The acceptance not only confirmed that Thai state agencies had responsibilities for project impacts, despite its location in Laos, but also pointed to the likelihood of transboundary impacts:

*"It is widely known that the project may cause impacts to the environment, water quality and quantity, the flow of water, ecological balances of the Mekong basin and other transboundary impacts in riparian countries, particularly local communities in the eight riparian provinces of the Kingdom of Thailand, which may bear extensive impacts on environmental quality, public health, sanitation, livelihoods, or community interests."*<sup>53</sup>

More recently, in July 2019, the plaintiffs filed for an injunction to suspend the PPA until measures to mitigate environmental impacts are released.<sup>54</sup> The application for an injunction followed Xayaburi dam's testing of its turbine during the extended drought period, which exacerbated impacts on downstream communities in Thailand who were already suffering from record-low water levels. Concerned over the impacts on drought-affected provinces in northeast Thailand, on 19 July 2019, Thailand's Office of National

Water Resources submitted an official letter requesting the Lao government to suspend the testing of turbines.<sup>55</sup>

While the court case continues, there remains a risk that the PPA may be cancelled or delayed if the court rules in favour of the plaintiffs. If so, this could have major consequences for the project's financial viability

### Thai Banks and Xayaburi: Responsible and Sustainable?

Comments by senior leadership of Thai Banks that financed Xayaburi dam (see Box 3), demonstrate there is a long way to go to translate their responsible and sustainable lending commitments into practice. However, recently there has been some encouraging trends, as some senior bankers admitted to needing to develop sector-specific guidelines, i.e. looking beyond the lens of legal compliance, to promote more responsible lending in the future.

The comments indicate inadequate due diligence by the banks on environmental and social risks and impacts prior to agreeing to finance the project. Engaging external experts to inform due diligence is important. However, TISCO Bank's CEO comments indicates that they relied primarily on the reports by consultants commissioned by the developers and Lao Government, who wanted to see the project proceed, and ignored other expert and independent analysis and studies. Only relying on project-commissioned EIA and studies for large hydropower projects is insufficient to comprehensively assess environmental and social risks in Laos, where "there is a lack of institutional capacity to plan, regulate and monitor implementation of EIA."<sup>56</sup>

It would not have taken much effort for the Thai banks to be made aware of major and widespread concerns about the project, including significant gaps

and flaws in project risk and impact assessments, most of which were publicly available prior to the banks' decisions to finance Xayaburi dam. As noted above, the MRC Technical Review Report, clearly states that project design, management and mitigation measures to do not meet MRC guidelines or international best practice.

Comments also indicate that the banks made little to no effort to engage stakeholders in Thailand, let alone in the region, prior to making their decision to support the project. Furthermore, despite commitments to transparency, most of the Thai banks have yet to publicly disclose their contribution to syndicate loan, nor the terms and conditions for loan agreement, including to what extent, if any, conditions related to environmental and social risks and impacts and monitoring were included.

It is clear that the banks' primary focus is on the financial returns and project's ability to repay loans, neglecting environmental and social concerns. Here, EGAT's decision to sign a PPA to buy 95% of Xayaburi's electricity for 29 years was a key factor in closing the deal, despite ongoing questions by independent analysts and civil society over Thailand's need for the electricity.<sup>57</sup>

Kasikorn bank's then-CEO in 2013 comment that "the project has already been approved by the international committee" is misguided. At the end of the initial six-month process, MRC member countries, particularly Vietnam and Cambodia expressed strong concerns, with Vietnam calling for a ten-year deferment on Xayaburi and mainstream dams, and Cambodia requesting extension of the Prior consultation process so further studies can be conducted and more informed decisions made.<sup>58</sup> The Xayaburi Prior Consultation was never formally concluded.

55. Wipatayotin, A. (2019, July 20). Dam Test Sparks Crisis: Thailand Asks Laos for Xayaburi Delay. *Bangkok Post*. Available at: <https://www.bangkokpost.com/thailand/general/1715627/dam-tests-spark-crisis>

56. OECD (2017). OECD Investment Policy Reviews: Lao PDR, p. 253. Available at: <http://dx.doi.org/10.1787/9789264276055-en>

57. Greacen, C. S. and Greacen, C. (2012, April). *Proposed Power Development Plan 2012 and a Framework for Improving Accountability and Performance of Power Sector Planning*. Available at: [https://www.internationalrivers.org/sites/default/files/attached-files/pdp\\_2012-eng.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/pdp_2012-eng.pdf)

58. See Vietnam and Cambodia's formal reply forms to the Xayaburi Prior Consultation Process. Vietnam: <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Viet-Nam-Reply-Form.pdf>; Cambodia: <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Cambodia-Reply-Form.pdf>

59. Nanthawithaya, A. (2019). Comments made at Bangkok Sustainable Banking Forum 2019 [video]. *Bank of Thailand*. Available at: <https://www.bot.or.th/broadcast/Sustainable/20190813-Sustainable-Session3.mp4>

60. Ibid.

61. Prachatai. (2013, April 26). TISCO Explained to Its Shareholders: Xayaburi Loan is Not Unethical [‘ธนาคารทิสโก้’ แจงผู้ถือหุ้นว่าปล่อยกู้ ‘เขื่อนไซยะบุรี’ ไม่ผิดศีลธรรมอันดี]. *Prachatai*. Available at: <http://prachatai.com/journal/2013/04/46429>

62. Prachatai. (2013, April 4). KBANK Explained Its Confidence in: Refusing to Disclose Loan amount [‘ทศกรไทย’ แจงผู้ถือหุ้นว่าไม่ ‘เขื่อนไซยะบุรี’ อนุมัติเงินกู้]. *Prachatai*. Available at: <https://prachatai.com/journal/2013/04/46111>

### BOX 3: Thai Banks views on Xayaburi dam: from past to present

*“We’re not going to make the statement that we won’t [lend to] hydropower. But in fact, there is a standard [that] we should comply and work with our clients.... We keep asking ourselves ‘what type of standard’? In [Xayaburi] project, we also tried to have our own independent advisor, but maybe it’s not good enough. So, this is something we will keep an eye open and try to do better to improve our quality.”*

– Arthit Nanthawithaya,  
CEO of Siam Commercial Bank, 2019,  
responding to question from the audience regarding Xayaburi<sup>59</sup>

*“At the time we granted the loan, the proposal was that there were certain principles that were already complied with, so the decision was made at that time because certain criteria had been met. But now, I don’t know exactly if the drought that happened is because of the dam; there is still quite controversial Information. It is of course an issue, a very big issue for us; we have to be very, very careful going forward, as something that may have environmental impact.”*

– Predee Daochai,  
President of Kasikornbank, 2019,  
responding to question from the audience regarding Xayaburi<sup>60</sup>

*“TISCO has determined that this project is not unethical; it is an energy project that will boost Thailand’s economic growth, and we are confident that it will be able to repay loans on schedule... Xayaburi is a run-off-the-river dam without large reservoir; therefore, it has little sedimentary impact. It also has fish passage. As for potential impact to the society and environment, TISCO is not an expert in these fields, so the bank relied on external experts. This project employs six consulting firms which produced numerous reports... those reports concluded that this dam will have very little social and environmental impacts, less than Chinese dams built in the Upper Mekong. For these reasons, TISCO was comfortable with joining the loan syndicate.”*

– Oranuch Apisaksirikul,  
President and CEO of TISCO Bank, 2013<sup>61</sup>

*“Xayaburi project has almost no repayment risk. Every Thai bank [in this syndicate] jumped at the chance to support it, because the project has already been approved by the international committee. In addition, Electricity Generation of Thailand (EGAT) agrees to buy all electricity produced from the project, and Thailand also needs this electricity. We therefore are not concerned about repayment .... But since it is a large project, it may have some impact on the local communities. For example, some communities will be relocated away from flooded areas. It is normal for large projects to have both supporters and dissenters; therefore, it is a matter of weighing between costs and benefits.”*

– Buntoon Lamsam,  
CEO of Kasikornbank, 2013<sup>62</sup>



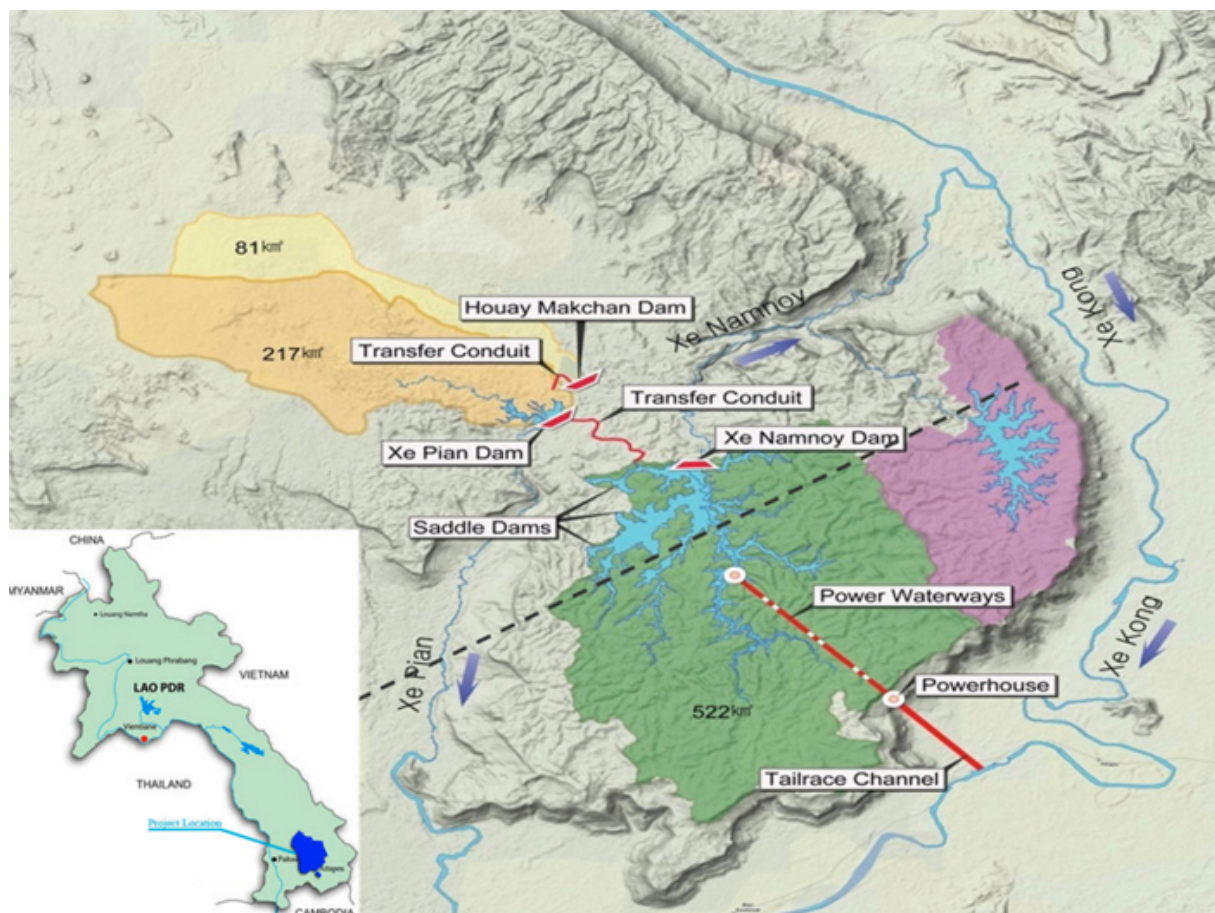


Figure 4: The location of XPXN project.

Source: <https://www.hydroreview.com/2015/11/19/us-1-02-billion-410-mw-xe-pian-xe-namnoy-hydroelectric-project-includes-3-dams/#gref>

## Xe Pian-Xe Namnoy

### Project overview

The 410-MW Xe Pian-Xe Namnoy (XPXN) is a trans-basin diversion project under construction in the Xekong River Basin in Southern Laos. The project comprises three main dams and a large storage reservoir on the Xe Namnoy River, enclosed by five auxiliary (or “saddle”) dams, which are used to reinforce the reservoir (see Figure 4).

The USD1.02 billion project is being developed by Xe Pian-Xe Namnoy Power Company Ltd, a joint venture, whose major shareholders include: SK

Engineering and Construction of Korea (26%), Korean Western Electric Power (25%), Ratchaburi Electricity Generating Holding Public Company (25%) and Lao Holding State Enterprises (24%). About 90% of the electricity will be sold to Thailand. A 20-year USD 714 million syndicated loan from four Thai banks is covering 70% of project costs. The lending syndicate comprises: Krung Thai Bank (as lead arranger), Ayudhya Bank and Tanachart Bank, along with the Export-Import Bank of Thailand, the government’s export credit agency.<sup>63</sup>

63. DFDL (2014, February 6). DFDL Advises on USD 1.02 billion Lao-Thai Hydropower Project Xe-Pian Xe-Namnoy, Media Release. Available at: <https://www.dfdl.com/resources/news/dfd-l-advises-on-usd-102-billion-lao-thai-hydropower-project-xe-pian-xe-namnoy/>



Figure 5: Xe Pian-Xe Namnoy project in Laos.

Source: <https://www.nationthailand.com/news/30370233>

64. Rujivanarom, P. (2019, February 17). Special Report: Compensation Talks Begin for Lao Dam Disaster Victims. *The Nation*. Available at: <https://www.nationthailand.com/national/30364301>

65. *Vientiane Times* (2018, August 10). Steps Taken to Investigate Dam Failure.

66. Lao News Agency (2018, July 30). Government Will Investigate Xe Pian-Xe Nam Noy Case In The Most Transparent Manner; PM. *Lao News Agency*. Available at: <http://kpl.gov.la/En/Detail.aspx?id=36552>

67. *Vientiane Times* (2019, May 29). Investigators: Dam Collapse Not a “Force Majeure” Event. *Vientiane Times*. Available at: [http://www.vientianetimes.org.la/freeContent/FreeContent\\_Investigators.php](http://www.vientianetimes.org.la/freeContent/FreeContent_Investigators.php)

68. See Inclusive Development International and International Rivers (2019). *Reckless Endangerment: Assessing the Responsibility for the Xe Pian-Xe Namnoy Dam Collapse*, pp. 15–19. The Korean media report is available at: [http://english.hani.co.kr/arti/english\\_edition/e\\_international/865895.html](http://english.hani.co.kr/arti/english_edition/e_international/865895.html)

## Dam collapse: Not a natural disaster

On 23 July 2018, an auxiliary dam of Xe Pian-Xe Namnoy (XPXN) Hydropower Project collapsed, unleashing a wall of water and wreaking havoc downstream. The official toll of dead and missing is 71.<sup>64</sup> More than 7,000 people, who received little or no advance warning, were displaced. The dam collapse also damaged homes and properties of thousands of people living along the Sekong River in Stung Treng Province, Cambodia. More than a year later, thousands of affected people are struggling meet daily needs and face an uncertain future. They have yet to receive adequate compensation for their losses. Cambodians affected by the disaster have received little assistance and no compensation.

Immediately after the collapse, the Lao government established a National Investigation Committee, chaired by Deputy Prime Minister Bounthong Chitmany, to examine the cause of the collapse and the responsibilities of actors

involved.<sup>65</sup> The National Investigation Committee was supported by an International Expert Panel, which submitted their investigation report and findings to the Lao government in March 2019. Despite commitments by the Lao Prime Minister to implement the investigation “in the most responsible, transparent and just manner” the report has not yet been publicly released<sup>66</sup>. However, comments by Lao government officials to Lao state media have ruled out force majeure, or an unforeseeable “act of god”, as the cause of the disaster, implying that construction problems were the primary cause of the dam collapse.<sup>67</sup>

Other evidence and media reports suggest that the dam’s lead developer and builder, SK Engineering and Construction may have caused the collapse. A Stanford University researcher found that the dam’s reservoir was built on a sinkhole, while Korean media reports indicate that SK Engineering & Construction lowered the height of the dam walls in order to save money and maximise profit.<sup>68</sup>





Figure 6: Villagers stranded after XPXN collapse.

Source: [https://ichef.bbci.co.uk/news/834/cpsprodpb/FF43/production/\\_102674356\\_5a524acc-84ea-42c3-9b4b-a4a01a8f0a37.jpg](https://ichef.bbci.co.uk/news/834/cpsprodpb/FF43/production/_102674356_5a524acc-84ea-42c3-9b4b-a4a01a8f0a37.jpg)

## Hydropower in Laos: Major disconnect between policy and practice

The Xe Pian-Xe Namnoy (XPXN) dam collapse highlights the major disconnect between policy and practice in the hydropower sector in Laos. XPXN is not the only dam to have collapsed or broken recently in Laos, with at least two other dam breaks in Laos since 2017,<sup>69</sup> causing significant damage. Despite the Lao government adopting various laws, regulations and guidelines for hydropower sector and projects, which include provisions on environmental and social impacts, consultation with affected communities, transparency and disclosure, among others, institutional capacity, enforcement and monitoring remains weak.

XPXN has a long history of controversy, with NGOs and civil society documenting and raising concerns about the XPXN project's impacts and failure to meet international standards in terms

of impact assessments, meaningful consultations, transboundary impacts, among others over many years. Yet, these were ignored or downplayed, with the project receiving Lao government approval, financial support from Korean overseas development assistance (ODA), and financing from the Thai banks, with devastating consequences for communities in Laos and Cambodia.

Given the lack of enforcement of environmental and social safeguards in Laos, Thai banks should not rely solely on 'legal compliance', but conduct their own due diligence and monitoring to ensure that their lending does not cause or contribute to violations of rights and damage the environment.

## Implications of dam collapse: Delays and liabilities

The extent of the fall-out from the dam collapse for the project developers and Thai banks financing the project remains to be seen. This is in part

<sup>69</sup>. The other two dam failures/breaks include: Kheng Khouane Dam (August 2019) and Nam Ao Dam (September 2017).

70. Praiswan, Y. (2018, October 4). Ratch Pushes Back Start Date of Laos Dam. *Bangkok Post*. Available at: <https://www.bangkokpost.com/business/1551706/ratch-pushes-back-start-date-of-laos-dam>
71. Kaohoon International (2019, February 20). Ratch Records 7% Lower of Profit in 2018, Insurance to Support Dam Collapse in Laos. *Kaohoon International*. Available at: <https://www.kaohoon.com/content/279183>
72. Inclusive Development International and International Rivers (2019). *Reckless Endangerment: Assessing the Responsibility for the Xe Pian-Xe Namnoy Dam Collapse*, p. 29

because key project agreements are not disclosed. The dam collapse has delayed the start date of the project from early 2019 to late 2019.<sup>67</sup> The developers have not publicly disclosed what, if any, financial penalties they must pay for their failure to meet the commissioning date identified in the Power Purchase Agreement (PPA). Nor have they publicly disclosed additional costs required to rebuild and repair the infrastructure damaged due to the dam collapse, let alone funds to compensate affected peoples.

The cost overruns and delays in operation will disrupt revenue stream, which in turn may impact on the company's capacity to repay the loans. According a media report, "the costs incurred as a result of the collapse are primarily the responsibility of the contractor in charge of engineering, procurement and construction" – that is, SK Engineering and Construction.<sup>71</sup>

While complaints have already been filed through non-judicial mechanisms, developers and financiers of the dam may also be subject to lawsuits for damages caused by the dam collapse and liable for remediation. The Thai banks that financed the dam have a responsibility to provide for or cooperate in remediation for the adverse human rights impacts they contributed to.<sup>72</sup> Given the extent of damages and number of people impacted, liabilities could be in the millions of dollars, which in turn has financial implications for the developers and financiers.

### Thai Banks and XPXN: Responsible and Sustainable?

Comments by senior leadership of Thai Banks (see **Box 4**) on the XPXN dam collapse are inconsistent. The Managing Director of Thai EXIM is pointing to inadequate dam structure as cause of the collapse, while SCB representative

#### Box 4: Thai Banks comments on XPXN dam collapse

*"When engaging in financing hydropower projects, banks always take the risks of the project into consideration before lending out. However, the dam collapse in Laos occurred due to inadequate dam structure which is the responsible of contractors. Therefore, Laos must be the one who investigate the incident and propose appropriate solutions to the problem. Furthermore, for the future projects, banks will still continue finance the hydropower projects in Laos and leave the complication of constructions to other stakeholders."*

– Mr. Pisit Serewiwattana,  
the Managing Director of Exim Bank

*"The dam collapse does not significantly affect the dam financing in Laos because it happened due to unexpected natural disaster. Moreover, before providing loan, banks have already considered the ability and condition of the project company based on international legal standard, strictly and comprehensively"*

– Mr. Wasin Saiyawan,  
a Senior Executive Vice President serving as  
Head of Corporate Banking of SCB



states it was an “unexpected natural disaster”. Common to both comments, however, is the implication that the Thai banks are not responsible for the disaster and that the disaster should not affect future Thai bank financing of hydropower projects in Laos.

In light of the dam collapse, and development and adoption of new

individual bank and sector-wide policies and guidelines, there is a need for Thai banks to more seriously assess and incorporate environmental and social risks into their due diligence and decision-making, if they are genuine about ensuring more responsible and sustainable investments.

73. Santhiprabhob, V. (2019). Opening Remarks, Bangkok Sustainable Banking Forum 2019.

74. For an analysis of how financial institutions involved in hydropower in Laos avoid and manage risks, including by transferring risks to others, see Trandem, A. (2019). *Offloading Risks & Avoiding Liabilities: How Financial Institutions Consider Hydropower Risks in Laos*.

75. The Thai Bankers' Association (2019, August 13). *Sustainable Banking Guidelines: Responsible Lending by The Thai Bankers' Association*, p. 1.

## Conclusion: Towards More Sustainable and Responsible Lending

*“When financial institutions focus mainly on short-term gains, neglecting the potential long-term effects or negative spillover of their activities, this can in fact increase financial institutions’ risks: risks that can impair credibility, public trust and financial positions in the long-run”*

– Veerathai Santhiprabhob,  
Governor of Bank of Thailand, 13 August 2019<sup>73</sup>

The Governor of Bank of Thailand’s quote above implies that to better manage risks, banks need to think beyond short-terms gains and more meaningfully consider – and avoid – negative impacts of their activities. However, as the experience of – and Thai banks’ public comments on – Xayaburi and Xe Pian-Xe Namnoy dams illustrate this has not been the case. Instead, through various instruments and measures, the banks have protected their financial interests by transferring the risks to other actors, with affected communities and Lao country as a whole bearing the brunt of the negative social and environmental consequences of the projects they have financed.<sup>74</sup>

If Thai banks are genuinely committed to being responsible actors that “can incentivise clients to mitigate negative and increase positive impacts to the

environment and society by linking cost of and access to capital to sustainability performance,”<sup>75</sup> the banks must change how they assess and address ESG risks of the projects they finance. Currently, Thai banks prioritise financial returns for themselves and their clients while offloading the environmental and social risks onto communities and the environment. There is a major gap between the Thai banks’ policies and commitments to positive environmental and social outcomes and what happens on the ground directly as a result of the project they finance.

While TBA Sustainable Banking Guidelines are a step in the right direction, much more can and should be done to strengthen and operationalise commitments to integrating environmental and social risks in bank’s decision-making processes and operations.

# Recommendations

Financing large-scale hydropower has always been a risky long-term activity for Thai banks. As the examples of Xayaburi and XPXN in this case study has shown, both projects have been fraught with extensive social and environmental risks that are not adequately captured in legal compliance, which is the customary lens through which Thai banks have been using to make financing decisions. It is no longer sufficient to simply demand that borrowers comply with all relevant laws and regulations; the risks of human rights

violations, future ecosystem collapse, and climate change impact on hydropower construction and operation need to be assessed and managed with new mindset, principles and tools. To that end, this report makes the following recommendations for Thai banks to help ensure that future hydropower financing can cope with both existing and emerging risks, as well as conducted in line with the four foundational elements in the TBA Sustainable Banking Guidelines.

## Leadership and responsible lending commitment

- ◆ Develop and issue a human rights policy, which clearly articulates banks' recognition to respect human rights, in line with UN Guiding Principles on Business and Human Rights and timebound commitments to ensure implementation
- ◆ Develop and issue sector lending policies, including for hydropower, in line with international standards.
- ◆ Strengthen the TBA Sustainable Banking Guidelines

## Stakeholder Engagement

- ◆ Stakeholder engagement should be conducted in line with UN Guiding Principles on Business and Human Rights
- ◆ Ensure that clients conduct meaningful stakeholder participation and engagement prior to finalising lending to high risk projects
- ◆ Establish direct grievance mechanism between the bank and potentially affected communities, and help strengthen existing judicial and non-judicial grievance mechanisms

## Internal implementation mechanisms

- ◆ Mandate clients to conduct human rights due diligence as a condition to hydropower financing
- ◆ Significantly increase resourcing and investment in ESG risks, including staff capacity and expertise
- ◆ Include clear environmental, social and human rights obligations as covenants and drawdown conditions in loan agreements

## Transparency

- ◆ Regularly and timely disclose project finance loans, including projects in the pipeline
- ◆ Allow opportunities for stakeholder input on current and future project financing decisions
- ◆ Provide timely and meaningful responses to stakeholders who request information about banks' involvement in projects

## Annex 1

# Select Guidance for Banks and Financial Sector to Strengthen Human Rights Due Diligence and Avoid Adverse Impacts

There is a growing number of resources specifically for banks and the finance sector that provide guidance on how they can operationalise improvements in their process and practices to avoid and address adverse impacts of their operations, including through their lending. Below is a select list, some of which also include checklist and key questions that banks can use at different stages to strengthen their due diligence before and after lending decisions have been made.

## SELECT RESOURCES

## DESCRIPTIONS

UNEP FI Human Rights Guidance Tool for the Financial Sector

<https://www.unepfi.org/humanrightstoolkit/>

An online tool aimed at finance sector which helps identify and assess potential human rights risks and mitigation measures. Tool includes information on human rights and finance, relevant international standards and guidelines, key questions in assessing human risks and impacts; and sector specific issues (e.g. power generation, infrastructure etc).

OECD (2017). Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises

<https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf>

Specifically aimed at financial sector actors, these elaborate on the OECD Guidelines for Multinational Enterprises. They include key steps and measures that banks and institutional investors can undertake to improve due diligence and responsible conduct.

OECD (2019). Due Diligence for Responsible Corporate Lending and Securities Underwriting: Key considerations for banks implementing the OECD Guidelines for Multinational Enterprises

<https://mneguidelines.oecd.org/Due-Diligence-for-Responsible-Corporate-Lending-and-Securities-Underwriting.pdf>

BankTrack and Oxfam (2018). Developing Effective Grievance Mechanisms in the Banking Sector

[https://www.banktrack.org/download/developing\\_effective\\_grievance\\_mechanisms\\_in\\_the\\_banking\\_sector/2018\\_pa\\_002\\_bank\\_report\\_faweb2\\_3.pdf](https://www.banktrack.org/download/developing_effective_grievance_mechanisms_in_the_banking_sector/2018_pa_002_bank_report_faweb2_3.pdf)

The report “reviews banks’ responsibilities and provides suggestions and recommendations for how banks can develop and implement effective operational-level grievance mechanisms that will be legitimate, trusted and meet their responsibilities under the Guiding Principles.”

Equator Principles

<https://equator-principles.com/>

A risk management framework adopted by financial institutions to determine, assess and manage environmental and social risk in projects. EP aims to provide a minimum standard for due diligence and monitoring to support responsible decision-making. The website includes links to various guidance documents.

Office of the High Commissioner for Human Rights (OHCHR), Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.

<https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

Guidance note from the OHCHR providing advice and clarification on the application of the UNGPs to the banking sector. The guidance focuses on factors influencing how a bank is involved with an adverse human rights impact; the responsibilities of banks with respect to remediation in situations where a bank has contributed to an adverse human rights impact; and the role of operational-level grievance mechanisms in this context.



Founded in 2018, members of Fair Finance Thailand coalition (FFT, [website www.fairfinancethailand.org](http://www.fairfinancethailand.org)) include one research company and four CSOs — Sal Forest Co., Ltd., Foundation for Consumers, ENLAW Foundation, International Rivers and Ecological Alert and Recovery - Thailand (EARTH). FFT members have been monitoring impacts and sustainability challenges of Thai financial institutions, and aim to advocate genuine adoption of the concept and best practices of sustainable banking. FFT utilizes Fair Finance Guide International ([www.fairfinanceguide.org](http://www.fairfinanceguide.org)) methodology in its annual assessment of disclosed policies of largest Thai financial institutions, starting in 2019.

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