



8 December 2011

**Submission to the UN Working Group on Human Rights and Transnational Corporations  
and Other Business Enterprises**

First Session (16-20 January 2012)

EarthRights International (ERI) welcomes the opportunity to make a submission in advance of the First Session of the UN Working Group on Human Rights and Transnational Corporations and Other Business Enterprises. As an organization whose work is dedicated to seeking and ensuring the accountability of business enterprises that operate in the Global South, ERI is well-placed to highlight considerations that would assist the Working Group in its goal of improving “outcomes for individuals and groups whose rights have been affected by business activity,” as referenced in the call for submissions.

In particular, this submission presents two case studies highlighting the need for clarity on the application of the Guiding Principles to financial institutions, including multilateral, public and private banks. The first concerns the communities of Canaán de Cachiyacu and Nuevo Sucre in Perú, which have suffered environmental and health impacts from oil operations financed by the International Finance Corporation (IFC), despite IFC safeguard policies that are meant to prevent such impacts. The second case is the proposed Xayaburi Hydropower Dam in Laos, which threatens to trigger a cascade of up to ten other dams along the lower Mekong River. Independent studies have found that if built, these dams are likely to lead to a food security crisis as well as a severe loss of biodiversity and increased tensions between Cambodia, Laos, Thailand and Vietnam.

These case studies point to the troubling role played by banks in financing, insuring or investing in projects with significant human rights impacts. The role of these lenders has been given insufficient attention in applying and implementing the UN “Protect, Respect, Remedy” Framework and Guiding Principles. The problem manifests itself in several ways: 1) lenders often operate in weak regulatory contexts that do not present external safeguards to mitigate the impacts of their lending activity; 2) some lending institutions invest in destructive projects as a matter of repeat practice; 3) many financial institutions do not have operational safeguard policies; and 4) those institutions which do have “safeguard” systems in place may not do enough to ensure that communities who are affected by their projects are effectively protected. Indeed, as this submission will show, even established “safeguards” can be meaningless without some degree of supervision to ensure that the project developer abides by the conditions of the loan or grant incorporating the safeguard policy.

## **State Duty to Protect & Access to Remedy**

Under both the State Duty to Protect and the Access to Remedy provisions of the Framework, States should be held to account for the impacts occasioned by investment projects leveraged or enabled by financial institutions. States cannot avoid their duty to prevent and protect against human rights violations merely because a bank that carries its own internal “safeguards” mechanism is financing a project. States must play an active role in supervising the project and the transactions between the businesses and banks to ensure that lenders do not aid and abet violations of human rights. States who participate in multilateral institutions, or who sponsor State-owned financial institutions, should also do their utmost to ensure that those financial institutions implement and enforce appropriate and effective safeguards.

Finally, States should be reminded of Guiding Principle 25’s commentary that, “unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.”<sup>1</sup> Indeed, the State duty to provide an adequate, accessible and effective remedy is as necessary in the context of financial institutions as it is in the case of any transnational enterprise.

## **Corporate Responsibility to Respect & Access to Remedy**

Financial institutions operating across national borders are business enterprises with a Responsibility to Respect human rights. A critical component of this responsibility is human rights due diligence that can identify, prevent, and mitigate adverse human rights impacts of corporate activities. Guiding Principle 17(a), in particular, emphasizes that this due diligence should “cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.”<sup>2</sup> This requirement of due diligence extends to project financing decisions, but thus far there has been insufficient attention to the requirements of due diligence in the project financing context. Due diligence must be exercised not only with attention to potential impacts to borrowers themselves, but also to those rights-holders who are adversely affected by any project that the institution finances. The requirement of due diligence also extends to financial institutions engaged in strategic investment transactions with smaller banks that operate in weaker regulatory contexts, or directly with destructive projects. This includes provision of remedies and ensuring that effective grievance systems are available. Guiding Principle 29 insists that “grievances [are] to be addressed early and remediated directly” and that “business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.”<sup>3</sup>

---

<sup>1</sup> *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, A/HRC/17/3 (March 21, 2011), Guiding Principle 25, commentary. <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

<sup>2</sup> *Id.* at Guiding Principle 17(a).

<sup>3</sup> *Id.* at Guiding Principle 29.

## The Communities of Canaán de Cachiyacu and Nuevo Sucre in Perú

The human rights impacts suffered by the Shipibo indigenous communities of Canaán de Cachiyacu and Nuevo Sucre in the Peruvian Amazon – with whom ERI has worked since 2005 – provide a concrete example of the need for attention to the human rights obligations of financial institutions. Since 1994, the communities have suffered from the harmful impacts of Maple Energy PLC’s oil operations on their land, including repeated oil spills into community drinking and bathing water, contamination of land used for cultivation, depletion of fish-supply, and troubling health problems as a result of the repeated spills. Since at least 2005, the two communities, along with regional indigenous federations, and national and international NGOs, have documented these harmful impacts and sought to bring them to the attention of Peruvian authorities. Despite the compelling evidence of harm brought forth by the communities, in 2007, the International Finance Corporation (IFC) granted an additional US \$40 million to Maple Energy PLC to expand oil operations around the two communities.<sup>4</sup> The IFC’s investment was intended to – and, in fact, successfully did – provide Maple with leverage to seek additional, private financing, which it otherwise could not have obtained.

In the years following the IFC grant, the Peruvian government did not effectively attend to the grievances of the communities of Canaán and Nuevo Sucre, perhaps believing that the IFC’s safeguards and grievance systems would suffice. Since 2007, there have been an additional six oil spills in the communities. In response to the most recent of these spills, without providing the communities with any warning as to possible harmful effects, the company hired community members to clean up the spills without providing any safety equipment. Neither the Peruvian government nor the IFC have acted with due care to prevent or punish those responsible. Nor have the people of Canaán or Nuevo Sucre been compensated for the illnesses and environmental damage.

The communities have engaged in long-delayed dialogue with both the IFC and the Peruvian government in their attempts to find a remedy. The IFC’s Compliance Advisor Ombudsman (CAO) finally accepted their petition for assistance in mediation with Maple in April 2010;<sup>5</sup> this process broke down in August 2011, having made no tangible progress.

This story raises concerns about the role that lenders like the IFC play in enabling, leveraging, and assisting in human rights violations. The Guiding Principles “apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”<sup>6</sup> Lending institutions like the IFC, therefore, have obligations, not only towards their own borrowers, but also to those affected by their financing activity. The history of Canaán and Nuevo Sucre highlights the shortcomings of the IFC’s internal safeguards process,

---

<sup>4</sup> Accountability Counsel, *Peru Chronology of Main Events in Canaán de Cachiyacu and Nuevo Sucre*, [http://www.accountabilitycounsel.org/Accountability\\_Counsel/Peru\\_Chronology.html](http://www.accountabilitycounsel.org/Accountability_Counsel/Peru_Chronology.html)

<sup>5</sup> They were assisted by two international NGOs: San Francisco-based Accountability Counsel, ([http://www.accountabilitycounsel.org/Accountability\\_Counsel/Accountability\\_Counsel.html](http://www.accountabilitycounsel.org/Accountability_Counsel/Accountability_Counsel.html)), and the International Accountability Project (IAP).

<sup>6</sup> *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/3* (March 21, 2011), General Principle (C). <http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf>.

indicating that major financial institutions – with their sheer financial and political influence, and their historical role in financing projects with disastrous human rights impacts – could benefit from additional guidance on their duties and expectations.

### **The Communities of the Lower Mekong River Basin**

The Xayaburi Dam, a proposed hydroelectric project on the Lower Mekong River in northern Laos, provides further the need to elaborate guidance for financial institutions. Xayaburi is the most advanced of eleven large hydropower dams planned for the Lower Mekong River's mainstream – a planned development which ERI's Southeast Asia office has followed closely. The US\$3.8 billion project is expected to generate 1,285 megawatts of electricity, around 95% of which will be exported to Thailand. As the proposed dam is on the mainstream of the Mekong River, and not on a tributary, the dam requires approval from the governments of Thailand, Laos, Cambodia and Vietnam, as indicated in the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin ("1995 Mekong Agreement").

The Mekong River is home to the world's largest inland fishery and is the second most bio-diverse river in the world after the Amazon. If built, the Xayaburi Dam would cause significant, irreversible damage to the river's ecosystem and the millions of people in the region who depend upon the river's rich resources for their livelihood and food security. The environmental and social risks and the need for further study prior to making a decision on dam construction are well-known and have been documented in a growing number of studies produced by the Mekong River Commission ("MRC") and other experts. An international panel of scientists commissioned by the MRC have stated that no proven measures currently exist to effectively mitigate the impact of mainstream dams on the river's fisheries. These concerns were outlined in the findings of the MRC's Strategic Environmental Assessment, which recommends deferring all decisions over the Xayaburi Dam and other mainstream dams for a period of ten years.

Four major Thai banks – Siam Commercial Bank, Bangkok Bank, Kasikorn Bank and Krung Thai Bank – have signaled their intention to finance Xayaburi with combined syndicated loans of 80 billion Thai baht.<sup>7</sup> These same banks have also already financed a number of major hydropower projects in Laos,<sup>8</sup> all of which have been found to inadequately address social costs and environmental impacts. Although each of them has stated their commitment to goals of corporate social responsibility, none has agreed to abide by the Equator Principles, under which private banks generally agree to abide by safeguard policies equivalent to those of the IFC.<sup>9</sup> The proposed Xayaburi project has been viewed as so environmentally and socially destructive that

---

<sup>7</sup> Bangkok Post, "CK remains confident in state projects," *Bangkok Post*, 22 April 2010, available at <http://www.bangkokpost.com/business/economics/36422/ck-remains-confident-in-state-projects>

<sup>8</sup> See, e.g., International Rivers, *Power Surge: The Impacts of Rapid Dam Development in Laos*, September 2008, <http://www.internationalrivers.org/node/3343>.

<sup>9</sup> Carl Middleton, *Thailand's Commercial Banks' Role in Financing Dams in Laos and the Case for Sustainable Banking*, December 2009, [http://www.banktrack.org/download/thailand\\_s\\_commercial\\_banks\\_role\\_in\\_financing\\_dams\\_in\\_laos\\_and\\_the\\_case\\_for\\_sustainable\\_banking/091201\\_sustainablethaibanks\\_ir\\_dec09.pdf](http://www.banktrack.org/download/thailand_s_commercial_banks_role_in_financing_dams_in_laos_and_the_case_for_sustainable_banking/091201_sustainablethaibanks_ir_dec09.pdf).

The Mekong Legal Network, an independent network of public interest lawyers will release a report updating the analysis of the safeguard policies of the Thai banks financing the Xayaburi Dam in March 2012.

neither the World Bank nor the Asian Development Bank (ADB) will provide financing.<sup>10</sup> Moreover, on November 30, 2011, the United States Senate Foreign Relations Committee approved a resolution calling on U.S. representatives at multinational banks to suspend financial support to environmentally questionable projects on the Mekong River, including the planned Xayaburi Dam.<sup>11</sup>

Despite the concerns raised over Xayaburi's transboundary impacts and the opposition expressed to the project by the region's people, there is concern that the dam may move forward. Private banks from Thailand, China, Malaysia, and Vietnam have stepped into the vacuum left by the multilateral institutions, but these banks typically lack robust safeguard policies and grievance mechanisms, which should be part of any due diligence regime. ERI brings this case to the attention of the Working Group to emphasize the potential severity of the human rights impacts of privately financed projects, and to illustrate the need for fully elaborated standards that apply to all financial institutions.

### **Recommendations**

In conclusion, ERI encourages the Working Group, as part of its initial work programme, to:

- Focus on concrete case studies, such as those identified above, to illustrate the potential human rights impacts of project financing and the need for further guidance.
- Elaborate due diligence standards for financial institutions, including multilateral, public, and private banks, especially with an eye toward avoiding, mitigating or remedying adverse impacts on rights-holders affected by the project itself, in addition to any human rights impacts on the bank's borrowers.

We urge the Working Group not to overlook the key sector of project financing in its efforts to implement the Guiding Principles and the "Protect, Respect, Remedy" Framework.

---

<sup>10</sup> World Bank, "World Bank Group Welcomes Strategic Environmental Assessment of Mekong Mainstream Dams" available at <http://www.worldbank.or.th/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/THAILANDEXTN/0, contentMDK:22740418~menuPK:333316~pagePK:2865066~piPK:2865079~theSitePK:333296,00.html>.

<sup>11</sup> Kristin Lynch, "US Senate pushes for Xayaburi funds freeze," *The Phnom Penh Post*, 1 December 2011, available at <http://www.phnompenhpost.com/index.php/2011120153086/National-news/us-senate-pushes-for-xayaburi-funds-freeze.html>