

The 10th Case Study Report

**The Laos Dam Collapse and the Responsibility of Japan's Private Banks:
The Importance of Human Rights Due Diligence in the Acquisition of Foreign Banks**



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Fair Finance Guide Japan



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Executive Summary

The collapse of a saddle dam in the Xe Pian-Xe Namnoy hydropower dam under construction in Attapeu Province in southern Laos on July 23, 2018, caused severe damage to the villages downstream, leaving at least 48 people dead, 23 missing, and more than 7,000 displaced. In addition, the inflow of water into the Sekong River forced 25,000 people to evacuate in downstream Cambodia. Now, nearly one year since the collapse, people in Attapeu are still displaced, and there has not been adequate compensation for the livelihoods lost due to the accident. There is a strong desire on the part of the displaced people to recover their previous ways of life.

Laos is a land rich in biodiversity and natural resources, and the many rivers that flow there supply 35% of the total discharge of the Mekong River. A river not only is an important source of livelihood for local residents but also symbolizes the identity of the local community, but dam construction in recent years is threatening such livelihoods. The Lao government aims to establish Laos as the “battery” of Southeast Asia by exporting to neighboring countries electricity generated by dams. However, dam construction is causing adverse impacts such as forced relocation and degradation of natural resources. At the same time, affected local residents do not benefit from such construction, as is often the case with local people affected by development projects. Although consultation that ensures meaningful participation regarding changes to living conditions due to dam construction should be conducted, it cannot be said that there is sufficient opportunity for such consultation.

The Xe Pian-Xe Namnoy hydropower project is a build-operate-transfer (BOT) project implemented by the Xe-Pian Xe-Namnoy Power Company (PNPC), a joint venture formed in March 2012 by SK Engineering and Construction (SK) of Korea holding 26% of the stakes, Korea Western Power Company (KOWEPO) and Ratchaburi Electricity Generating Holding (RATCH) of Thailand, each holding 25%, and Lao Holding State Enterprise (LHSE), a Lao state-owned enterprise holding 24% of the stakes. SK led the dam construction, with plans to begin operation in February 2019. 90% of the electricity generated will be exported to Thailand.¹ In addition, LHSE has received a loan of approximately 80 million USD from the Economic Development Cooperation Fund of Korea with an interest rate of 0.025%.² Further, MUFG Bank holds 76.88% of the shares of the Bank of Ayudhya which is one of the Thai banks that lend to PNPC.³

1 <https://www.pnpc Laos.com/index.php/en/project/project-in-brief>

2 Lao Holding State Enterprise (LHSE) FUNDING ARRANGEMENTS
<http://www.laoholding.com/en/funding-arrangement-2/>

3 <https://www.krungsri.com/bank/en/Other/AboutUs/Overview.html>

Who should provide compensation for the damage caused by this kind of large-scale development project involving multiple participants in an emerging country? The company that was actually in charge of construction, SK, should be held responsible as a matter of course. However, the accident occurred as part of a series of hydropower projects being promoted by the Lao government, and in this regard, the responsibility of the Lao government whose duty it is to protect the rights of its citizens should also be considered. In September 2018, the Lao government stated that it would pay 12 USD per month to each of the affected residents, but this amount is not sufficient for those who have lost their housing and most of their assets to live in evacuation centers. The construction of temporary housing and houses in resettlement sites is also behind schedule, and the standard of compensation for lost assets has not been made clear.

What responsibility, then, do the financial institutions that invested in a project assume? This becomes an issue especially when, as in the case of the Xe Pian-Xe Namnoy project, it is difficult to expect the government to provide sufficient relief to the affected people. The discussion on how to prevent and mitigate adverse impacts that may be caused by large-scale development projects on people's livelihoods and on how to provide relief for the damage caused has led to the introduction of international standards such as the International Finance Corporation's Performance Standards on Environmental and Social Sustainability, as well as the Equator Principles which applies the IFC standards to private financial institutions. The UN Guiding Principles on Business and Human Rights (UNGPs), endorsed unanimously at the UN Human Rights Council in 2011, are guidelines for private enterprises in addressing human rights risks in their corporate activities and play an important role. Given how much impact businesses have on civil society, the UNGPs, while recognizing that states have the duty to protect human rights, clearly states that business enterprises also have the responsibility to protect international human rights. In emerging countries, domestic law often does not meet international standards. Previously, businesses operating in such countries focused on complying with domestic law, which led to many instances of human rights abuses. Therefore the UNGPs require corporations to consider human rights risks in their business activities in light of international standards such as the Universal Declaration of Human Rights and ILO Conventions. The responsibility of businesses specified in the UNGPs includes securing engagement by relevant stakeholders, conducting human rights due diligence as a measure to identify human rights risks and to prevent and reduce such risks, establishing grievance mechanisms to respond to complaints from stakeholders, and providing remedy for harms caused.

MUFG Bank is involved in the dam collapse through the Bank of Ayudhya, a consolidated subsidiary that is financing the project. MUFG Bank has published on its website their Human Rights Policy as

well as the MUFG Environmental and Social Policy Framework. Although these documents refer to international standards such as the UNGPs and the Equator Principles as guidelines, the Policy Framework does not apply to the Bank of Ayudhya. Further, there is no transparency and accountability regarding any specific process of human rights due diligence, and no grievance mechanism has been established to take up concerns by relevant stakeholders.

It is possible that the Lao government to continue with the Xe Pian-Xe Namnoy hydropower project without significant changes even after the dam collapse. Given this, in order to ensure that such an accident never happens again, MUFG Bank needs to follow its Human Rights Policy and work on providing remedy through individual dialogue with the residents who were harmed by the accident, as well as improve the effectiveness of its human rights due diligence.

The number of acquisitions of foreign financial institutions by Japanese financial institutions is on the rise, arguably making the existence of human rights risks such as the Xe Pian-Xe Namnoy dam collapse more visible. It is essential for the acquired financial institutions to exercise their influence over projects adequately in order to guarantee the rights of people, and this report aims to promote efforts to that end.

Recommendations to MUFG Bank regarding human rights considerations in the Xe Pian-Xe Namnoy hydropower project

In order for financial institutions to exercise their influence and to prevent and mitigate adverse impacts on human rights caused by development projects that they are financing, it is necessary for them to carry out human rights due diligence 1) at the time of financing and 2) during project implementation. In the Xe Pian-Xe Namnoy hydropower project, even if MUFG Bank was not able to do so at the time of financing, it is possible for MUFG Bank to implement human rights due diligence during project implementation, which is the human rights responsibility that the UNGPs require financial institutions to assume. In the present case, MUFG Bank should not only follow domestic Lao law but also take measures based on international standards, for example by ensuring sufficient participation by affected communities.

However, there may be adverse impacts on human rights even if human rights due diligence is implemented both at the time of financing and during project implementation. In that case, MUFG Bank should consider take remedial actions. The abovementioned Human Rights Policy mentions only that MUFG Bank would respond in “an appropriate manner”, but specifically they should seek to

find the most suitable remedial measures for victims through the following steps.

1. Fully grasp the reality of the impact of the accident. In addition to holding a direct dialogue with the affected people who are important shareholders, work with NGOs and other outside experts.
2. At the same time, encourage engagement by the Bank of Ayudhya, a subsidiary of MUFG Bank and the main financing body of the Xe Pian-Xe Namnoy project, and fully support such engagement as the parent company.
3. Conduct discussions on how to respond to the accident with the Korean government and other relevant stakeholders. A large number of stakeholders as in the present case may well obscure where the responsibility lies and thereby delay the provision of remedy. Actively take initiative to avoid such a situation and to ensure that relevant stakeholders take coordinated action.
4. With the consent of the other parties, publish information about the measures mentioned above on the MUFG Bank website to ensure transparency and accountability.
5. Establish internal governance structures that ensure continuous implementation of human rights due diligence.
6. Establish a grievance mechanism for the purpose of identifying, preventing, and mitigating human rights risks as part of human rights due diligence, to fulfill the requirement stated in their existing policy.
7. Establish an individual grievance mechanism for each of the same type of projects currently underway in order to prevent similar situations from occurring.

Recommendations to private financial institutions acquiring foreign banks

As the below table shows, the number of cases is increasing in which Japanese financial institutions not limited to MUFG Bank become involved, through acquisition or financing, in the projects of foreign financial institutions especially in emerging countries, and the range of their business activities is expanding. This means that the same kind of responsibility assumed by MUFG Bank in the Xe Pian-Xe Namnoy dam collapse may fall on other banks as well. Therefore, when expanding operations, Japanese financial institutions are strongly urged to take measures to prevent and

mitigate adverse impacts on human rights by the projects in which the financial institutions they are affiliated with are involved, and to proactively establish a mechanism that will provide remedy when human rights harms occur.

Examples of Investment in Foreign Banks by Japanese Banks

	Date	Type of investment	Target of investment
MUFG	2008	100% acquisition	Union Bank (U.S.A.)
	October 2008	Investment	Morgan Stanley (U.S.A.)
	December 2013	Purchase of majority stake	Bank of Ayudhya (Thailand)
	April 2019	94% acquisition	Bank Danamon (Indonesia)
Sumitomo	June 2008	Capital and business alliance	Barclays (U.K.)
Mitsui	February 2019	Investment	BTPN (Indonesia)
Mizuho	January 2009	Investment	Merrill Lynch (U.S.A.)
	September 2011	Capital and business alliance	Vietcom Bank (Vietnam)
	June 2012	100% acquisition	WestLB Brazil (Brazil)

Specifically, Japanese private financial institutions should undertake the following when engaging with foreign banks through acquisition and other forms of investment:

1. Clearly state in their human rights or other policy statements that they will urge the target bank to comply with the UNGPs.
2. Make their human rights policies applicable to all subsidiaries subject to consolidation (affiliated financial institutions).
3. At the time of acquisition, conduct due diligence regarding human rights risks in the projects financed by the target bank.
4. After acquisition, adequately monitor whether there is human rights consideration in light of the purpose of the UNGPs in the preexisting projects financed by the acquired bank.
5. Establish effective grievance mechanisms with which residents that are or may be affected by the corporations or projects receiving their investment or lending may file complaints.

*The full report is available in Japanese at <https://fairfinance.jp/>

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