



**Initial Assessment of the Korean NCP
for the OECD Guidelines for Multinational Enterprises**

**Complaint from the Korean Civil Society Task Force Team
Regarding the Xe-Pian Xe-Namnoy Saddle Dam Collapse**

September 25, 2019

1. Introduction

The OECD Guidelines for Multinational Enterprises (hereinafter, “the Guidelines”) are a set of voluntary and non-binding recommendations aimed at minimizing adverse impacts from the activities of multinational enterprises and strengthening their responsible business conducts.

The government of the Republic of Korea (ROK) established and is operating the Korean National Contact Point (KNCP) to promote the Guidelines and to handle specific instances regarding the activities of multinational enterprises which are based or operating in the ROK.

The KNCP offers good offices for parties to resolve issues raised in specific instances in accordance with the Implementation Procedures of the Guidelines. These procedures are to be used only upon agreement of the parties and their commitment to participate in good faith during the procedures.

The decision of a multinational enterprise to participate in good offices does not imply that its activities are not in compliance with the Guidelines. No parties participating in good offices are compelled to make a concession, waive their legal rights or violate the law.

2. Progress of the Specific Instance Procedures

On June 28, 2019, the Korean Civil Society Task Force Team for the Xe-Pian Xe-Namnoy Dam Collapse, a coalition of seven civic groups including KTNC Watch, the People’s Initiatives for Development Alternatives (PIDA), the Energy & Climate Policy Institute, the People’s Solidarity for Participatory Democracy, PEACE MOMO, the Korean Federation for Environmental Movement (KFEM), and the Korea Green Foundation (hereinafter “complainant”) submitted a specific instance with the Korean NCP against the Export Import Bank of Korea (KEXIM), SK Engineering & Construction (SK E&C), and Korea Western Power Co.,Ltd. (KOWEPO) (hereinafter “respondents”) regarding the collapse of a saddle dam built for the Xe-Pian Xe-Namnoy reservoir, which took place on July 23, 2018.

The respondents submitted written responses to the KNCP - KOWEPO on July 19, 2019, and both KEXIM and SK E&C on July 26, 2019 - which the KNCP then forwarded to the complainant. The complainant presented additional submissions on August 19, 2019 and the KNCP forwarded these to the respondents. In response, KOWEPO submitted additional documents on September 3, 2019, KEXIM on September 4, 2019, while SK E&C stated there was no further opinion. The KNCP forwarded these to the complainant.

3. Substance of the Specific Instance

3-1. Regarding SK E&C

- The accident was a result of the poor design and construction of the dam, as it appears that the traits of the soil in the area were not appropriately reflected in the design and construction, and the type and design of the dam were also changed during the process. (Guidelines Chapter II General Policies, Chapter IV Human Rights, Chapter VI Environment)
- Prior to the collapse, the respondent failed to establish contingency plans, and during the collapse, failed to make an emergency water discharge or take appropriate action, and after the collapse, failed to provide accessible relief for the residents that were victimized by the accident. (Guidelines Chapter II General Policies, Chapter IV Human Rights, Chapter VI Environment)
- Since the accident, the respondent has refused to meet with civic groups, remained silent to requests to disclose information, and rejected the results of the National Investigation Committee (NIC)'s investigation report without providing specific evidence. (Guidelines Chapter III Disclosure)

3-2. Regarding KOWEPO

- Prior to the collapse, the respondent failed to establish contingency plans, and during the collapse, failed to make an emergency water discharge or take appropriate action, and after the collapse, failed to provide accessible relief for the residents that were victimized by the accident. (Guidelines Chapter II General Policies, Chapter IV Human Rights, Chapter VI Environment)
- Since the accident, the respondent has refused to meet with civic groups, remained silent to requests to disclose information, and rejected the results of the National Investigation Committee (NIC)'s investigation report without providing specific evidence. (Guidelines Chapter III Disclosure)

3-3. Regarding KEXIM

- The Guidelines also apply to KEXIM as it profited from signing a commercial contract to provide financial consulting services with regard to this business.
- The respondent should have prepared safeguard measures to prevent and respond to environmental, social and human rights issues that may arise during the EDCF (Economic Development Cooperation Fund) business operation, and has not implemented any grievance mechanism for the victims after the accident. (Guidelines Chapter II General Policies, Chapter IV Human Rights, Chapter VI Environment)
- Moreover, the respondent did not properly assess the risks in the process of carrying out EDCF operations and financial consulting contracts, including a failure to review or monitor an Emergency Action Plan. (Guidelines Chapter II General Policies, Chapter IV Human Rights, Chapter VI Environment)
- The respondent does not have a policy regarding the general disclosure of EDCF related information, and failed to disclose relevant information on the incident. (Guidelines Chapter III Disclosure)

4. The respondents' position

4-1. SK E&C's position

- The issues raised by the complainant (design and construction matters, insufficient action during the accident, lack of contingency plans and relief measures, refusal to hold meetings or disclose information, etc.) will be reviewed and judged in accordance with the procedures to be set in the future by related institutions, including the Lao government and the court that will determine the cause of the accident, and whether there is legal or contractual responsibility.

- Regarding the request to provide information on the accident and the argument against the Lao government's investigation report, it is difficult to disclose such information as this may affect the court ruling in the future, as stated in the Guidelines III Disclosure.
- Immediately after the accident, SK E&C continued to implement recovery and relief efforts, dispatching workers to the site, supporting medical and health related activities, building temporary residential complexes and repairing roads. Furthermore, procedures for compensation are under discussion with the Lao government and insurance companies, among others.

4-2. KOWEPO's position

- The maintenance of facilities such as the dam during construction and establishing contingency plans such as emergency water discharges and other measures in case of emergency were the responsibility of PNPC (Xe-Pian Xe-Namnoy Power Company) and SK E&C, not of KOWEPO.
- KOWEPO is not in a position to answer questions regarding the cause of the accident as this does not fall under the scope of KOWEPO's responsibility, and this does not in any way refute the investigation results.
- To fulfill its moral responsibility and human rights management obligations, KOWEPO is providing a wide range of support, including relief volunteer work, environmental cleanup activities, relief funds and supplies.

4-3. KEXIM's position

- Financial consulting is a supplementary service to the ODA (official development assistance) project, and therefore cannot be considered as commercial activity simply because it received fees.
- Since the EDCF safeguard policy was established in February, 2016, it was not in force when the project was approved in April, 2015. Accepting and handling civil complaints are the responsibility of the project operator PNPC, and a grievance mechanism is included in the environmental impact assessment report which PNPC prepared.
- The environmental impact assessment, environment management and monitoring plans were prepared in accordance with Lao environmental regulations, International Finance Corporation (IFC) standards, and the Asian Development Bank (ADB) Safeguard Policy, and received the approval of the Lao government. Regarding the environmental impact assessment, there was a thorough review on its appropriateness through an independent review process carried out by a third party.
- Although this business is not subject to EDCF safeguards, the environmental impact assessment report in accordance with international environmental standards is available on the website, and the name and details of projects expected to receive EDCF have also been disclosed since February, 2016.

5. KNCP's Initial Assessment

In compliance with the Procedural Guidance in the Guidelines, the NCP makes an initial assessment once a specific instance is received. The initial assessment is a process which determines whether the issue raised is bona fide and relevant to the implementation of the Guidelines. In making an initial assessment, the following six factors are taken into account:

- the identity of the party concerned and its interest in the matter.
- whether the issue is material and substantiated.

- whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance.
- the relevance of applicable law and procedures, including court rulings.
- how similar issues have been, or are being, treated in other domestic or international proceedings.
- whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines.

Accordingly, the KNCP considered these factors based on the documents submitted by the parties.

1. the identity of the party concerned and its interest in the matter.

The complainant, the Korean Civil Society Task Force Team for the Xe-Pian Xe-Namnoy Dam Collapse which is a coalition of seven civic groups including KTNC Watch, the People's Initiatives for Development Alternatives (PIDA), the Energy & Climate Policy Institute, the People's Solidarity for Participatory Democracy, PEACE MOMO, the Korean Federation for Environmental Movement (KFEM), and the Korea Green Foundation, is not a victim directly affected by the accident. However, as they are NGOs that monitor and check government agencies and businesses related to human rights, environment, labor, etc., it has an interest in this specific instance.

SK E&C is a multinational enterprise that is based in the Republic of Korea and operates overseas subsidiaries in countries including the U.S., Indonesia and China. It has businesses in infrastructure, construction, housing, and plants, is a shareholder of PNPC, and was responsible for the design and construction of this project. In the light of the above, SK E&C has an interest in this specific instance.

KOWEPO is a multinational enterprise to which the Guidelines apply, as it is headquartered in the Republic of Korea and operates overseas subsidiaries in countries including Australia, the Philippines and Indonesia. It has businesses in power resource development and power generation, is a shareholder of PNPC, and was responsible for the operation of the hydro power plant after the construction was completed. In the light of the above, KOWEPO has an interest in this specific instance.

KEXIM is based in the Republic of Korea and has offices in countries including the U.K., Indonesia and Vietnam, and has an interest in this specific instance as it provided concessional loans to the Lao government. However, KEXIM was established and operates under a special national law to achieve national policy objectives, and according to the OECD Ex-Ante Guidance, concessional loans are classified as non-commercial business. In addition, its supplementary financial consulting services are also not considered as falling under international investment or commercial activity. In this regard, it is hard to say that KEXIM is a multinational enterprise in this specific instance.

2. whether the issue is material and substantiated

Given that the complainant alleged violations of Chapter II General Policies, Chapter III Disclosure, Chapter IV Human Rights and Chapter VI Environment of the Guidelines and submitted relevant data, which was then followed by the respondents responding to these allegations, the issues raised in the complaint are considered to be material and substantiated.

3. whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance

Regarding this project, KEXIM provided concessional loans, SK E&C and KOWEPO are shareholders of the project operator PNPC, SK E&C were responsible for the design and

construction, and KOWEPO for its operation after the construction was completed. Hence, there seems to be a link between the enterprise's activities and the issue raised.

4. the relevance of applicable law and procedures, including court rulings

KEXIM, an ODA agency, is subject to the Economic Development Cooperation Fund Act and a separate environmental impact guideline of the DAC (Development Assistance Committee).

In particular, an environmental impact assessment as well as environment management and monitoring plans were prepared in accordance with Lao environmental regulations, International Finance Corporation (IFC) standards, and the Asian Development Bank (ADB) Safeguard Policy, and were approved by the Laos Ministry of Natural Resources and Environment .

5. how similar issues have been, or are being, treated in other domestic or international proceedings

In its initial assessment regarding the Jalaur River multi-purpose project case which was filed with the KNCP in October, 2018, the KNCP stated that the Guidelines were not applicable to KEXIM's ODA project.

NCPs in other countries also have not applied the Guidelines to ODA projects, and explained that for an entity that is regulated nationally by special legislation and for which special arrangements exist within the OECD for the purpose of achieving national policy goals, such as KEXIM, the Guidelines are not applicable.

Moreover, on the issue of whether a public entity loses its status as a public entity if it runs supplementary businesses for profit, the Patent Court of Korea has ruled that even if the operation of supplementary for-profit businesses occurs, it is still a public entity that operates non-profit business unless making profit is its main purpose.

6. whether the consideration of the specific issue would contribute to the purposes and effectiveness of the Guidelines

The role of the KNCP is to serve the purpose and effectiveness of the Guidelines by offering a forum for discussion and supporting the related parties to find a solution. The KNCP may contribute in serving the purpose and effectiveness of the Guidelines by facilitating a resolution through negotiations and the good offices that it may provide for the complainant and the respondents including SK E&C and KOWEPO.

6. Conclusion

The KNCP reviewed all the factors that should be considered in the initial assessment on the basis of the submissions of the parties concerned. As a result, given that the issues are material and that both sides are actively responding, it is recognized that there is a need to contribute to the resolution of the issues by offering an NCP level forum for discussions. Therefore, the KNCP determines that the issues raised merit further examination through good offices.

Related parties, the Korean Civil Society Task Force Team for the Xe-Pian Xe-Namnoy Dam Collapse, SK E&C and KOWEPO need to come up with measures for the recovery through mutual and substantial negotiations and discussion. On the other hand, the ODA agency KEXIM will not be included in the mediation procedures or the good offices that the KNCP will provide, as it is not subject to the Guidelines.

It shall remain clear that the initial assessment is not a process to determine whether the respondent has violated the Guidelines, but to determine whether the NCP can help the parties resolve their issues by offering good offices for dialogue.

7. Future plan

The KNCP will contact the parties to check whether the parties are willing to participate in the process of good offices to discuss with each other and reach a mutually acceptable agreement. This initial assessment statement will be published on the NCP's website (www.ncp.or.kr), as well as the final statement after the conclusion of the good offices.