



Final Statement of the Korean NCP for the OECD Guidelines for Multinational Enterprises

Complaint regarding the Xe-Pian Xe-Namnoy Saddle Dam Collapse in Laos

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. Substance of the Specific Instance

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 “the complainant”) submitted a specific instance to the Korean NCP on June 28, 2019 and its additional statement on August 19, 2019, against the Export Import Bank of Korea (KEXIM), SK Engineering & Construction (SK E&C), and Korea Western Power Co.,Ltd. (KOWEPO) (hereinafter “the respondents”) regarding the collapse of a saddle dam built for the Xe-Pian Xe-Namnoy reservoir, which took place on July 23, 2018. The complainant’s statements are as follows.

2-1. Regarding SK E&C

o The accident was the 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)

o 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)

o 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)

2-2. Regarding KOWEPO

o 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)

o 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)

2-3. Regarding KEXIM

o The Guidelines also apply to KEXIM as it profited from signing a commercial contract to provide financial consulting services with regard to this business.

o 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)

o 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)

- o 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)

3. The respondents' position

The respondents submitted written responses to the KNCP - KOWEPO on July 19, 2019, and both KEXIM and SK E&C on July 26, 2019. KOWEPO submitted additional documents on September 4, 2019. The respondents' statements are as follows.

3-1. SK E&C's position

- o 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.

- o 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.

- o 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.

3-2. KOWEPO's position

- o 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.

- o 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.

- o 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.

3-3. KEXIM's position

o 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.

o Since the EDCF safeguard policy was established in February, 2016, it was not applied 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.

o 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.

o 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.

4. Proceedings of the KNCP

In accordance to the Guidelines, the NCP makes an initial assessment after it accepts the complaint. To determine whether the issue is bona fide and relevant to the implementation of the Guidelines, the NCP will take 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

On September 25, 2019, the KNCP made the initial assessment with the conclusion as follows.

o As the submitted documents show that the issues are material, which both parties acknowledge, the KNCP recognizes 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.

o 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 discussions. On the other hand, the ODA agency KEXIM will not be included in the mediation procedures offered by the KNCP, as it is not subject to the Guidelines.

o 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.

Announcing the result of the initial assessment, the KNCP contacted the parties regarding their willingness to take part in the mediation procedure. The respondents, both SK E&C and KOWEPO, notified on December 12, 2019 that they would not participate in the procedure. On December 13, 2019, the complainant requested to form a mediation committee and launch investigation as a follow-up to the initial assessment.

Taking this into consideration, on March 17, 2020, to encourage participation of the mediation procedure, the KNCP organized a mediation committee of civil commissioners and informed both parties, and on April 29, 2020, it again called on the respondents, both SK E&C and KOWEPO, to join the procedure, but on May 7, 2020, they announced that they stand firm on their decision of non-participation, halting further steps of the procedure.

The KNCP sent the draft of the final statement to both parties, giving them the opportunity to express their opinions. KOWEPO, SK E&C, and the complainant each sent their statements on June 17, June 22, and June 29, 2020, respectively.

Considering the fact that the complaint was raised in Laos, a non-adhering country, and the necessity to give both parties a full opportunity to state their opinions before announcing the final statement, the KNCP extended the timeline from June 27, 2020 to July 31, 2020.

The reasons for non-participation by the respondents are as follows.

4-1. SK E&C

SK E&C actively engaged with the direct stakeholder, the Laos government on-site in Laos, regarding recovery and compensation measures for residents of the affected area, and as the steps are in the final stage, it is difficult to expect any substantial effect from participating in the additional arbitration procedure with the complainant, and as SK E&C raised questions about the findings of the investigation into the cause of the accident to the government, the further procedure is likely to conflict with decisions of the government or related agencies in a series of legal proceedings in the future, hence, it is inevitable that SK E&C is unable to join the mediation procedure.

4-2. KOWEPO

As KOWEPO is the observer of trial-operations during the construction of the plant, and is in charge of the operation as the O&M contractor after the completion of the construction, while during the operation, it is the responsibility of PNPC, the project owner, to deal with environmental matters in accordance to the O&M contract, KOWEPO is not directly responsible for the collapse of the saddle dam that occurred during the construction.

The project owner PNPC is in the ongoing process of compensating the residents for their direct damage after hiring damage investigators to evaluate the scale of damage, of negotiating cost-sharing plans to build a permanent housing complex for the residents, and finally, PNPC and SK E&C are in their final stage of communicating with the Laos government regarding compensation and support, hence, it seems unnecessary to go through the third-party mediation procedure.

From a legal perspective, as KOWEPO was not involved in any act during the construction that caused the damage, it was consulted that it is legally inappropriate to join a mediation procedure for legal compensation or reparation, and even if it creates a donation or contribution fund separate from the compensation, the firm's management should abide by the principle of due care and due diligence not to disadvantage the business and stakeholders, and as KOWEPO and Korea Electric Power Corporation (KEPCO) have already offered much human and material resources including one million dollar donation, it is difficult to add the further mediation procedure.

5. Conclusion

The NCP complaint procedure depends on voluntary participation of MNEs and stakeholders, supporting the parties to resolve matters in an informal way through discussions at a mediation procedure, rather than judgements on violation of the Guidelines.

Although the KNCP decided that it was necessary to offer good offices to both parties in the initial assessment of the case, as SK E&C and KOWEPO decided not to join the mediation procedure, it is unable to proceed further.

Concluding all procedures of the case, the KNCP makes following recommendations to SK E&C and KOWEPO.

(1) Establish a communication channel to discuss issues raised by the complainant and continue the dialogue.

(2) Give explanation with integrity to the complainant regarding the details of recovery and relief activities, compensation for the residents, measures to prevent further accidents, among others.

(3) Adopt an internal system to create settings and cooperate on responsible business conduct (RBC) of MNEs, including the OECD Guidelines for MNEs and the OECD Due Diligence Guidance for RBC.

(4) Send a report on the progress regarding the matter within six months after receiving this final assessment.

July 23, 2020
Korean National Contact Point (KNCP)