COMMENT

DAMNING THE MEKONG: PROJECT FINANCE'S INABILITY TO CURE THE STEEP COSTS OF HYDROPOWER DEVELOPMENT IN THE MEKONG RIVER BASIN

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Project finance is a system of financing employed to fund large infrastructure facilities, and it has been a driving force of investment in undeveloped countries. While project finance's capacity to facilitate high levels of investment is facially appealing, its implementation and management illustrate an alarming accountability problem. Project finance's dispersal of risk has created a glaring accountability gap that allows project participants to systematically thrust environmental and social harms upon local communities. Moreover, because infrastructure development often occurs in undeveloped countries, host governments and third parties are often disinterested or incapable of stepping in to mitigate those harms.

Nowhere are these flaws more plainly illustrated than in the Mekong River Basin, where hydropower development has sharply risen since the 1990s. This rapid and widely criticized development has caused both acute and cumulative harms throughout the Basin. Nearly one hundred dams are causing irreversible damage to the Basin's ecosystems, and the region's 60 million inhabitants are bearing the brunt of that harm through flooding, destruction of farms and fisheries, and forced resettlement. Although some of project finance's principal actors have taken steps to mitigate these harms, their efforts have largely fallen short. There is thus a critical need for a new mechanism that addresses project finance's accountability gap and holds project participants accountable for the harms inflicted upon project-affected communities.

INTRODUCTION

In July 2018, Laos suffered catastrophic flooding after substandard construction and a "severe lack of oversight" resulted in the collapse of the Xe Pian Xe Namnoy Dam.[1] The floodwaters from the collapse stretched some fifty miles, killing 71 people and displacing 5,000 more.[2] Over a year later, most of these 5,000 villagers remain homeless or in temporary camps, and the compensation that project-affected communities have received has ranged from grossly inadequate to nonexistent.[3] Despite these ongoing harms, none of Xe Pian Xe Namnoy's financiers, sponsors, or builders have been held accountable for the profound consequences of the collapse, thus forcing the local population to bear the steep costs of those harms alone.[4]

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1. Eugene Whong, *Laos' Deputy Prime Minister Blames PNPC Dam Collapse on Poor Planning*, RADIO FREE ASIA (Mar. 20, 2019), https://www.rfa.org/english/news/laos/bounthong-chitmany-pnpc-03202019161742.html [https://perma.cc/SEV7-SL67].

2. INCLUSIVE DEVELOPMENT INTERNATIONAL & INTERNATIONAL RIVERS, RECKLESS ENDANGERMENT: ASSESSING RESPONSIBILITY FOR THE XE PIAN-XE NAMNOY DAM COLLAPSE 2, 5 (2019) [hereinafter RECKLESS ENDANGERMENT].

3. *Id.* at 2, 12–14.

4. *Id.* at 2–3.

Unfortunately, the collapse of the Xe Pian Xe Namnoy Dam only represents a fraction of the harm that hydropower development poses to the Lower Mekong River Basin's sixty million inhabitants.[5] As of May 2019, there are 63 operational dams in Laos, several of which exhibit a lack of oversight comparable to that which led to Xe Pian Xe Namnoy's collapse.[6] By 2020, the Mekong River Commission (MRC), an intergovernmental organization aimed at developing the Mekong River Basin, expects to have 81 operational dams in the Lower Basin.[7] By 2040, the number of dams in the Lower Basin is expected to swell to 140.[8]

To fund such ambitious development—with a total cost around $50 billion—the MRC's member states have relied on private sector investment and international financial institutions.[9] This method of financing—commonly used for infrastructure facilities—is known as project finance and involves a specially-formed corporation that borrows funds from international financial institutions and repays those loans using revenues generated by the project.[10] On its face, a system that involves governments, financial institutions, and international organizations all contributing to projects that provide energy to developing regions seems promising. In reality, this system of financing has created a framework that permits project participants to avoid liability for the severe harms that their projects inflict on local communities. Xe Pian Xe Namnoy's collapse illustrates the more acute of these harms, but it is the cumulative environmental and social effects of these projects that has the most profound impact on regions like the Mekong River Basin.[11] Throughout the Basin, for example, hydropower

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5. *See* MEKONG RIVER COMM'N, STATE OF THE BASIN REPORT 2010 vii (Hanne Bach & Robin Taylor eds., 2010), http://www.mrcmekong.org/assets/Publications/basin-reports/MRC-SOB-report-2010full-report.pdf [hereinafter STATE OF THE BASIN REPORT 2010].

6. *See* RECKLESS ENDANGERMENT, *supra* note 2, at 8–9.

7. MEKONG RIVER COMM'N, REVIEW AND UPDATE OF BASIN-WIDE SUSTAINABLE HYDROPOWER DEVELOPMENT STRATEGY FOR THE LOWER MEKONG BASIN, Draft 1.0 3–4 (August 31, 2018), http://www.mrcmekong.org/assets/Uploads/Summary-note-Draft-SHDS-Aug-2018.pdf [hereinafter *Review of Basin-wide Sustainable Hydropower*].

8. *Id.*

9. Vincent Merme et al., *Private Equity, Public Affair: Hydropower Financing in the Mekong Basin*, 24 GLOB. ENVTL. CHANGE 20, 22 (2014).

10. Marissa Marco, *Accountability in International Project Finance: The Equator Principles and the Creation of Third-Party-Beneficiary Status for Project-Affected Communities*, 34 FORDHAM INT'L L.J. 452, 452–53 (2011).

11. *See infra* Part III. "[A] dam doesn't have to collapse for it to be a disaster. Even when dams work well, in the best case scenarios they produce a tremendous degree of uncertainty for the people they affect about what might happen and what comes next." Jerome Whitington, *Is Uncertainty a Useful Concept? Tracking Environmental Damage in the Lao Hydropower Industry*, PLATYPUS: THE CASTAC

projects continue to flood villages, disturb migratory fish patterns, erode fertile farmland, and destroy fisheries.[12] Moreover, governments that host these projects are often unwilling to aid project-affected communities because of their vested interest in bolstering foreign investment, which expensive mitigation or compensation measures can undermine.[13] Instead, these governments have used corrupt tactics like coercion and forced evictions to eliminate obstacles for investors.[14] With international institutions content to profit from their investment while avoiding liability for project harms, project-affected communities are ultimately left with minimal avenues to seek redress.[15]

Most of these problems stem from the dispersal and avoidance of risk amongst project participants. This Comment argues that hydropower development in the Mekong River Basin demonstrates fatal flaws in the framework of project finance in addressing the environmental and social harms that such development causes. Accordingly, this Comment proposes a more capable accountability mechanism that is independent from international institutions and intergovernmental organizations that have vested financial or political interests in the success of those projects. Part I outlines the modern project-finance framework, then elaborates on the history of the Mekong River Basin and the development of hydropower. Part II identifies the source of project finance's critical flaws and details why current regulatory mechanisms are incapable of addressing those flaws, then Part III illustrates how those flaws have played out in the Basin over the past two decades. Lastly, Part IV proposes a new accountability mechanism that can address the profound issues currently plaguing the Basin and project finance in general.

I. THE INTERPLAY OF PROJECT FINANCE, HYDROPOWER, AND THE MEKONG RIVER BASIN

The severity of the issues in the Mekong River Basin are due in large part to the disjointed nature of project finance, but the region's weak institutional capacities and overwhelmingly pro-hydropower

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BLOG (July 30, 2018), blog.castac.org/2018/07/uncertainty/ [https://perma.cc/2M2W-DY39].

12. POWER SURGE: THE IMPACTS OF RAPID DAM DEVELOPMENT IN LAOS 7–9 (International Rivers ed., 2008) [hereinafter POWER SURGE].

13. *See* Merme et al., *supra* note 9, at 24, 26.

14. *See, e.g.*, David J.H. Blake & Keith Barney, *Structural Injustice, Slow Violence? The Political Ecology of a "Best Practice" Hydropower Dam in Lao PDR*, 48 J. CONTEMP. ASIA 808, 820–21 (2018).

15. *See* Nathanial Matthews, *Water Grabbing in the Mekong Basin—An Analysis of the Winners and Losers of Thailand's Hydropower Development in Lao PDR*, 5 WATER ALTERNATIVES 392, 396 (2012).

regimes exacerbate those issues.[16] Southeast Asia is a predominantly underdeveloped region that is rich in natural resources and ripe for development.[17] Unfortunately, the governments with authority over those resources have demonstrated that they are either incapable of or unwilling to address concerns that risk undermining such development.[18] Therefore, understanding the causes, effects, and solutions to the region's accountability problems requires a basic understanding of project finance and the history of hydropower in the Basin.

A. Fundamentals of Project Finance

Project finance is a method of financing typically used for costly infrastructure installations, such as power plants, mines, and dams.[19] Projects are initiated by project sponsors who then form a "project company" for the specific purpose of constructing, owning, and operating the infrastructure facility.[20] Due to the inherent complexities in financing, constructing, and operating an infrastructure facility, a single project involves several parties and entities beyond just the project company.[21] For instance, the country hosting a project has a vested interest in the project's construction, operation, and output. The most common arrangement for projects in developing countries is a "build-own-transfer" arrangement, under which a project company will construct the facility, operate it for a specified period of time (typically twenty to thirty years), and then transfer ownership of the facility to the host government at no cost.[22] In some cases, the host government will own a share of the project company itself.[23] Additionally, the highly technical nature of infrastructure facilities demands engineering and environmental consultants to play an essential role in a project's

16. *See infra* Part I-C.

17. U.N. Conference on Trade and Development, *The Least Developed Countries Report 2017*, at v, UNCTAD/LDC/2017 (2017).

18. *See* Merme et al., *supra* note 9, at 22; *see also* Natalie Bugalski, *The Demise of Accountability at the World Bank?*, 31 AM. U. INT'L L. REV. 1, 13 (2016).

19. Equator Principles Ass'n, *Equator Principles III* 18 (June 2013), http://equator-principles.com/wp-content/uploads/2017/03/equator_principles_III.pdf [https://perma.cc/JE2N-4DGX] [hereinafter *Equator Principles III*].

20. Marco, *supra* note 10, at 452.

21. SCOTT L. HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE 71–77 (3d ed. 2008); *see also* Merme et al., *supra* note 9, at 26.

22. *Id.* at 81; *see also* WORLD BANK ET AL., PUBLIC-PRIVATE PARTNERSHIP REFERENCE GUIDE VERSION 3.0 6 (2017). "Build-operate-transfer" is also often used generically to refer to a similar structure called "build-own-operate-transfer," which is slightly different but will be used interchangeably with "build-operate-transfer" in this Comment. *Id.* at 7.

23. HOFFMAN, *supra* note 21, at 74–75.

development.[24] A consultant's primary responsibility is to assess risks associated with a project and provide the project company with an impact assessment that determines the project's likely effects on local populations.[25]

The participants that contribute the most capital to a project, however, are the lenders. Because of the immense amount of capital required to build infrastructure facilities,[26] project companies seek funding from various lenders, most commonly international financial institutions.[27] Examples of international financial institutions include private commercial banks, export credit agencies, and multilateral development banks.[28] Unique to project finance is that the borrower (i.e. project company) repays the lender almost exclusively with revenues generated by the project's output (e.g., power created by a power plant).[29] This intricate structure of financing is the crux of project finance, and although it is beneficial to project participants, it has fostered an attenuated system of accountability that neglects projects' impacts on local communities.

B. Risk Mitigation and Accountability in Project Finance

Project participants take on considerable risks when funding or endorsing large infrastructure projects in developing regions.[30] To insulate themselves from these risks, participants employ various mechanisms to monitor projects and ensure that project companies do not act in a manner that might jeopardize their investment.[31] Lenders, for example, use common methods of risk management such as obtaining insurance and allocating risk via contract, but the unpredictable and high-risk nature of infrastructure projects has led project participants to employ stronger measures to protect their investments.[32] These preventative measures include formulating standards aimed at regulating—or at least guiding—proper implementation of infrastructure projects and promoting institutional

24. *Id.* at 74.

25. *Id.* at 106–09; *see generally infra* Part II-A-3.

26. *See infra* Part III-C (discussing the $905 million, $1.45 billion, and $3.8 billion costs of the Theun-Hinboun, Nam Theun 2, and Xayaburi Dams, respectively).

27. *See* HOFFMAN, *supra* note 21, at 80–84.

28. *See id.* at 73–74. Multilateral development banks are institutions dedicated to financing infrastructure projects in developing countries; they can operate both regionally (e.g., Asian Development Bank) and globally (e.g., World Bank). *Id.* at 282.

29. *Equator Principles III*, *supra* note 19, at 18.

30. *See generally* HOFFMAN, *supra* note 21, at 33–102.

31. *See generally id.* at 66–68, 253–66.

32. *See id.*

bodies charged with monitoring and (supposedly) enforcing those standards.[33]

These standards and monitoring mechanisms are present throughout project finance. For example, the World Bank established two accountability mechanisms—the Inspection Panel and the Compliance Advisor/Ombudsman (CAO)—that monitor the Bank's investment and create a channel for communities affected by Bank-funded projects to seek recourse.[34] These mechanisms do so pursuant to the Bank's Environmental and Social Framework, in addition to other internal social and environmental policies.[35] Amongst private commercial banks, the most widely accepted standards are the Equator Principles, a risk-management framework adopted by roughly one hundred financial institutions that covers "the majority of international project finance debt within developed and emerging markets."[36] Beyond the efforts of typical project participants, the Organization for Economic Co-operation and Development (OECD) embodies perhaps the most comprehensive intergovernmental effort to mitigate project risks.[37] Pursuant to its Guidelines for Multinational Enterprises, the OECD provides a forum for project participants and local communities to resolve disputes arising out of violations of OECD Guidelines for Multinational Enterprise.[38]

Despite these typically uniform standards and established accountability mechanisms, project finance continues to yield projects that have exceedingly harmful effects.[39] In the realm of hydropower alone, for instance, the World Bank has financed several dams that have had catastrophic impacts on local communities and ecosystems.[40]

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33. *See infra* Part II-B.

34. *See* Cristina Passoni et al., *Empowering the Inspection Panel: The Impacts of the World Bank's New Environmental and Social Safeguards*, 49 N.Y.U. J. INT'L L. & POL'Y 921, 925 (2017); *see also About the CAO*, COMPLIANCE ADVISOR/OMBUDSMAN, http://www.cao-ombudsman.org/about/ [https://perma.cc/2WJW-ACE4].

35. *See, e.g.*, *Environmental and Social Framework*, WORLD BANK, https://www.worldbank.org/en/projects-operations/environmental-and-social-framework [https://perma.cc/LA2W-WU5Z].

36. *The Equator Principles*, EQUATOR PRINCIPLES, http://equator-principles.com./about/ [https://perma.cc/4SYF-T5VW].

37. *See generally About the OECD*, OECD, http://www.oecd.org/about/ [https://perma.cc/8AAF-72FM].

38. *See generally* OECD Guidelines for Multinational Enterprises (2011 ed.), http://www.oecd.org/daf/inv/mne/48004323.pdf [https://perma.cc/ZAJ4-9A5Q] [hereinafter OECD Guidelines].

39. *See* Bugalski, *supra* note 18, at 12.

40. For example, the Chixoy Dam in Guatemala, financed by the World Bank and Inter-American Development Bank, displaced more than 3,500 individuals, destroyed the livelihoods and lands of over 6,000 families, and led to the massacre, torture, and kidnapping of community members who opposed the dam. INT'L RIVERS,

Even hydropower projects that proponents have deemed "successful"[41] continue to face considerable criticism because of the persistent negative effects they have had on local populations.[42] Moreover, the accountability mechanisms built to mitigate these effects often fall short of doing so, either because project participants have worked to circumvent responsibility for their failures or because the mechanisms' attempts to take corrective action are simply ignored.[43] Furthermore, while standards like the Equator Principles identify "best practices" for international investment, the institutions that have adopted those standards are not bound by or held accountable for violating them.[44] These institutional shortcomings are only exacerbated by the isolated nature of project-affected communities and the often oppressive regimes that govern them.[45]

C. Hydropower and the Mekong River Basin

The Mekong River and its tributary system, cumulatively the Mekong River Basin, compose the largest river system in Southeast Asia, and its biodiversity is second in the world only to the Amazon River.[46] It is divided into two basins: the Upper Basin, located almost entirely in China, and the Lower Basin, which flows through Laos, Cambodia, and Vietnam.[47] The Lower Basin—the focus of this Comment—has approximately sixty million people living in its vicinity, two-thirds of which depend on the Basin's resources for sustenance and their livelihoods.[48]

Chixoy Dam, https://www.internationalrivers.org/campaigns/chixoy-dam [https://perma.cc/6A93-GB54]. For another example, see Swizeen Ndyabawe, *Human Rights Lessons from the Bujagali Dam in Uganda*, FIVAS, http://fivas.org/en/frontsak-en/human-rights-lessons-from-the-bujagali-dam-in-uganda/ [https://perma.cc/YY7A-847S].

41. *See generally* WORLD BANK, DOING A DAM BETTER: THE LAO PEOPLE'S DEMOCRATIC REPUBLIC AND THE STORY OF NAM THEUN (Ian C. Porter & Jayasankar Shivakumar eds., 2011) [hereinafter DOING A DAM BETTER].

42. *See generally* DEAD IN THE WATER: GLOBAL LESSONS FROM THE WORLD BANK'S MODEL HYDROPOWER PROJECT IN LAOS (Bruce Shoemaker & William Robichaud eds., 2018) (criticizing the Nam Theun 2 project and its impacts on the Mekong Basin).

43. *See* Passoni, *supra* note 34, at 933; *see infra* Part II-B-2.

44. *Equator Principles III*, *supra* note 19, at 11.

45. *See* Bugalski, *supra* note 18, at 13.

46. *See* STATE OF THE BASIN REPORT 2010, *supra* note 5, at 23–24.

47. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Mekong River Basin*, http://www.fao.org/nr/water/aquastat/basins/mekong/mekong-CP_eng.pdf [https://perma.cc/DFW3-GP6E].

48. *See* STATE OF THE BASIN REPORT 2010, *supra* note 5, at 47–51.

The recent influx of hydropower development in the Basin began in the mid-1990s.[49] In 1995, Cambodia, Laos, Thailand, and Vietnam signed the Agreement on the Cooperation for Sustainable Development of the Mekong River Basin (1995 Mekong Agreement) which formed the Mekong River Commission (MRC), an intergovernmental body aimed at promoting responsible development of the Basin.[50] Since its formation, the MRC and its member states have undertaken considerable efforts to develop the Basin, which already has dozens of hydropower facilities.[51] At the center of this development is Laos, whose government has made clear its aspiration to become the "Battery of South East Asia" by harnessing the Basin's resources.[52] Laos alone has sixty-three operational hydropower facilities within its borders and hundreds more proposed or under construction.[53]

Skepticism towards such expansive hydropower development has been mounting and reached a fever pitch with the collapse of the Xe Pian Xe Namnoy Dam in Laos.[54] The collapse, a result of substandard construction and a "severe lack of oversight," illustrated the devastating impacts of Laos's underregulated hydropower development.[55] Yet, beyond these immediate impacts, there is greater concern regarding the profound cumulative and long-term effects that hydropower is having on the Basin. These include degradation of the Basin's biodiversity, major flooding and erosion, disruption of fish migratory patterns, and water quality problems.[56] Two-thirds of the Basin's inhabitants heavily rely on fishing and farming for food security and their livelihoods,

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49. *See* Fleur Johns, *On Failing Forward: Neoliberal Legality in the Mekong River Basin*, 48 CORNELL INT'L L.J. 347, 354–55 (2015).

50. *See generally* Cambodia-Laos-Thailand-Vietnam: Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, 34 I.L.M. 864 (1995) [hereinafter 1995 Mekong Agreement].

51. *See Review of Basin-wide Sustainable Hydropower*, *supra* note 7, at 3–4.

52. *See Laos Hydroelectric Power Ambitions Under Scrutiny*, BBC NEWS (July 24, 2018), https://www.bbc.com/news/world-asia-44936378 [https://perma.cc/J4WV-Z5AC]. *But see* Francis Savahkham, *Laos' PM Thongloun Confirms Hydropower Policy at WEF on ASEAN*, LAOTIAN TIMES (Sept. 13, 2018), https://laotiantimes.com/2018/09/13/laos-pm-thongloun-confirms-hydropower-generation-policy/ [https://perma.cc/3HKG-KSLD] (translating an interview with the Laos Prime Minister who said, "Laos cannot become a 'battery of Asia' because our capacity to develop electricity in Laos . . . is still very limited").

53. RECKLESS ENDANGERMENT, *supra* note 2, at 8.

54. *See, e.g.*, *Laos' Dams—Perpetuating Disaster are Encouraged by the World Bank and Funded by Thailand, China and Korea*, RIVERS WITHOUT BOUNDARIES (Oct. 25, 2018), https://www.transrivers.org/2018/2422/ [https://perma.cc/366W-NV8T] [hereinafter *Laos' Dams—Perpetuating Disaster*].

55. Whong, *supra* note 1.

56. POWER SURGE, *supra* note 12, at 86–88.

which amplifies the threat that these harmful trends pose to the Basin's social and economic foundations.[57]

Additionally, the Laos government's mismanagement of these harms has only heightened concerns for the Basin and its inhabitants. After Xe Pian Xe Namnoy's collapse, for instance, the Laos government briefly recognized the potential harms that these hastily built dams could cause and ordered a temporary suspension of any future hydropower plans.[58] Unfortunately, the suspension only applied to *new* proposals and did not halt progress on the many dams already in the early stages of development.[59] In fact, the day after the Laos government ordered its "suspension," the MRC and Laos took a significant step forward in developing the Pak Lay Dam—one of two dams Laos is building on the previously untouched Lower Mekong mainstream.[60]

The government's deceptive and self-interested conduct is not uncommon in Laos, a country often identified by independent reports as among the most corrupt in the world.[61] Likely contributing to this designation is that Laos is governed by a secretive, single-party regime that has demonstrated its willingness to coerce and intimidate its citizens to lessen resistance to government-supported projects.[62] As a result, many of the country's seven million citizens are reluctant to speak out against recent infrastructure development at the risk of facing intimidation or even "disappearance."[63] Moreover, due to the structure of the 1995 Mekong Agreement, the MRC is powerless to intervene because Laos effectively has unilateral authority to build dams within its territory.[64] Understandably, this history has led critics to describe Laos as a place "where freedoms are restricted, transparency is low,

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57. *See* STATE OF THE BASIN REPORT 2010, *supra* note 5, at 47–51.

58. *Regional CSOs Boycott Mekong River Forum Over Opposition to Lao Dam*, RADIO FREE ASIA (Sept. 21, 2018), https://www.rfa.org/english/news/laos/regional-csos-boycott-mekong-river-forum-09212018164238.html [https://perma.cc/P78S-BKW9].

59. *Id.*

60. *Id.* This step began the MRC's six-month prior consultation process which was taken in spite of broad criticism of the dam, including observations that the project's approval was based on a report that was "flawed and outdated, with most data and references dating prior to 2011." *Id.*

61. *See* Transparency International, *Laos* (2018), https://www.transparency.org/country/LAO [https://perma.cc/RW7E-FPVH].

62. *See also supra* notes 226–29 and accompanying text.

63. *See* Tom Fawthrop, *Laos' Dam Disaster May Not be its Last*, THE DIPLOMAT (August 2, 2018), https://thediplomat.com/2018/08/laos-dam-disaster-may-not-be-its-last/ [https://perma.cc/FX4N-YSYL]; *see also infra* note 104 (discussing disappearance of Sombath Somphone).

64. *See* 1995 Mekong Agreement, *supra* note 50, at 868 ("Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparian's rights.").

and corruption is high,"[65] and where projects are often "shrouded in secrecy."[66] It is these political and social conditions that stretch project finance's already attenuated system of accountability to a point of ineffectiveness.

II. THE SEVERITY OF PROJECT FINANCE'S ACCOUNTABILITY GAP

Project finance's framework leaves a considerable accountability gap that allows project participants to systematically impose project impacts on local communities and ecosystems. These systematic issues stem from the self-interested conduct of project finance's principal actors and the unchecked measures they take to skirt liability for project harms.[67] And while some groups have taken steps to mitigate these harms,[68] their steps have proven inadequate in curing the larger issue.[69] Only by understanding the institutional origins of project finance's accountability gap and highlighting the shortcomings of the current systems can one begin to formulate a mechanism that adequately remedies project finance's broken framework.

A. Three Institutions from Which the Accountability Gap Stems

Project finance's structural deficiencies stem from one of project finance's principal purposes: insulating parties from the risks associated with complex infrastructure projects.[70] Throughout a project's development, parties make concerted efforts to limit risks that threaten their ability to deem the project a "success" for their own purposes.[71] Conversely, project participants are less interested in mitigating risks that are unlikely to affect their stake in a project and thus will only mitigate risks to the extent necessary to protect their own interests.[72] Although this seems like a rational approach to high-risk investment, serious ethical concerns arise when a framework allows parties to act in their own self-interest without holding them accountable for the

65. POWER SURGE, *supra* note 12, at 3.

66. Stefan Lovgren, *Southeast Asia May Be Building Too Many Dams Too Fast*, NAT. GEO. (Aug. 23, 2018), https://www.nationalgeographic.com/environment/2018/08/news-southeast-asia-building-dams-floods-climate-change/.

67. *See infra* Part II-A.

68. *See infra* Part II-B.

69. *See generally* Natalie L. Bridgeman & David B. Hunter, *Narrowing the Accountability Gap: Towards a New Foreign Investor Accountability Mechanism*, 20 GEO. INT'L ENVTL. L. REV. 187 (2008).

70. HOFFMAN, *supra* note 21, at 45.

71. Merme et al., *supra* note 9, at 26.

72. *See id.* at 26–27.

resulting harms.[73] Project finance has fostered such a framework by failing to implement effective checks on three of its most prominent participants: host governments, international financial institutions, and project consultants.[74]

1. HOST GOVERNMENTS

First and foremost, an infrastructure facility's construction, benefits, and effects are governed by the country in which it sits.[75] A "basic tenet[]" of state sovereignty is a government's ability to "set its own environmental and development policies."[76] Power plants are rarely built without government approval, the energy produced is typically regulated by the government, and it is the government's people that are impacted by a facility's negative effects.[77] As a result, project-affected communities traditionally rely on their country's agencies and judiciary for redress.[78] Unfortunately, in developing countries, host governments are often incapable or unwilling to enforce regulations or implement policies that adequately protect those communities.[79]

Developing countries' failure to adequately remedy project harms can be attributed to three principal factors. First, developing countries often lack the capacity to implement effective environmental and social policies.[80] Second, even if they did possess such capacity, host governments are often discouraged from doing so because policies that protect the environmental and social interests of the region also tend to create barriers to foreign investment.[81] Countries designated as "developing" by the U.N. generally aspire to graduate from that status.[82] Thus, developing countries often promote regulatory policies that attract foreign investment by decreasing the cost of that investment and allowing expensive environmental and social initiatives to fall by the wayside.[83] Third, corruption often prevents project-affected

73. *See infra* Part III.

74. *See infra* Parts II-A-1, II-A-2, II-A-3.

75. *See* Rep. of the U.N. Conference on Env't and Dev., Rio de Janero, Brazil June 3–14, 1992, *Rio Declaration on Environment and Development, Principle 2*, U.N. Doc. A/CONF.151/26 (July 14, 1992).

76. Bridgeman & Hunter, *supra* note 69, at 195.

77. *See* HOFFMAN, *supra* note 21, at 42–50.

78. *See* Bridgeman & Hunter, *supra* note 69, at 195.

79. *Id.* at 196–97.

80. *Id.* at 190.

81. *Id.* at 192, 196.

82. *See Least Developed Countries Report 2017*, *supra* note 17, at v.

83. *See* Merme et al., *supra* note 9, at 24–25.

communities from seeking compensation, protection, or redress.[84] Similar to preventive policies, retroactive compensation for a project's adverse effects tends to increase overall project costs.[85] Therefore, to limit the perceived cost of constructing an infrastructure facility, developing countries often employ corrupt tactics such as deception, coercion, and abduction to suppress the voices of individuals seeking compensation.[86]

Each of the above factors plays a role in the development of hydropower in the Mekong River Basin, particularly in Laos.[87] The United Nations' "Least Developed Countries" list identifies Laos as a "low-income countr[y] suffering from severe structural impediments to sustainable environments."[88] Laos's weak institutional capacities have hindered its ability to combat the country's most urgent issues, such as poor education, severe poverty, and low economic productivity.[89] While environmental sustainability is listed as an objective in Laos's development, Laos struggles to secure even the most fundamental needs for its people.[90]

Assuming Laos had the capacity to implement effective policy surrounding hydropower development, it is unlikely that it would eagerly pursue such policy changes.[91] To graduate from the U.N.'s "Least Developed Countries" list, Laos would need to continue attracting considerable investment from international financial institutions.[92] To do so requires Laos to foster a regulatory framework that makes such investment as attractive as possible.[93] This regulatory approach impacts the Laos government's actions towards all stages of project development. In attracting investment, Laos believes it is in its

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84. *See* Bugalski, *supra* note 18, at 13.

85. *See* Blake & Barney, *supra* note 14, at 819–20, 827–28.

86. *Id.* at 827–28. "[Host governments] seem willing to throw their own people under the bus for what they believe to be the greater good of attracting investment on their project . . . or personal benefit." Interview with Ian G. Baird, Dir. of the Ctr. for Se. Asian Studies & Assoc. Professor of Geography, U. of Wis.—Madison, at 11:30 (Jan. 22, 2019) (on file with author).

87. *See* STATE OF THE BASIN REPORT 2010, *supra* note 5, at vii.

88. *Least Developed Countries Report 2017*, *supra* note 17, at v; *see also* U.N. Dep't of Econ. and Soc. Affairs, Least Developed Countries (LDCs), https://www.un.org/development/desa/dpad/least-developed-country-category.html.

89. U.N. in Lao PDR, *Country Analysis Report: Lao PDR*, at vii–xi (Nov. 2015).

90. *Least Developed Countries Report 2017*, *supra* note 17, at v.

91. *See* Blake & Barney, *supra* note 14, at 809.

92. *See* U.N. Dep't of Econ. and Soc. Affairs, *The Least Developed Country Category: 2018 Country Snapshots* (2018).

93. *See* Merme et al., *supra* note 9, at 24 ("To attract international capital, the Laotian government established investment incentives, such as extensive tax exemption, special import duty rates for materials, equipment and supplies, and eased labor regulations.").

best interest to limit the number of administrative obstacles to potential investors.[94] During a project's planning and construction, the fewer regulatory and monitoring costs imposed by the local government, the more investors stand to profit from that project's output.[95] Further, when determining the extent to which it will compensate project-affected communities, Laos is motivated to keep project costs low by limiting both the groups that qualify for such compensation and the amount of compensation allocated to those groups.[96] Unfortunately, this investor-friendly framework merely thrusts project costs onto the Laos people and their natural resources, greatly outweighing any perceived benefit that such a framework might yield.[97]

Finally, Laos's status among the world's most corrupt nations raises concerns about its dedication to making good-faith attempts to implement policies that protect project-adjacent communities.[98] Despite recent improvements, Laos is nonetheless controlled by an authoritarian one-party regime that shares little information with the public.[99] For example, the government rarely conducts adequate consultation with communities near or downstream from hydropower project sites.[100] Additionally, Laos's lack of an empowered civil society, while a glaring concern for most, is a considerable benefit for the government in attracting investment.[101] After all, it is much easier and less costly to construct a project that does not face the obstacle of overcoming public

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94. Ian G. Baird, an Associate Professor of Geography at the University of Wisconsin and a former consultant on hydropower dams in the Basin, *see generally* Ian G. Baird, *Principled Engagement: Obstacles and Opportunities in an Increasingly Consultancy Dominated World*, 13 ACME: INT'L J. FOR CRITICAL GEOGRAPHIES 497 (2014) [hereinafter Baird, *Principled Engagement*], explained the Laos government's mentality toward hydropower projects as follows:

> The Laos government hasn't said to [parties assessing project impacts], "If you find a problem, we'll shut the dam down." They're not [sending] that kind of message. Their message is, "This is a government-supported project, the government partially owns this, this is in the interest of the country. Anyone against this project is not a friend of our country."

Interview with Ian G. Baird, *supra* note 86 (on file with author).

95. Bridgeman & Hunter, *supra* note 69, at 197.

96. "The main concern of the Laos government seems to be that if they compensate people . . . then it will set a precedent that means they'll need to give compensation for future projects and that will discourage investors." Interview with Ian G. Baird, *supra* note 86 (on file with author).

97. *See* Bugalski, *supra* note 18, at 23.

98. *See* Transparency International, *supra* note 61.

99. *See* Fawthrop, *supra* note 63.

100. *See, e.g.*, RECKLESS ENDANGERMENT, *supra* note 2, at 32; *see also* Ian G. Baird, *Party, State and the Control of Information in the Lao People's Democratic Republic: Secrecy, Falsification and Denial*, 48 J. CONTEMP. ASIA 739, 739–40 (2018).

101. *Laos' Dams—Perpetuating Disaster*, *supra* note 54.

skepticism and protest.[102] Indeed, the people of Laos have been hesitant to criticize the government's plan to continue hydropower development,[103] likely due to the government's history of intimidating and even abducting individuals who have voiced such opposition.[104]

2. INTERNATIONAL FINANCIAL INSTITUTIONS

The international financial institutions ("IFIs") that fund projects in developing countries, including both development banks and private banks, also contribute to project finance's accountability gap. Although these institutions have taken perhaps the most measurable steps to increase project participants' accountability,[105] the history of IFIs' role in project finance contains several instances where IFIs have avoided liability for the severe impacts that their projects have had on local communities.[106] Beyond the immediate harms that result from project failures, there are often more long-lasting effects that are entirely absent from IFIs' purview. These take the form of gradual environmental changes,[107] involuntary displacement of local communities,[108] and general disruptions of social and economic processes.[109]

Two principal aspects of IFIs' role in project finance have most contributed to their failures in addressing project harms. First, IFIs have a relatively shorter period during which they have a stake in projects.[110] In most cases, IFIs have superior bargaining power when negotiating a project's terms with borrowers or host governments and thus their obligations are often front-loaded.[111] Even though IFIs commit to assessing and mitigating a project's potential impacts, their commitment to any given facility significantly lessens over time.[112] Ten years after a facility's construction, the average lender (i.e., IFIs) has

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102. *See* Whitington, *supra* note 11.

103. *See* Fawthrop, *supra* note 63.

104. For example, in December 2012, Laos officials abducted Sombath Somphone, a known civil society leader who had spoken out against some of the government's policies. *Government Slanders Sombath Somphone, Issues "Blanket Denials" on Enforced Disappearance During Rights Review*, INT'L FED'N FOR HUMAN RIGHTS (July 18, 2018), https://www.fidh.org/en/region/asia/laos/government-slanders-sombath-somphone-issues-blanket-denials-on [https://perma.cc/6QG2-4GBY].

105. *Infra* Part II-B-2.

106. *See* Bugalski, *supra* note 18, at 13 (listing recent failures of current monitoring and accountability mechanisms).

107. *See* RECKLESS ENDANGERMENT, *supra* note 2, at 9.

108. *See* Bugalski, *supra* note 18, at 13.

109. *See* Merme et al., *supra* note 9, at 27.

110. *Id.* at 26.

111. *See* Bridgeman & Hunter, *supra* note 69, at 192, 198.

112. *See id.*; *see also* Merme et al., *supra* note 9, at 24.

not only broken even on its investment but has also secured a reasonable return.[113] At that point (or sooner),[114] the lender has minimized any considerable stake in the project and has fewer, if any, obligations to mitigate the project's adverse impacts.[115] This premature withdrawal is problematic because infrastructure facilities such as dams cast a larger temporal shadow than the twenty-five years during which IFIs are invested in them.[116] As a result, when inadequate pre-construction assessments fails to identify potential harms that materialize decades later, most IFIs can avoid liability because the bulk of their responsibilities to the project have long since expired.

The second aspect of IFI participation that contributes to project finance's accountability gap is privatization—i.e., the shifting of responsibility from public international actors to private banks and borrowers.[117] This shift is increasingly common with development banks which have gone from playing a central role in project finance to relying on borrowers, private sector lenders, and host governments to take responsibility for projects.[118] As a result, modern project agreements tend to emphasize the borrower's role in assessing project risks and rely on the borrower and host government to implement mechanisms to mitigate those risks.[119] Even in cases where development banks maintain a limited role in that process, they have fewer obligations to ensure that impact assessment and mitigation are adequately carried out by the other participants.[120] Moreover,

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113. HOFFMAN, *supra* note 21, at 45 (outlining basic structure of project finance lending agreement).

114. The World Bank's role in the Nam Theun 2's Social and Environment Project ended in 2017, only eight years after the dam opened, despite reports identifying the dam's persistent and unmitigated impact on downstream villages. *See Nam Theun 2: World Bank Withdrawal Leaves Major Concerns Over Project Outcomes*, INT'L RIVERS (June 19, 2018), https://www.internationalrivers.org/resources/report-l-nam-theun-2-world-bank-withdrawal-leaves-major-concerns-over-project-outcomes [https://perma.cc/9FPU-6RLX].

115. Merme et al., *supra* note 9, at 24.

116. *Id.*

117. *See* Cynthia A. Williams, *Regulating the Impacts of International Project Financing: The Equator Principles*, 107 AMER. SOC. INT'L L. 303, 304 (2013); *see also* Mike Ives, *Laos Dam Failure Exposes Cracks in a Secretive Government's Agenda*, N.Y. TIMES (July 29, 2018), https://www.nytimes.com/2018/07/29/world/asia/laos-dam-response-government.html [https://perma.cc/K7TM-FUGT].

118. *See* Williams, *supra* note 117, at 303; *see also* Merme et al., *supra* note 9, at 22.

119. *See* Bugalski, *supra* note 18, at 9.

120. As Professor Baird explained:

> One thing [that is] very common is environmental impact assessments that look half decent, prepared to gain financing . . . then once the financing is approved . . . they're never implemented, or they're only very partially implemented. . . . There are laws that say you have to do an environmental impact assessment. There is no law that says you

multilateral banks continue to struggle to fulfill even their more limited obligations to projects.[121] For instance, the World Bank continuously fails to comply with due diligence, consultation, and other front-end responsibilities required by its own policies.[122]

These flaws would be less problematic if the parties to whom responsibility was passed were equipped to handle them, but that is simply not the case. Borrowers in the context of project finance are the project companies, which are typically owned by private companies and, in some cases, the host government itself.[123] Private companies—whose primary objective is to construct and operate facilities for profit—are deterred from implementing mitigation measures or compensating project-affected communities because those efforts are costly and decrease project profitability.[124] Moreover, host governments of developing countries, both in their role as a governing body and as partial owners of a project company, have demonstrated their inability to implement effective environmental and social standards.[125] Therefore, when development banks reduce their role in monitoring and mitigating project impacts, they are merely passing the responsibility down the line to parties unequipped and adversely motivated to do so.

3. CONSULTANTS

Most jurisdictions and financial institutions require a consultant to conduct an impact assessment for a project before its approval.[126] Social and environmental impact assessments contemplate an array of issues, including a project's potential impact on natural resources, ecosystems, and local communities.[127] Many institutions require the consultants who conduct impact assessments on projects to be independent from parties with a stake in those projects because a negative report can greatly hinder a project's progress or success.[128] In theory, a project will be

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> have to . . . go through each of the main points of an [environmental impact assessment] and make sure that the [project companies] are following those points.

Interview with Ian G. Baird, *supra* note 86 (on file with author).

121. *See* Passoni et al., *supra* note 34, at 942–44.

122. *Id.*

123. *See* HOFFMAN, *supra* note 21, at 71, 74–75.

124. *See* Matthews, *supra* note 15, at 396.

125. *See supra* Part II-A-1; *see also* Blake & Barney, *supra* note 14, at 820 ("[T]his [resettlement] plan was shelved on the instructions of the [Government of Laos's] local administration, in an apparent effort to reduce compensation and mitigation costs.").

126. HOFFMAN, *supra* note 21, at 106–09.

127. *Id.*

128. *See, e.g., Equator Principles III*, *supra* note 19, at 8 (noting that Principle 7 requires an "Independent Environmental and Social Consultant, not directly

approved, rejected, or modified based on the good-faith recommendations of consultants with expertise in the area of the facility's potential environmental and social impacts.[129] For example, when an impact assessment determines that a project is likely to impact local communities, World Bank policy requires the project company to carry out "free, prior, and informed consultation" with the communities in order to receive funding.[130]

In practice, however, certain pressures often prevent consultants from providing entirely accurate or "independent" impact assessments for projects.[131] Consultants submit their impact assessments during the later stages of project planning, when the ability to halt or significantly modify a project is limited.[132] Furthermore, although consultants do not themselves have a financial stake in a project's success, they are hired by parties that do.[133] Therefore, consultants are incentivized to frame project impacts as manageable to avoid being replaced by another consultant or risk missing out on future consultancy work.[134] In other instances, the pressure on consultants is far less subtle.[135] For example, if a project company deems a consultant's report unsatisfactory, the project company may withhold payment from the consultant or simply amend the report and publish the amended version.[136] Moreover, consultants' contracts with project companies often include confidentiality obligations which prevent consultants from disclosing

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associated with the client"); *see also Environmental and Social Framework*, *supra* note 35, at 24.

129. Robert Fisher, *Anthropologists and Social Impact Assessment: Negotiating the Ethical Minefield*, 9 ASIA PAC. J. ANTHROPOLOGY 231, 232 (2008).

130. World Bank, *Operational Manual*: *Op 4.0 – Indigenous Peoples* (July 2005) (revised in April 2013). Worth noting is the fact that the World Bank rejected including free, prior and informed *consent* in its Operational Manual, opting instead to require only the watered down "free, prior, and informed *consultation*" of indigenous peoples in the decision-making process. S.J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT 210–11 (2014).

131. Fisher, *supra* note 129, at 232; *see also* Baird, *Principled Engagement*, *supra* note 94, at 498–502.

132. Shannon Lawrence, *The Nam Theun 2 Controversy and Its Lessons for Laos, in* CONTESTED WATERSCAPES IN THE MEKONG REGION 81, 104 (François Molle et al. eds., 2009).

133. *See* Fisher, *supra* note 129, at 232.

134. Lawrence, *supra* note 132, at 104–05 ("The author is aware of a number of cases of a consultant's work being replaced by that of another firm—or strong indications that this would be the case—if the consultant's prediction of likely impacts and mitigation costs are too high.").

135. *See generally* Baird, *Principled Engagement*, *supra* note 94.

136. The ability of a project company to do this depends on the specific provisions of a consulting agreement, but neither example is uncommon to projects in the Basin. *E.g., id.* at 499, 501.

the findings of their impact assessments to the public.[137] This confidentiality prevents impact assessments from facing public or expert scrutiny, thus impeding third parties' ability to identify a project's flaws.[138] It is easy to imagine how many impact assessments are distorted by these types of institutional pressures, effectively misrepresenting the profound impacts that projects might have on local communities, livelihoods, and ecosystems.[139]

B. Inadequacies of Current Mechanisms in Addressing the Accountability Gap

The fundamental issues with project finance's principal characters are not new, and there have been countless attempts to ensure more responsible investment in developing countries.[140] These attempts have taken many forms and include environmental and social standards,[141] institutional accountability mechanisms,[142] and intergovernmental organizations dedicated to regulating development.[143] Each of these efforts has played an important role in promoting responsible practices in project finance, but each has also demonstrated significant flaws in their application.

1. ENVIRONMENTAL AND SOCIAL STANDARDS ARE HOLLOW AND ASPIRATIONAL

In the realm of international investment, there is no shortage of standards and principles aimed at providing institutions with guidelines for responsible investment.[144] Although these standards are typically created for the same purpose, the context in which they are created and the organizations to which they apply vary greatly.[145] For example, the United Nations' Principles for Responsible Investment (U.N. Principles) are perhaps the most widely-accepted standards with over

137. *Id.* at 502.

138. Richard Howitt, *The Importance of Process in Social Impact Assessment: Ethics, Methods and Process for Cross-cultural Engagement*, 8 ETHICS PLACE & ENVTL. 209, 210–11 (2005).

139. *See* Matthews, *supra* note 15, at 402.

140. *See* Bridgeman & Hunter, *supra* note 69, at 188.

141. *Id.* at 188–89.

142. *E.g.*, *About the CAO*, COMPLIANCE ADVISOR/OMBUDSMAN, http://www.cao-ombudsman.org/about/ [https://perma.cc/SF8L-VNCD].

143. *See* Passoni et al., *supra* note 34, at 925.

144. *See* Bridgeman & Hunter, *supra* note 69, at 188 (listing several "standards and norms" in project finance).

145. *See infra* text accompanying notes 139–51.

2,300 signatories.[146] However, the U.N. Principles paint in broad strokes, do not impose any liability on would-be violators, and are mostly aspirational.[147] As a result, many critics view institutions' adoption of the principles as mere "greenwashing"—i.e., portraying one's activities as environmentally conscious without making any real commitment to do so.[148] An example of more narrowly tailored standards are the World Commission on Dams' Criteria and Guidelines, a thorough report on the necessary measures each project participant should take in order to ensure a viable and beneficial hydropower project.[149] Although many laud the World Commission on Dams for identifying the best practices for developing hydropower,[150] the Commission was a temporary organization without a lasting presence to ensure compliance with its Guidelines.[151]

The Equator Principles, which were promulgated in 2003 to address project finance's increasing privatization, have had a more lasting impression in the realm of private investment in developing countries.[152] The Equator Principles establish a comprehensive risk management framework that provides minimum standards for the roughly one hundred financial institutions that have adopted them.[153] Specifically, the Equator Principles outline requirements for project lenders that pertain to the protection of indigenous peoples, human rights violations, climate change, and other areas of concern that stem from infrastructure projects.[154] Despite the Equator Principles' established presence in project finance, they nevertheless fall well short of an adequate safeguard for project-affected communities.[155] Like the U.N. Principles, the Equator Principles are built around voluntary participation and do not purport to impose liability on any of its

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146. *About the PRI*, PRINCIPLES FOR RESPONSIBLE INVESTMENT, https://www.unpri.org/pri/about-the-pri [https://perma.cc/Y4RX-MXS3].

147. *See id.* at 3.

148. *See* Michael P. Vanderbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 175 (2013); *see also* Bridgeman & Hunter, *supra* note 69, at 188.

149. *See generally* WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW DECISION-MAKING FRAMEWORK 259–63 (Nov. 2000).

150. *See, e.g.*, POWER SURGE, *supra* note 12, at 87.

151. *See* Tira Foran & Kanokwan Manorom, *Pak Mun Dam: Perpetually Contested?, in* CONTESTED WATERSCAPES IN THE MEKONG REGION 55, 66–69 (François Molle et al. eds., 2009).

152. *See* Williams, *supra* note 117, at 303–04.

153. *Equator Principles III*, *supra* note 19, at 11; *EP Association Members & Reporting*, EQUATOR PRINCIPLES, https://equator-principles.com/members-reporting/ [https://perma.cc/7B3C-BKN2].

154. *The Equator Principles*, *supra* note 36.

155. *See, e.g.*, *infra* Part III-A (discussing failure of Equator Principles signatories to redress harms caused by the Theun-Hinboun Dam).

signatories.[156] Additionally, they lack any body or mechanisms with the authority to take action against potential violators.[157] These shortcomings, along with those of standards like the U.N. Principles and the World Commission on Dams' Guidelines, demonstrate the inability of aspirational and passive standards to adequately address project finance's systemic flaws.[158]

2. Internal Accountability Mechanisms are Incapable of Taking Effective Action Against Parent Organizations

Several IFIs contain accountability mechanisms to ensure internal compliance with certain environmental and social standards.[159] These mechanisms are common in large development banks[160] and serve roughly the same purpose: providing project-affected communities with a system through which they can hold institutions responsible for violating environmental and social standards.[161] The first of these mechanisms was the World Bank's Inspection Panel (the Panel), created in 1993 to investigate complaints from individuals "who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project."[162] The Panel reports directly to the Bank's Board of Executive Directors, which has authority to authorize or deny the investigation of complaints.[163] This structure aims to make the Panel an "impartial fact-finding body, independent from the World Bank management and staff."[164]

The Compliance Advisor/Ombudsman (CAO), established by the World Bank in 1999, has authority over the Bank's private sector arms—the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).[165] Similar to the Panel, the CAO accepts complaints from parties alleging adverse impacts from

156. *Equator Principles III*, *supra* note 19, at 11 ("The Equator Principles do not create any right in, or liability to, any person, public or private. Financial Institutions adopt and implement the Equator Principles voluntarily and independently.").

157. *See* Joshua A. Lance, *Equator Principles III: A Hard Look at Soft Law*, 17 N.C. BANKING INST. 175, 195 (2013).

158. *Id.* at 198–99.

159. *See* Bridgeman & Hunger, *supra* note 69, at 194.

160. *Id.* at 193–94, 220.

161. *See id.* at 194–96.

162. *About the Inspection Panel*, THE WORLD BANK, https://inspectionpanel.org/about-us/about-inspection-panel [https://perma.cc/Q5YF-BS6D].

163. Bridgeman & Hunter, *supra* note 69, at 208–09.

164. *About the Inspection Panel*, *supra* note 162.

165. Bridgeman & Hunter, *supra* note 69, at 208–09.

IFC or MIGA funded projects.[166] However, the CAO's mandate goes beyond mere dispute resolution and includes both compliance and advisory functions.[167] The CAO's functions include overseeing more general investigations of IFC's and MIGA's operations and advising the Bank's management on implementing policies that will more effectively achieve their goals.[168]

The Panel, the CAO, and analogous accountability mechanisms are meaningful steps towards increased accountability in project finance, but they exhibit two critical flaws in addressing the larger issue: narrow authority and objectives that conflict with their governing organization.[169] First, the privatization of project finance has diminished the role of multilateral development banks in the development of emerging economies like Laos.[170] The World Bank's restructuring of its Environmental and Social Framework in 2016 illustrates this trend by enhancing borrower and host government project responsibilities and making firm distinctions between its own obligations and those of borrowers.[171] Moreover, internal policies are trending away from imposing long-term obligations on IFIs, focusing instead on early-stage monitoring and advisory responsibilities.[172] Therefore, even if a complaint pertained to a World Bank-funded project, it would nonetheless need to allege violations of the World Bank's narrowly-tailored standards in order for the CAO or Panel to impose liability.[173] Second, these mechanisms remain instruments of their parent organizations. Thus, even if the Panel determines the Bank violated internal standards, it is the parties who violated those standards (i.e., the Bank's management) that determine how mitigation measures ought to be implemented,[174] or whether to implement them at all.[175] Despite

166. *Id.* at 210–11.

167. *Id.*

168. *Id.* at 211.

169. *See infra* notes 170–76 and accompanying text.

170. *See* Merme et al., *supra* note 9, at 22; *see also* Williams, *supra* note 117, at 303–04.

171. *See* Passoni et al., *supra* note 34, at 922, 926.

172. *See* Merme et al., *supra* note 9, at 27.

173. *See* Bridgeman & Hunter, *supra* note 68, at 207 ("[A]ccountability mechanisms have expanded citizen access to some international decision-makers affecting their lives . . . . Unfortunately, the contexts in which these mechanisms are effective tend to be narrow.").

174. *See id.* at 215.

175. For example, after the CAO determined that IFC had violated several of its obligations to the Tata Mundra power plant, IFC simply ignored the CAO's findings and did not take remedial action for at least four years. *See Media Advisory: Supreme Court Hears Case on Whether the World Bank Group is Above the Law*, EARTHRIGHTS INTERNATIONAL (Oct. 31, 2018), https://earthrights.org/media/media-advisory-

the emphasis that accountability mechanisms place on "impartiality" and "accessibility," those objectives are undermined by the institutional flaws that exhibit contradictory characteristics.[176]

3. Intergovernmental Organizations Lack Transparency and Authority to Address Harms

Through treaties and intergovernmental organizations, developed and undeveloped countries have made concerted efforts to promote responsible investment and protect the interests of project-affected communities. One of the largest such efforts is the Organization for Economic Cooperation and Development (OECD).[177] Another intergovernmental organization that pursues similar objectives, albeit on a much smaller scale, is the Mekong River Commission (MRC) which consists of Cambodia, Laos, Thailand, and Vietnam.[178] The OECD and MRC differ in their scope of authority, but each demonstrates distinct challenges associated with managing the impacts of project finance in developing countries.

a. Organization for Economic Cooperation and Development

The OECD is an intergovernmental forum that aims to resolve disputes arising out of institutional lending that potentially violate its Guidelines for Multinational Enterprises.[179] Such disputes are addressed by the OECD's ombudsman function, which—like the Panel and CAO—allows communities affected by projects to seek redress from institutions that funded those project and have violated the Guidelines.[180] The authority to receive complaints about potential violations of the Guidelines rests with National Contact Points—OECD representatives located within each of OECD's thirty-six member-countries.[181] If a Contact Point receives a complaint and believes it merits further examination, the Contact Point has broad latitude to investigate the alleged violation(s) of the Guidelines and consult with

supreme-court-hears-case-on-whether-the-world-bank-group-is-above-the-law/ [https://perma.cc/4EFR-RWTV].

176. *CAO Operational Guidelines*, CAO (2013 ed.), http://www.cao-ombudsman.org/howwework/documents/CAOOperationalGuidelines2013_ENGLISH.pdf [https://perma.cc/DM3U-QAR7].

177. *About the OECD*, OECD, http://www.oecd.org/about/ [https://perma.cc/YR24-5CNP].

178. *See generally* 1995 Mekong Agreement, *supra* note 50.

179. *See* OECD Guidelines, *supra* note 38, at 3.

180. *Id.* at 71–75.

181. *Id.* at 71.

the parties involved.[182] From there, the Contact Point's objective is to facilitate mediation between the parties and work towards a solution to the pertinent issues.[183] If the parties are unable to agree, the Contact Point simply issues recommendations on how to properly implement the Guidelines.[184] The OECD's Investment Committee reviews Contact Points' reports and recommendations but does not have a formal appeal function.[185] While the enforceability and effectiveness of these rulings remains questionable, OECD's complaint system has nonetheless made some positive impacts on the activities of IFIs in developing countries.[186]

Unfortunately, the OECD's failures in addressing harmful IFI conduct tend to overshadow its successes. The "overwhelming majority" of complaints are either rejected by Contact Points or simply conclude without meaningful resolution.[187] This ineffectiveness is the result of two principle factors. First, the OECD lacks transparency, which prevents third parties from evaluating the process or reasoning behind the OECD's decisions.[188] The lack of transparency is exacerbated by the arbitrary manner that Contact Points manage complaints, often making determinations that are incompatible with the Guidelines—and, more generally, traditional notions of due process.[189] Second, OECD's Guidelines contain a disclaimer that, like the Equator Principles, explains that observance of the Guidelines by enterprises is "voluntary and not legally enforceable."[190] Therefore, in the narrow circumstances that a Contact Point finds a company in violation of the Guidelines, neither the Contact Point nor OECD at large can compel that company to remedy its conduct.[191]

The Belgian Contact Point's management of a complaint against a Belgian energy company, Tractebel, demonstrates the ineffective and even perplexing results that OECD's shortcomings yield.[192] In 2001, Tractebel had purchased an 80% share of the Houay Ho Power

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182. *Id.* at 72–73.

183. *Id.*

184. *Id.*

185. *Id.* at 73.

186. *See generally* Angel Gurría, *The OECD at 50: Past Achievements, Present Challenges and Future Directions*, 2 GLOBAL POL'Y 318 (2011).

187. OECD WATCH, 10 YEARS ON: ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 29 (2010) [hereinafter 10 YEARS ON].

188. *See* Bridgeman & Hunter, *supra* note 69, at 215.

189. 10 YEARS ON, *supra* note 187, at 43–45.

190. OECD Guidelines, *supra* note 38, at 17.

191. 10 YEARS ON, *supra* note 187, at 51.

192. *See Proyecto Gato v. Tractebel*, OECD WATCH, https://complaints.oecdwatch.org/cases/Case_35 [https://perma.cc/K3DD-SXXL].

Company (HHPC)—the Ho Houay Dam's project company—three years after the dam had begun operation.[193] The complaint alleged that Tractebel had not adequately remedied the ongoing harms caused by the Houay Ho Dam, including 3,000 forced evictions and various negative health and economic impacts.[194] Although Tractebel "made little effort to address the unresolved problems,"[195] the Contact Point stated that "no breaches of the Guidelines could be attributed to Tractebel" because they stemmed from before Tractebel acquired ownership in HHPC.[196] This ruling not only contradicts basic principles of corporate liability—i.e., Tractebel purchased 80% of HHPC's assets *and* liabilities[197]—but also created a jarring accountability vacuum that leaves the project-affected communities with no recourse, even as they continue to feel Houay Ho's effects today.[198] Ultimately, until the OECD can address these institutional shortcomings, it will remain a prominent but ultimately ineffective mechanism incapable of preventing the harms outlined in its own Guidelines.[199]

b. Mekong River Commission

The MRC functions differently than the OECD and has a narrower scope, but it similarly aims to promote responsible investment. Unlike the OECD, the MRC lacks independent facilities or authority because its power exclusively derives from its members: the governments of Cambodia, Laos, Thailand, and Vietnam.[200] Nonetheless, the MRC provides its member states with an amicable forum to formulate policy and to address growing concerns pertaining to the development of the Basin.[201]

The MRC's structure and procedures, however, prevent the MRC from effecting any legitimate change in the Basin. Unlike the Mekong Committee that preceded it,[202] the MRC and its member states do not

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193. Nok Khamin, *Case Study Nine: Houay Ho Hydropower Project*, *in* POWER SURGE, *supra* note 12, at 73, 73.

194. *Proyecto Gato*, *supra* note 192.

195. Khamin, *supra* note 193, at 74.

196. *Proyecto Gato*, *supra* note 192.

197. 4 ALAN S. GUTTERMAN, GOING GLOBAL: A GUIDE TO BUILDING AN INTERNATIONAL BUSINESS § 34:37 (2018) ("[A]cquiring companies run the risk of successor liability for any violation of the [Foreign Corrupt Practices Act] by the target company that may have occurred *prior to consummation of the transaction*.") (emphasis added).

198. *See* Khamin, *supra* note 193, at 73–75.

199. *See* 10 YEARS ON, *supra* note 187, at 5.

200. *See* Johns, *supra* note 49, at 355–57.

201. *See* 1995 Mekong Agreement, *supra* note 50, at 2.

202. Alistair Rieu-Clarke & Geoffrey Gooch, *Governing the Tributaries of the Mekong—The Contribution of International Law and Institutions to Enhancing*

possess the authority to veto independent decisions made by members.[203] This structure provides member states with unilateral power to construct dams within their borders as long as they inform the other members (for tributary dams) or engage in a six-month "prior consultation period" (for mainstream dams).[204] Therefore, when a member state or the MRC as a whole opposes development, it is powerless to prevent that development through any means other than simply voicing its disapproval.[205] The effectiveness of the MRC thus entirely depends on the goodwill and cooperation of its members.[206] Further, while dissenting member states have minimal power to prevent new development, the communities and organizations directly impacted by that development have no meaningful role in MRC's deliberation whatsoever.[207] The MRC's toothless structure provides little hope that it can act as an effective means of holding members accountable for violating international environmental and social standards.

III. Illustrations of Project Finance's Institutional Deficiencies in the Basin

The inherent complexity in project finance's framework produces infrastructure projects that drastically differ from one another. For example, no two hydropower projects have the same financing structure, ownership arrangement, and overall cost.[208] On a technical level, dams can differ in their size and energy output—e.g., "large" dams have a generating capacity of at least 30 megawatts (MW) whereas "small" dams have a capacity around 10 MW.[209] Most importantly, dams differ considerably in terms of the impacts they have

Equitable Cooperation over the Sesan, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 193, 216 (2010).

203. *See* 1995 Mekong Agreement, *supra* note 50, at 3.

204. *See id.* at 6–7.

205. Rieu-Clarke & Gooch, *supra* note 202, at 216–17.

206. *Id.* at 217.

207. Professor Baird explained the limited scope and mandate of the MRC as follows:

> There's no civil society involvement, there's no mandate for any other involvement. . . . The governments are the only members, which means the MRC has to do what the governments tell them. . . . There's not much legal pluralism there in terms of thinking about other stakeholders and how they should be involved.

Interview with Ian G. Baird, *supra* note 86 (on file with author).

208. *See* HOFFMAN, *supra* note 21, at 78.

209. OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, *Types of Hydropower*, https://www.energy.gov/eere/water/types-hydropower-plants [https://perma.cc/4WGS-T73S].

on the environment and nearby communities.[210] Each of these project-specific variables implicates different parties, institutions, and standards; thus, every dam presents a unique illustration of project finance's role throughout a facility's lifespan.[211]

Three dams in particular illustrate the escalation of hydropower development in the Basin and the exceedingly destructive effects such development is having on local populations. The Theun-Hinboun and Nam Theun 2 Dams, completed in 1998 and 2010 respectively, are projects that the Asian Development Bank and World Bank hold up as "model" dams for future development.[212] However, both dams demonstrate deeply-rooted flaws that undermine those claims.[213] Next, the Xayaburi Dam, expected to be operational in 2019, is the first of eleven dams being built on the mainstream of the Lower Mekong River.[214] Xayaburi's short history is particularly alarming because it indicates that project participants continue to neglect project finance's principal flaws, and that those flaws have only worsened under modern conditions.[215]

Although their harms have been severe, it is important to recognize that these dams represent a mere fraction of the operational and proposed dams in the Basin.[216] Thus, one must consider their impacts cumulatively and in the broader context of hydropower development in the Basin, because the failures associated with Theun-Hinboun, Nam Theun 2, and Xayaburi are sadly not the exception, they are the norm.

A. Theun-Hinboun: An Early Cause for Alarm

The Theun-Hinboun Dam is a hydropower project in Laos that had an initial capacity of 220 MW.[217] In 2013, the dam's project company, Theun-Hinboun Power Company (THPC), completed the Theun-Hinboun Expansion Project which increased Theun-Hinboun's capacity

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210. *Compare infra* Part III-A (Theun-Hinboun Dam), *with infra* Part III-B (Nam Theun 2 Dam), *and infra* Part III-C (Xayaburi Dam).

211. *See* HOFFMAN, *supra* note 21, at 78 ("Project finance structures are virtually unlimited.").

212. *See generally* Asian Development Bank, *Project Performance Audit Report on the Theun-Hinboun Hydropower Project*, PPA: LAO 27325 (Nov. 2002) [hereinafter *Theun-Hinboun Audit Report*]; *see generally* DOING A DAM BETTER, *supra* note 41.

213. *See infra* Part III-A (Theun-Hinboun); *see also infra* Part III-B (Nam Theun 2).

214. International Rivers, *A Dangerous Trajectory for the Mekong River: Update on the Status of the Mekong Mainstream Dams*, at 5 (June 2017).

215. *Id.* at 5–6.

216. *See Review of Basin-wide Sustainable Hydropower*, *supra* note 7, at 3–4.

217. *Theun-Hinboun Audit Report*, supra note 212, at 1.

to 520 MW.[218] The initial cost of the project was $240 million, which was financed by a $60 million loan from the Asian Development Bank and other IFI loans.[219] The Expansion Project cost an additional $665 million and was financed by several private IFIs, including three Equator Principle signatories.[220] Notably, Theun-Hinboun was the first time the Laos government formed a partnership with the private sector to finance, construct, and operate a power plant.[221] As a result, the Laos government owns 60% of the THPC, and two foreign energy companies own the remaining 40%.[222] Theun-Hinboun nonetheless operates under a "build-operate-transfer" arrangement, under which the THPC will own and operate the dam for thirty years before transferring full ownership to the Laos government.[223]

The Asian Development Bank regards Theun-Hinboun as "successful, bordering on highly successful" and as a "model" project, but the severe impacts that Theun-Hinboun has had on the surrounding region undermine those assertions.[224] Criticism towards Theun-Hinboun began early when, prior to the dam's operation, several non-governmental organizations (NGOs) published reports identifying unrecognized harms the project would cause.[225] Unfortunately, THPC and the Asian Development Bank neglected these reports—and failed to conduct adequate impact assessment of their own—which resulted in Theun-Hinboun inflicting profound impacts early in its operation.[226] In its first year, Theun-Hinboun adversely impacted fifty-seven villages and roughly 25,000 people by causing dramatic drops in fish catches (as much as 90% in some areas), losses of drinking water and gardens,

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218. *The Theun-Hinboun Expansion Project*, THEUN-HINBOUN POWER CO., http://www.thpclaos.com/index.php?option=com_content&view=article&id=42&Itemid=209&lang=en [https://perma.cc/P22Y-RE8C]. The THPC exports 95% of Theun-Hinboun's output to Thailand. *Theun-Hinboun Project Completion Report*, *supra* note 212, at 3.

219. *Theun-Hinboun Project Completion Report*, *supra* note 212, at 5, 33–36.

220. Blake & Barney, *supra* note 14, at 815.

221. *Theun-Hinboun Project Completion Report*, *supra* note 212, at 1.

222. *Id.* at 2. These companies are MDX Lao, a subsidiary of a Thai power company, and Nordic Hydropower, a partnership of Swedish and Norwegian state-owned utilities. *Id.* at 20.

223. *Id.* at 3.

224. *Theun-Hinboun Audit Report*, *supra* note 212, at iv.

225. One such report addressed THPC's "poor process of implementation, lack of consultation with local people, potential for causing serious harm to thousands of people's livelihoods, and the lack of appropriate mitigation and compensation measures." BRUCE SHOEMAKER, TROUBLE ON THE THEUN-HINBOUN: A FIELD REPORT ON THE SOCIO-ECONOMIC AND ENVIRONMENTAL EFFECTS OF THE NAM THEUN-HINBOUN HYDROPOWER PROJECT IN LAOS 5, INT'L RIVERS (Apr. 1998), https://www.internationalrivers.org/sites/default/files/attached-files/trouble_on_the_theun-hinboun.pdf [https://perma.cc/2UXU-L2FQ].

226. *Theun-Hinboun Audit Report*, *supra* note 212, at v.

and widespread displacement of local communities.[227] In 2000, THPC finally recognized Theun-Hinboun's severe impacts by committing to fund a Mitigation and Compensation Program and working with the Laos government to help "voluntarily" relocate project-affected communities.[228]

Unfortunately, THPC's mitigation efforts have not adequately addressed the harms Theun-Hinboun has caused in the last two decades.[229] In 2001, THPC contracted with consultants to gather additional information on the dam's impacts but ended up refusing to release the consultants' report because THPC considered it an "internal matter and did not want outsiders to intervene."[230] THPC subsequently released an amended version of the report that omitted key information, such as the harms that the proposed expansion would have on the region.[231] Many other consultancy reports met a similar fate.[232] Ultimately, THPC's inadequate baseline data and restrictions on post-construction research helped THPC obscure its own causal liability because THPC was able to blame project harms on unidentified factors or broader societal trends and thus elude accountability for those harms.[233]

Mitigation of Theun-Hinboun's adverse impacts were further hampered by the manner the Laos government attempted to "voluntarily" resettle project-affected communities.[234] First-hand accounts of the Laos government's efforts illustrate patterns of coercion and intimidation used to relocate project-affected communities.[235] In several instances, villagers hesitant to accept the government's resettlement plan were coaxed by false promises or coerced by threats of arrest.[236] As a result, most villagers have been too afraid to criticize the project due to fear of "difficulties with local authorities."[237]

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227. Aviva Imhof, *Case Study Three: Theun-Hinboun Hydropower Project and Theun-Hinboun Expansion Project*, *in* POWER SURGE, *supra* note 12, at 35–36.

228. *Id.* at 36–38.

229. *Id.* at 35–37.

230. Fisher, *supra* note 129, at 234.

231. *Id.*

232. *See, e.g.*, JEROME WHITINGTON, ANTHROPOGENIC RIVERS: THE PRODUCTION OF UNCERTAINTY IN LAO HYDROPOWER 136 (2018) (discussing consultant report that was "scuttled when the consultant objected to attempts to change his conclusion").

233. *Id.* at 137–39.

234. *See* Imhof, *supra* note 227, at 38–39 ("[T]he [resettlement] plan . . . is by no means voluntary. Indeed, if villagers do not 'choose' to relocate, they will be provided with no assistance for the aggravated flooding that will occur as a result of the Theun-Hinboun Expansion project.").

235. Blake & Barney, *supra* note 14, at 820–21.

236. *Id.* As one villager explained:

Accountability mechanisms and international standards have also failed to address Theun-Hinboun's impacts. In 2002, the Asian Development Bank conducted an audit of Theun-Hinboun, but the audit concluded that the project was "successful, bordering on highly successful," citing its favorable rates of return, strong dividends, and financial stability.[238] These findings disregarded numerous reports indicating the project's overt violation of the Asian Development Bank's internal guidelines and standards.[239] The Equator Principles also failed to alleviate Theun-Hinboun's impacts. Three private banks involved in financing the Theun-Hinboun Expansion Project are Equator Principles signatories.[240] However, when an NGO study concluded that the Expansion Project violated several aspects of the Equator Principles, no action was taken by IFIs or other parties to hold those banks accountable.[241] As a result, the now 30,000 people who are bearing the brunt of Theun-Hinboun's increasingly severe impacts are left with little hope that THPC, the Laos government, or anyone else will compensate them for their losses.[242]

B. Nam Theun 2: The Supposed Gold Standard of Hydropower

The Nam Theun 2 Dam is the largest operational hydropower project in Laos with generating capacity of 1075 MW.[243] The dam's project company, the Nam Theun 2 Power Company (NTPC), completed construction of the dam in 2010.[244] The Laos government owns only 25% of NTPC, with the other 75% of ownership divided

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> Ten villagers were sent summons to be arrested last year [2014], they are afraid of the force of the district . . . . When we said we didn't want to move, the officials said you are [attempting to be] "above the law," and you will be arrested. Some people suggest writing a complaint letter but we don't have enough money to petition the [provincial] governor.

Id. at 820.

237. *Id.* at 823.

238. *Theun-Hinboun Audit Report*, *supra* note 212, at vi.

239. For example, the Asian Development Bank violated a policy which required it to "identify and assess options for avoiding, mitigating, or compensating groups which may be adversely affected" by a Bank project. ASIAN DEVELOPMENT BANK, HANDBOOK FOR INCORPORATION OF SOCIAL DIMENSIONS IN PROJECTS (1994); *see also* Blake & Barney, *supra* note 14, at 823.

240. ANZ Banking Group (Australia), BNP Paribas (France), and KBC (Belgium). Blake & Barney, *supra* note 14, at 815.

241. *See id.* at 816.

242. Imhof, *supra* note 227, at 35–37.

243. Meriem Gray, World Bank, *Nam Theun 2 Multipurpose Development Project: Review and Update*, Doc. No. 71539, at 2 (July 2012). Like Theun-Hinboun, 95% of Nam Theun 2's output is exported to Thailand. *Id.*

244. World Bank, *Case Study 33: Laos – Nam Theun 2 Project*, Rep. No. 76163, at 2 (Aug. 2012).

between Electricité de France International (35%), Electricity Generating Company of Thailand (25%) and Italian Thai Development Company Limited of Thailand (15%).[245] Nam Theun 2 operates under a build-operate-transfer arrangement similar to Theun-Hinboun's, but NTPC will transfer the facility to the Laos government after twenty-five years of operation.[246]

At $1.45 billion, the total cost of Nam Theun 2 greatly exceeded the $905 million invested in Theun-Hinboun.[247] In 2004, when construction of Nam Theun 2 began, its cost equaled half of Laos's GDP.[248] As a result, Nam Theun 2's financing was far more complicated and involved twenty-seven IFIs, including four multilateral development banks, nine international commercial banks, and seven Thai commercial banks.[249]

The World Bank has held up Nam Theun 2 as an example of "Doing a Dam Better."[250] And financially speaking, Nam Theun 2 has succeeded.[251] But independent review of the project demonstrates that Nam Theun 2 is merely another example of project revenue taking precedence over its social and environmental impacts.[252] Although project participants appeared to go to great lengths to create rigid environmental and social obligations for Nam Theun 2,[253] third-party reports have found several violations of those obligations and the internal policies of the World Bank and Asian Development Bank.[254]

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245. *Id.*

246. *Id.*

247. *See id.* at 1.

248. *Lao PDR Country Profile*, WORLD BANK, https://data.worldbank.org/country/lao-pdr [https://perma.cc/2VQ2-WS8V].

249. World Bank, *Project Appraisal Document for the Nam Theun 2 Hydroelectric Project*, Rep. No. 31764-LA, at 20 (March 2005) [hereinafter *Nam Theun 2 Appraisal Document*]. At least five of the private banks were Equator Principles signatories (ANZ, BNP Paribas, ING, KBC, Standard Chartered). *See EP Association Members & Reporting*, EQUATOR PRINCIPLES, https://equator-principles.com/members-reporting/ [https://perma.cc/K77V-TQUX].

250. *See generally* DOING A DAM BETTER, *supra* note 41.

251. *See* Teresa Serra et al., *The Project is Prepared*, *in* DOING A DAM BETTER, *supra* note 41, at 51, 88.

252. *See, e.g.*, Shannon Lawrence, *Case Study Four: Nam Theun 2 Hydropower Project*, *in* POWER SURGE, *supra* note 9, at 41, [hereinafter Lawrence, POWER SURGE].

253. *See* Nam Theun 2 Watershed Management and Protection Authority, World Bank, *Social and Environmental Management Framework and First Operational Plan* (Jan. 2005), http://documents.worldbank.org/curated/en/225081468047117449/pdf/309400v10COVER0SEMFOP.pdf [https://perma.cc/B7XK-9AD2].

254. INT'L RIVERS, *Nam Theun 2 Hydropower Project: Risky Business for Laos*, at 3–4 (Nov. 2007); *see also* Merme et al., *supra* note 9, at 25.

Before construction began, multiple NGOs identified shortcomings in Nam Theun 2's development plan and filed a complaint with OECD's Contact Point in France against Electricité de France (35% owner of NTPC).[255] The NGOs alleged that Electricité de France breached OECD's Guidelines by conducting inadequate impact assessment for the project.[256] Additionally, the complaint outlined NTPC's deficient consultation process with local communities that the project was likely to displace.[257] Nonetheless, and with minimal explanation, the French Contact Point concluded that Electricité de France had not violated OECD Guidelines.[258] The NGOs requested OECD's Investment Committee to reopen the case, citing the Contact Point's lack of transparency and insufficient explanation, but the Committee denied their request.[259] Sadly, many of the impacts identified in the complaint came to fruition shortly thereafter, including displacement of thousands of local individuals, declines in fish catches, and contamination of the local water supply.[260]

Additionally, the lack of transparency in Nam Theun 2's management undermined one of its principle objectives: allocating project revenues to poverty alleviation.[261] From the early stages of development, the World Bank insisted Nam Theun 2 would be an "integral component" in alleviating poverty in Laos.[262] Unfortunately, there is no evidence Nam Theun 2 has realized that capacity.[263] In fact, Nam Theun 2's revenues have simply been comingled with the Laos government's other funds, and the precise allocation of those funds is presently unknown.[264] As of 2018, the Laos government has not disclosed any of the requested financial statements for the poverty alleviation program, and the World Bank itself has expressed concern over the allocation of project revenues.[265] Considering the World Bank

255. *See Proyecto Gato v. Electricité*, OECD WATCH, https://complaints.oecdwatch.org/cases/Case_55 [https://perma.cc/R8B6-4H7C].

256. *Proyecto Gato v. Electricté de France*, Case No. 55, Complaint Filed with French NCP (Nov. 24, 2004).

257. *Id.*

258. *Proyecto Gato v. Electricité*, *supra* note 255.

259. *Id.*

260. *Id.*

261. *See generally* Bruce Shoemaker, *Revenues Without Accountability: National Poverty Alleviation and Nam Theum 2*, *in* DEAD IN THE WATER: GLOBAL LESSONS FROM THE WORLD BANK'S MODEL HYDROPOWER PROJECT IN LAOS 206 (Bruce Shoemaker & William Robichaud eds., 2018).

262. Rosa Alonso i Terme & Homi Kharas, *Lao PDR Gets Ready for NT2*, *in* DOING A DAM BETTER, *supra* note 41, at 33, 36–37.

263. Bruce Shoemaker, *supra* note 261, at 211–12.

264. *Id.* at 208.

265. *Id.* at 209. A World Bank status report for Nam Theun 2 in 2015 illustrates their concern:

framed Nam Theun 2 primarily as a project aimed at alleviating poverty, it is alarming that "the Bank is still not able to demonstrate a clear link between NT2 revenues and poverty alleviation."[266] Thus, when it deemed Nam Theun 2 a model for "Doing a Dam Better," it seems as though the World Bank prioritized the financial interests of lenders over those of the local populations.

C. Looking Ahead to Xayaburi

The threat of hydropower to the Basin did not stop at Nam Theun 2 and has only escalated since construction of the Xayaburi Dam in Laos began. The Xayaburi Project Company (XPC) is expected to complete the dam in 2019, at which point it will be the first operational dam of eleven planned for the Lower Mekong's mainstream.[267] Moreover, with a total cost of $3.8 billion, Xayaburi is a much more ambitious project than any of its predecessors.[268] Yet, unlike Theun-Hinboun or Nam Theun 2, Xayaburi has been entirely funded by Thai banks and is thus not subject to the standards or oversight of organizations like the World Bank or Asian Development Bank.[269] Indeed, Xayaburi's project documents lack any provisions for independent oversight of its performance, environmental harm, or social impacts.[270] As a result, Xayaburi appears to heighten the detrimental conduct associated with its predecessors, all of which continue to inflict profound harm on the Basin.[271]

Already, Xayaburi has exhibited many of the principal flaws in project finance. Since construction began in 2010, XPC has repeatedly failed to conform to international standards of consulting and transparency, even falling short of efforts taken with Nam Theun 2.[272]

> While audits confirm that the revenues have been received in the Government Treasury [of Laos] and a significant portion of NT2 revenues have been allocated to eligible sectors, implementation of the revenue and expenditure management arrangements is not yet consistent with related obligations. The [Laos] government has . . . not met obligations regarding public disclosure, NT2 revenue allocation and expenditures and regarding public consultations.

Id. (citing World Bank, *Nam Theun 2 Social and Environmental Project: Implantation Status Report* (June 30, 2015)).

266. *Id.* at 211.

267. *A Dangerous Trajectory for the Mekong River*, *supra* note 214, at 2–5.

268. Johns, *supra* note 49, at 360–61.

269. *Id.* at 360.

270. *Id.* at 363.

271. *Id.* at 374–75, 381 ("[T]he Nam Theun 2 project failed forward into the relative obduracy of the Xayaburi project.").

272. *See, e.g.*, Ame Trandem & Int'l Rivers, *Fatally Flawed Xayaburi EIA Fails to Uphold International Standards* (Mar. 2011),

In 2012, after Laos and XPC violated the 1995 Mekong Agreement's "prior consultation" requirement, other MRC members criticized the project's continued construction but were unable to take effective action.[273] As of 2017, with the dam over 75% complete, the project designs had still "not been released to the public or reviewed" by the MRC.[274] Today, the Laos government has already resettled 2,980 people, but Xayaburi's impacts are expected to get far worse.[275] Once operational, Xayaburi will directly affect roughly 202,000 individuals through the environmental impacts it will inflict upon the previously untouched Lower Mekong mainstream.[276] With minimal participation in the project outside of Laos and Thailand, there are very few measures that could effectively mitigate the looming threat of the Xayaburi Dam.[277]

IV. CREATING A MORE EFFECTIVE ACCOUNTABILITY MECHANISM

To adequately cure project finance's pitfalls, a mechanism must address the underlying issues that have permitted project participants to systematically avoid accountability for project harms. The root of these issues is the lack of independent checks on project participants which allows them to act in their own self-interest without severe consequences.[278] Host governments, especially authoritarian regimes like Laos, can neglect or undercompensate project-affected communities to keep project costs low and its country attractive to investors.[279] International financial institutions can fall well short of their obligations to a project so long as the project is a "success" financially.[280] Project companies can shop around for project-friendly consultants or simply change unfavorable reports to ensure a project

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https://www.banktrack.org/download/fatally_flawed_xayaburi_eia_fails_to_uphold_international_standards/110707_preliminary_review_of_xayaburi_eia_14_03_11_final.pdf [https://perma.cc/YKF5-6TW7]; *see also* Johns, *supra* note 49, at 362–63.

273. Alistair Rieu-Clarke, *Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy*, 5 ASIAN J. INT'L L. 143, 153–55 (2015).

274. International Rivers, *Disappointing and Lengthy Mediation Leaves Impacts of Xayaburi Dam Unaddressed* (July 20, 2017), https://www.internationalrivers.org/resources/press-release-disappointing-and-lengthy-mediation-leaves-impacts-of-xayaburi-dam [https://perma.cc/TK7B-6RH9] [hereinafter International Rivers, *Disappointing and Lengthy Mediation*].

275. International Rivers, *supra* note 214, at 5.

276. *Id.*

277. *See* International Rivers, *Disappointing and Lengthy Mediation*, *supra* note 274.

278. *See supra* Part I-A.

279. *See supra* Part II-A-1.

280. *See supra* Part II-A-2.

proceeds as planned.[281] A mechanism should not aim to, nor would it be able to, eliminate these embedded institutional behaviors, but it should act as the necessary check on an otherwise unchecked system.

The proposed mechanism (the Mechanism) would have three primary functions, each playing a significant role at different stages throughout a project's development:

(A) Consulting & Impact Assessment Function (CIAF)—ensure early and independent consultant involvement in project planning and outline explicit obligations for project participants.

(B) Monitoring Function—compile credible, objective, and consistent information throughout a project's lifespan using independent investigation and research gathered by third parties.

(C) Ombudsman—provide project-affect communities with a neutral and, if necessary, anonymous system through which they can file complaints against project participants without fear of retaliation from adversely-motivated parties.

Each function's efficacy depends on the others, and all three are intended to supplement rather than replace existing mechanisms. In fact, in some instances, the Mechanism's functions rely upon the participation of existing parties—e.g., other accountability mechanisms, IFIs, and NGOs.

A. Consulting and Impact Assessment Mechanism

The Consulting and Impact Assessment Function (CIAF) of the Mechanism would aim to prevent the biased and noncommittal environmental and social impact assessments that are often involved in projects.[282] The CIAF would do this in two ways. First, it would create a randomized pool of qualified consultants from which project companies would hire consultants that are truly independent.[283] Second, the CIAF would ensure that impact assessments clearly outline mitigation measures that project companies must take in order to proceed with a project.[284]

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281. *See supra* Part II-A-3.

282. *See supra* Part II-A-3.

283. International Rivers attempted to implement a similar "independent" consultancy system for the Theun-Hinboun Dam, but its efforts were subsequently undermined by THPC editing the consultants' report. WHITINGTON, *supra* note 232, at 158, 161–66.

284. Both the Equators Principles and IFC's standards require detailed and enforceable obligations to mitigate foreseeable harms, but neither has been effective or well-implemented. *See* Williams, *supra* note 117, at 304–05.

The procedures surrounding the consultant pool would be relatively straightforward. The CIAF would compile lists of consultants that meet a certain threshold of qualifications in, for example, the realm of hydropower. Those consultants would then provide impact assessments on a randomized or rotational basis for new hydropower projects. The CIAF would thus act as a buffer between consultants, who conduct impact assessments, and project companies, who have a vested interest in favorable impact assessments. This buffer would prevent project companies from shopping around for project-friendly consultants and/or pressuring consultants to return favorable findings, thus adding neutrality and independence to the consultant-selection process. Because the World Bank, Equator Principles, and other organizations already require "independent" consultants for projects,[285] support for the CIAF would simply require recognition by those organizations that the best way to ensure truly "independent" consultant participation is through this kind of pool system. In fact, organizations like the World Trade Organization have already recognized the importance of independent expert review by implementing a "list" system for appointing neutral experts when adjudicating disputes involving highly scientific or technical subject matter.[286] Lastly, the independent nature of the consultant pool would increase the transparency of project impact assessment reports.[287] This increased transparency would preclude project companies from altering or withholding impact assessment reports from the public and enhance public scrutiny of those reports.[288]

Second, the CIAF would impose firm commitments on project companies and lenders to implement mitigation measures proportionate

285. *See Equator Principles III*, *supra* note 19, at 8 (Principle 7); *see also Environmental and Social Framework*, *supra* note 35.

286. Joost Pauwelyn, *The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as Applied in the Three First SPS Disputes:* EC—Hormones, Australia—Salmon, and Japan—Varietals, 2 J. INT'L ECON. L. 641, 661–62 (1999). For example, in resolving disputes involving the WTO Agreement on Sanitary and Phytosanitary Measures, World Trade Organization dispute resolution panels can appoint experts "from a list of names provided to the panel by the relevant international organization or by the parties themselves." *Id.* at 661.

287. Professor Baird explained the need for transparency in countries like Laos, as opposed to more developed countries, as follows:

> In other countries, where you have strong governmental or civil society or public scrutiny of [consultancy reports], it is much more difficult to get away with [biased reporting]. But in the context of Southeast Asia where those things don't exist, you have a lot of [consultants] who are coming up with the type of advice that will give them future work . . . and they're getting directly rewarded with big contracts.

Interview with Ian G. Baird, *supra* note 86 (on file with author).

288. *See* Howitt, *supra* note 138, at 210–11.

to a project's anticipated impacts. Many such requirements already exist in the realm of project finance, but they nonetheless fail to impose accountability on project companies or lenders who do not satisfy their obligations.[289] For example, impact assessments for hydropower projects typically estimate the number of individuals that a dam's construction and operation will displace.[290] Currently, it is common for a project's development to continue as scheduled despite obvious deficiencies in the mechanisms set up to compensate and resettle those individuals.[291] The CIAF, on the other hand, would outline firm benchmarks and objectives that a project must meet throughout its development in order for development to continue, not merely aspirational promises that are easily ignored. To effectively impose these obligations, CIAF-appointed consultants would play an integral role early in a project's planning to ensure the project's financing is closely tied to—if not contingent upon—the timely and adequate satisfaction of those obligations.[292]

Providing the CIAF with the ability to delay or halt a project's construction would require considerable concessions by project companies and IFIs.[293] However, many concession agreements already include comparable provisions regarding impact assessment and mitigation efforts, but enforcement of those provisions is simply lacking.[294] Without such concessions, the CIAF would nonetheless serve an important purpose by providing reliable information regarding a company's obligations to a project. Therefore, if a project participant breaches its pre-construction obligations, outside parties can use that breach as evidentiary support in a claim against that participant. Evidence of an apparent breach of clearly defined project commitments can be sufficient to hold institutions accountable to internal or international mechanisms (e.g., Inspection Panel, OECD).[295]

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289. For example, the World Bank has still not met its front-end, poverty alleviation commitments to Nam Theun 2. *See* Bruce Shoemaker, *supra* note 261, at 207–12.

290. *See* HOFFMAN, *supra* note 21, at 106–07.

291. *See, e.g.*, Lawrence, POWER SURGE, *supra* note 252, at 41.

292. Early consultant involvement is essential because once a project has reach later stages of planning, project proponents will be more reluctant to accept reports that undermine that project's continued development. *See* Bridgeman & Hunter, *supra* note 68, at 192.

293. *See* Carl Middleton et al., *Old and New Hydropower Players in the Mekong Region: Agendas and Strategies, in* CONTESTED WATERSCAPES IN THE MEKONG REGION 23, 47–48 (François Molle et al. eds., 2009).

294. *See, e.g.*, *Nam Theun 2 Appraisal Document*, *supra* note 249, at 21–23.

295. After being confronted with ample evidence of its breaches of pre-construction obligations, the Asian Development Bank was compelled to take more measurable steps in mitigating Theun-Hinboun's impacts. *See Theun-Hinboun Audit Report*, *supra* note 212, at v; *see also* Fisher, *supra* note 129, at 232.

B. Monitoring Function

The Mechanism's Monitoring Function would provide independent and credible information on projects to rebut biased or misleading information that host governments and project companies produce. A large impediment to holding institutions accountable for project harms is the lack of consistent and reliable information.[296] Although independent NGOs may report that a project company's resettlement program is grossly underperforming, the project company—and sometimes host government—can produce reports claiming the opposite.[297] The issue, especially in countries under authoritarian regimes, is that the latter reports are often products of coercion or selective research.[298] Nonetheless, project participants tend to rely on such reports when declaring a project a success while simultaneously neglecting independent reports that undermine those findings.[299]

The Monitoring Function would address these issues in much the same way that NGOs have but under the guidance of the CIAF's clearly-defined pre-construction obligations.[300] The Monitoring Function would collect information by conducting field reports that assess the environmental and social impacts on project-affected communities.[301] Moreover, the Monitoring Function would consolidate information collected by reputable NGOs (e.g., International Rivers, Mekong Watch), provided those NGOs submit reports that meet minimum requirements of reliability, transparency, and independence.[302] As a result, if a project company or IFI breaches certain obligations to a project, these sources of information would equip the Mechanism with considerable evidence of that breach which it could then use to compel action by the offending party.

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296. *See* Foran & Manorom, *supra* note 151, at 61.

297. For example, the Asian Development ignored various reports submitted by NGOs regarding Theun-Hinboun's impacts until the harms became much more severe. Fisher, *supra* note 129, at 238.

298. Some early impact assessment for the Theun-Hinboun Dam only took into account downstream impacts on the five villages nearest to the dam, excluding consideration of more severe harms occurring further downstream. Interview with Ian G. Baird, *supra* note 86 (on file with author).

299. *See, e.g.*, *Siemenpuu et al. v. Pöyry Group*, Case No. 259 (2012), OECD WATCH, https://complaints.oecdwatch.org/cases/Case_259 [https://perma.cc/5UST-3QDV].

300. *See, e.g.*, *supra* notes 255–60 and accompanying text.

301. These field reports would parallel the efforts that NGOs like International Rivers conduct around project sites. *See generally, e.g.,* BRUCE SHOEMAKER, *supra* note 225.

302. *See, e.g.*, Mekong Watch, *Laos Nam Theun 2 Hydropower Project Field Report (5-7 January 2017)* (Feb. 2017), http://www.mekongwatch.org/PDF/NT2FieldReportJan2017.pdf [https://perma.cc/97MX-N5Q5].

The largest obstacle in obtaining such a breadth of information would be host governments. The governments of developing countries often restrict access to or outright ban parties from investigating project impacts, especially when those investigations aim to undermine a project's development.[303] Compelling host governments to allow such investigation would thus require the backing of IFIs, who could then put pressure on host governments to permit independent review of projects by lending project funds contingent upon their compliance with the Monitoring Function.[304]

C. Ombudsman

The Mechanism's Ombudsman would fill the largest hole in project finance's accountability framework. Although ombudsmen are not entirely absent from project finance,[305] none adequately provide broadly accessible means through which project-affected communities can seek redress.[306] Assuming project-affected communities are capable of contacting an ombudsman—one that happens to have authority over a lender that financed the harm-inducing project—many would still be hesitant to do so.[307] In Laos, for example, the risks associated with opposing government-backed projects typically outweigh the unlikely chance that an ombudsman will hold its parents organization accountable.[308] Moreover, even when those procedures do succeed, it is due primarily to the initiatives of NGOs who filed complaints on behalf of project-affected communities.[309]

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303. *See, e.g.*, Baird, *Principled Engagement*, *supra* note 94, at 501 (discussing Nepal banning Piers Blaikie from the country after his publication of *Nepal in Crisis* and Cambodia putting pressure on consultants who had been investigating potential violations of environmental and social standards).

304. These pressures would likely be effective in changing host government behavior because of the disproportionate negotiating power that IFIs typically have over host governments. *See* Bridgeman & Hunter, *supra* note 69, at 197–98.

305. For example, the Compliance Advisor/Ombudsman. *See supra* Part II-B-2.

306. *See supra* Part II-B-2.

307. *See supra* notes 234–37.

308. Failures of ombudsmen in Laos are best illustrated by Professor Baird's first-hand experience. Professor Baird explained that he rarely recommends for villagers to get involved in ombudsman procedures because "they will be exposed, and then they will be vulnerable. [The Laos government] doesn't look kindly upon people who disagree with them and cause them to lose face." He elaborated, "The ombudsman needs to provide [complainant] information to the Laos government. Very quickly, the Laos government is going to go down there, find those people in a moment, and put all sorts of pressure on them to change their [mind]." Interview with Ian G. Baird, *supra* note 86 (on file with author).

309. *See, e.g.*, *Proyecto Gato*, *supra* note 192; *see also Siemenpuu, supra* note 299.

To address these shortcomings, the Mechanism's Ombudsman would provide accessible and anonymous procedures that allow communities to voice concerns and file complaints without fear of retaliation from their government or other project participants.[310] Although some legal systems disfavor anonymous complaints,[311] the notion of withholding complainant information for their protection is not uncommon.[312] This system would allow the Ombudsman to act as an accredited and neutral party capable of ensuring the veracity of complaints. Alternatively, the Ombudsman would have the authority to file complaints sua sponte when it has independently—or with the assistance of the Monitoring Function—discovered violations of project standards or obligations.

Similar to the Mechanism's Monitoring Function, the Ombudsman would require host governments to acquiesce to Ombudsman personnel operating and gathering information near project sites.[313] However, if the Ombudsman was supported by IFIs, then those institutions could compel host governments to allow such involvement at risk of losing future opportunities for foreign investment.[314] Although the Ombudsman—along with the Mechanism's other functions—relies on IFIs supporting a mechanism that appears adverse to their interests, that support is not as unattainable as it might seem. Most development banks and private lenders have already adopted guidelines, standards, or principles that require independent consulting, monitoring of project impacts, consultation with local communities, and other analogous duties.[315] The Mechanism simply aims to more clearly define those commitments, gather unbiased information regarding their implementation, and ensure that violations thereof are not buried in the complex and opaque structures of project finance.

310. The U.N. identified accessibility and anonymity as "best practice" strategies for grievance mechanisms in order to effectively survey villagers in project-affected areas. *See* ROMBOUTS, *supra* note 130, at 341–44.

311. *See, e.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (discussing "[c]ustomary and constitutionally-embedded presumption of openness").

312. The Human Rights Ombudsman of Guatemala initiated an investigation based on an anonymous complaint that led to the discovery of government officials routinely violating international freedom of press and expression laws. European Ombudsman, OECD, *The Role of Ombudsman Institutions in Open Government* 4 (OCED Working Paper on Public Governance No. 29, 2018). In the U.S., pseudonym complaints are permissible under several circumstances, including when the complainant is in "real, imminent personal danger." *Femedeer v. Haun*, 227 F.3d 1244, 1246 (10th Cir. 2000).

313. *See supra* note 296–301.

314. For a discussion on host governments' vulnerability to financial and political pressures by IFIs, see Bridgeman & Hunter, *supra* note 69, at 198–99.

315. *See, e.g.*, *Equator Principles III*, *supra* note 19; *see also Environmental and Social Framework*, *supra* note 35.

CONCLUSION

The last two decades of hydropower in the Mekong River Basin illustrate project finance's potential capabilities and pernicious failures. Project finance has allowed developing countries like Laos to increase foreign investment and accelerate the development of infrastructure facilities. But the costs of development have been immense. Catastrophic failures like the collapse of the Xe Pian Xe Namnoy Dam demonstrate the fatal consequences that deficient government oversight and inadequate due diligence can yield. However, a hydropower facility need not collapse in order to inflict severe and long-lasting harms on local communities.[316] Indeed, the most alarming impacts have been the gradual and latent harms—e.g., degradation of biodiversity, destruction of farms and fisheries, exacerbated flooding and erosion, and clean water shortages—caused by dams like Theun-Hinboun, Nam Theun 2, Xayaburi, and dozens more.[317] In aggregate, these harms have destabilized the livelihoods and food security of the Basin's inhabitants and threaten to cripple the region's social and environmental bedrock.[318]

Proponents of hydropower development in the Basin have neglected the gravity of these harms and forced project-affected communities to bear their exceedingly steep cost.[319] Although project participants often frame hydropower projects as beneficial to local communities,[320] their failures to address the persistent and adverse impacts such projects have on those communities undermine their hollow assertions.[321] Instead, recent hydropower projects indicate that project participants prioritize a project's financial success above all else and are content to discount environmental and social concerns.[322] Unfortunately, the framework of project finance permits, and even encourages, such self-interested conduct.[323] For example, Laos continues to attract foreign investment despite its history of corruption, forced resettlement, and coercive tactics.[324] Moreover, project companies and IFIs consistently fail to mitigate project impacts and, to keep projects profitable, rarely provide project-affected communities with adequate compensation for those impacts.[325]

316. *See* Whitington, *supra* note 11.
317. *See* POWER SURGE, *supra* note 12, at 7–9.
318. *Id.*
319. *See* International Rivers, *supra* note 214.
320. *See, e.g.*, Bruce Shoemaker, *supra* note 261, at 207–12.
321. *See* POWER SURGE, *supra* note 12, at 87.
322. For a thorough discussion of this, *see supra* Part II-B-1.
323. *See supra* text accompanying notes 69–73.
323. Transparency International, *supra* note 61.
324. Bugalski, *supra* note 18, at 13.
325. *See supra* Part II-A-1.

Despite this glaring accountability gap, project finance lacks a mechanism that can protect the rights of project-affected communities or hold project participants accountable for violating environmental or social standards. International organizations have attempted to create such mechanisms, but they have failed to address the accountability gap's underlying problem: project finance's structure allowing project participants to act in their own self-interest, unchecked by independent review. Thus, a mechanism that is subordinate to project participants or that lacks the ability to impose strict obligations on them will invariably fail and cannot cure project finance's larger systematic flaws.

The proposed Mechanism would provide the necessary independent oversight throughout the multi-decade lifespan of hydropower facilities. In doing so, the Mechanism would address the neglected realities of project finance, such as the oppressive regimes that often govern developing nations, the latent impacts of dams, and the financially motivated proponents of hydropower development. Absent this Mechanism, the devastation of Xe Pian Xe Namnoy's collapse will soon pale in comparison to the devastating and irreversible impacts inflicted upon the Mekong River Basin and its sixty million inhabitants.