Case Study 3.2

The Lower Sesan II

Human Rights Implications for Chinese Overseas Projects

Leigha Crout and Michael Liu

1 Overview

This case study examines the human rights implications arising from the construction of the Lower Sesan II dam, Cambodia's largest hydroelectric dam, and one seated at a tributary of the Mekong River. As a long-standing initiative first proposed by the Asian Development Bank in the 1990s, the Lower Sesan II was later adopted by and labeled a "key project" of China's Belt and Road Initiative (BRI). The dam was intended to dramatically expand access to reliable energy sources within Cambodia. As energy demand is expected to increase rapidly by 6–7% each year through 2025 in the Lower Mekong River Basin, the Lower Sesan II provides a valuable alternative to nonrenewable energy sources.

However, project developers and contractors face significant criticism as the construction efforts have displaced Indigenous communities and failed to address environmental reports that projected a substantial disruption to local biodiversity, adverse effects that were later documented by local groups and nongovernmental organizations (NGOs). Drawing from international, transnational, and domestic sources of law, and interviews with various community stakeholders, this study illustrates how Chinese parties building BRI projects engage with applicable human rights obligations through the example of the Lower Sesan II and discusses the consequences of noncompliance.

2 Introduction

The construction of the Lower Sesan II dam in 2018 represents the conclusion of a long-standing and international joint venture intended to address the large-scale energy demand in Cambodia.[1] Coordinated by China Huaneng Group (CHNG), a Chinese state-owned enterprise (SOE) owning a controlling stake in the project, Cambodia's Royal Group, and Electricity of Vietnam, it

[1] Asian Development Bank Regional Technical Assistance Team 6367, *Sesan, Sre Pok and Sekong River Basins Development Study in Kingdom of Cambodia, Lao People's Democratic Republic, and Socialist Republic of Viet Nam* (ADB 2010) www.adb.org/sites/default/files/project-document/74950/40082-012-reg-tacr.pdf.

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has been designated by PRC officials as a "key project" of the BRI.[2] Investors committed the project to "ensuring the energy security, lowering the price of electricity, and reducing poverty in Cambodia."[3] With 400 MW power, the Lower Sesan II stands as the nation's largest hydropower dam and is projected to contribute to a regional initiative to provide clean energy beyond Cambodia to surrounding states in the region, thus decreasing the need for reliance on fossil fuels.[4] In light of the 2022 UN Resolution on the Right to a Clean, Healthy and Sustainable Environment's formal declaration that the "right to a clean environment" is a human right, this timely project might also contribute to global aspirations to cut carbon emissions for years to come.[5]

However, concerns about the dam's short- and long-term community impact were raised as early as 2008, when a corporate Environmental Impact Assessment (EIA) predicted substantial harm to local groups that would be displaced as a result of the construction.[6] A 2012 study published in *Proceedings of the National Academy of Sciences* echoed the initial report and added that the dam would significantly harm biodiversity, for example, projecting approximately a 10% loss of fish across the Mekong Basin.[7] Today, allegations of involuntary resettlement, deforestation, and significant negative impacts to water quality have all been reported as local communities and Indigenous peoples struggle with the loss of more than 34,000 ha of land.[8]

Drawing from bilateral investment treaties (BITs), corporate regulations and sustainability reports, impact statements, legal complaints, interviews with a range of stakeholders, and national and international human rights laws, this case study provides an in-depth analysis of the major human rights impacts

[2] 'Cambodia's Lower Sesan II Hydropower Dam Fully Operational' (*PowerChina*, 23 October 2018) www.chinadaily.com.cn/m/powerchina/2018-10/23/content_37174891.htm (state-sponsored media outlet).

[3] 'Cambodia Hydro Project Powers Up' (*China Daily*, 19 December 2018) https://global.chinadaily.com.cn/a/201812/19/WS5c19a94aa3107d4c3a00195c.html (state-sponsored media outlet).

[4] Royal Group, 'HydroPower Lower Sesan 2' www.royalgroup.com.kh/business-portfolio/energy-division/hydropower-lower-sesan-2; Asian Development Bank, *Building a Sustainable Future: The Greater Mekong Subregion* (2009) www.adb.org/sites/default/files/publication/29307/building-sustainable-energy-future.pdf.

[5] The Human Right to a Clean, Healthy and Sustainable Environment (26 July 2022) UN Doc A/76/L/75.

[6] '[Draft] Environmental Impact Assessment for Feasibility Study of Lower Sesan 2 Hydropower Project, Stung Treng Province, Cambodia – Executive Summary – OD Mekong Datahub' (*OpenDevelopmentCambodia*, 2008) https://data.opendevelopmentcambodia.net/agreement/draft-environmental-impact-assessment-for-feasibility-study-of-lower-sesan-2-hydropower-project-stu/resource/a4d6cd73-4ada-4436-88a2-e19325971255.

[7] Guy Ziv, Eric Baron et al., 'Trading-Off Fish Biodiversity, Food Security, and Hydropower in the Mekong River Basin' (2012) 109 Proceedings of the National Academy of Sciences 5609–5614.

[8] Stephanie Jensen-Cormier, 'Watered Down: How Do Big Hydropower Companies Adhere to Social and Environmental Policies and Best Practices?' (*International Rivers*, 2019) https://3waryu2g9363hdvii1ci666p-wpengine.netdna-ssl.com/wp-content/uploads/sites/86/2020/10/watered-down-full-report-english-compressed.pdf.

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arising from the construction of the Lower Sesan II. It begins with an introduction of the relevant legal standards, including domestic legislation, regional agreements, and international human rights treaties. It then analyses the compliance measures undertaken by CHNG, its corporate partners, and the state and assesses whether human rights obligations were met by the relevant parties. The case study concludes with a summary of the above findings and suggests that further measures are needed to ensure alignment with human rights standards.

3 The Case

3.1 Background on Human Rights Obligations and the BRI

When undertaking BRI projects, both Chinese companies and the project's host country (in this case, Cambodia) are subject to three general categories of human rights standards that govern their conduct: international, transnational, and domestic. At the international level, states have agreed to respect, protect, and fulfill fundamental human rights through a series of treaties drafted by the United Nations (UN).[9] Nonbinding documents such as declarations and guiding principles also influence state and private actions taken by corporations, although they are not legally enforceable.

The transnational level includes binding standards and principles arising from bilateral agreements and regional treaties. BITs are included in this category,[10] and they typically govern the specifics of state-to-state investment projects. These agreements can have provisions governing human rights standards, transparency, and dispute resolution procedures, among other regulations. Finally, domestic rules refer to legislation governing the conduct of the state and private organizations. This includes constitutions, legislation regarding business practices and human rights, and any administrative regulations that might be applicable.

At each level, this framework demands substantive protections for human rights and high levels of transparency. However, multiple BRI projects have been under scrutiny in recent years for failing to meet the obligations imposed by human rights laws.[11] Legal complaints and international resolutions have been levied against Chinese SOEs and private corporations operating in several

[9] OHCHR, 'The Core International Human Rights Instruments and Their Monitoring Bodies' www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies.

[10] BITS are included in transnational legal instruments given their often explicit commitment to "facilitate transnational investment flows." Kenneth J. Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard International Law Journal 469, 472 (citations omitted).

[11] Between the years of 2013 and 2020, the Business and Human Rights Resource Centre "recorded 679 human rights abuse allegations linked to Chinese business conduct abroad." '"Going out" Responsibly: The Human Rights Impact of China's Global Investments' (Business and Human Rights Resource Centre, August 2021) www.business-humanrights.org/en/from-us/briefings/going-out-responsibly-the-human-rights-impact-of-chinas-global-investments/.

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BRI countries, alleging systematic violations of human rights. Notable examples include withheld wages, unlawful deprivations of liberty, human trafficking, and failing to implement safety measures in hazardous working environments.[12] Other harms such as violations to the right of a clean environment have also been reported, although legal cases vindicating this right are rarer.

The case of the Lower Sesan II illustrates the challenges of ensuring transparency and compliance in multilateral projects like those within the BRI. The discussion below articulates the relevant legal standards governing the parties in this case, beginning with international human rights obligations.

3.2 International Human Rights Law

The international human rights instruments relevant to this analysis include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These binding texts will be discussed in the context of Cambodia, as China is not subject to liability for violations of these instruments outside its territory. Under these treaties, it is Cambodia that bears the responsibility to protect and fulfill the rights of its citizens.

Relevant nonbinding texts with broader application include the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the UN Guiding Principles on Business and Human Rights (UNGPS), and the UN Resolution on the Right to a Clean Environment. China and Cambodia are party to these agreements.

The ICCPR has been signed and ratified by Cambodia, meaning that the state is legally bound to enforce the rights protections in its text.[13] Two rights are most relevant to this discussion. First, Cambodia is obligated to respect and protect the rights of subsistence, which holds that a people or group can freely dispose of their natural wealth and resources without interference by the state.[14] Second, minority groups are entitled to "enjoy their own culture, to profess and practise their own religion."[15] In General Comment 23, the Committee of the ICESCR discussed the latter and suggested that this right required the adoption of legal protections for traditional aspects of minority culture, such as hunting or fishing.[16]

[12] See, e.g., European Parliament RC-B9-0600/2021 (15 December 2021), which is a 'Joint Resolution on Forced Labour in the Linglong Factory and Environmental Protests in Serbia'. See also 'U.S. Department of Labor Secures $3.3 Million Judgment against Saipan Casino Developer for Systemic Wage Violations by Contractors' (*DOL*, 25 April 2019) www.dol.gov/newsroom/releases/whd/whd20190425-1.

[13] Cambodia acceded to the ICCPR with no reservations. See generally, International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[14] ibid art 1 (2). [15] ibid art 27.

[16] UN Human Rights Committee, CCPR General Comment No. 23: Article 27 (Rights of Minorities) (8 April 1994) UN Doc CCPR/C/21/Rev.1/Add.5.

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The ICESCR has also been ratified by Cambodia, and requires the state to provide an adequate standard of living, "including adequate food, clothing and housing, and … continuous improvement of living conditions."[17] States are further obligated "to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[18] General Comment 21 introduces a secondary obligation for states to respect the land rights of Indigenous persons.[19]

While the UNDRIP and UNGPS are nonbinding, their standards reflect broad international consensus on these matters. The UNDRIP has been signed by all recognized countries that are party to the UN, and the UNGPS has received widespread endorsement, including from China and Cambodia.[20] The UNDRIP mandates that governments consult with Indigenous peoples to receive their "free and informed consent" prior to making use of their lands.[21] Actions that displace Indigenous peoples from their lands are prohibited under this declaration.[22]

The UNGPS imposes obligations on states and corporate actors and defines potential avenues for remedies. Its core tenets mandate that the state protect its citizens from human rights abuses committed by third parties (including corporations); that corporations conduct human rights due diligence prior to and during its operations; and that states should enforce their human rights laws, with the cooperation of corporations.[23]

Unlike the other measures discussed here, the standards upheld by the UNGPS do apply to China and its domestic corporations. It holds states to account for human rights violations committed by its own organizations and imposes basic regulations on corporate conduct.[24] States moreover have a special responsibility to "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State," which here implicates SOEs like the Huaneng Group.[25]

Finally, the 2022 UN Resolution on the Right to a Clean, Healthy and Sustainable Environment grants the right to a healthy environment the status of a universally recognized human right.[26] While it has not yet been included within binding human rights treaties, a separate regime of international

[17] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171 (ICESCR).
[18] ibid art 11.
[19] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), (21 December 2009) UN Doc E/C.12/GC/21.
[20] United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res. 61/295 (2 October 2007); UN Doc A/RES/61/295 (UNDRIP); UNSC Res 1373 (28 September 2001); UN Doc S/RES/1373 (UNGPS); The Coca-Cola Company, 'Human Rights Principles' www.coca-colacompany.com/policies-and-practices/human-rights-principles.
[21] UNDRIP (n 20) art 32. [22] ibid art 8. [23] UNGPS (n 20) I(A)(1), II(A)(15) II(B)(17).
[24] ibid. [25] ibid art 4. [26] UN Doc A/76/L/75 (n 5).

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environmental law is dedicated to the protection of the environment and the promotion of sustainable societies.

3.3 Regional and Transnational Legal Standards

Transnational legal standards govern the business or diplomatic relationships between two or more state parties. They are contextual and can articulate specific procedures for investment, guidelines for private parties, and methods of recourse in the case of legal disputes. In the case of China and Cambodia, two instruments are relevant to human rights obligations: the 1995 Mekong Agreement and the Association of Southeast Asian Nations (ASEAN) Human Rights Declaration.

The 1995 Mekong Agreement is a regional directive concluded between Cambodia, Laos, Thailand, and Vietnam.[27] It governs "sustainable development, utilization, conservation and management of the Mekong River Basin water and related resources."[28] While the Agreement is nonbinding, it established the independent Mekong River Commission that is tasked with supervising the party states and their compliance with the text.[29] The main premises of the Agreement that relate to the right to a clean environment include the obligation to conduct a regional consultation prior to commencing major projects that would impact the Mekong, to protect the environment and cease actions that have a negative impact on the Mekong region, and to ensure adequate reparations are administered for violations of the Agreement.[30]

Like the international human rights declarations discussed in Section 3.2, the ASEAN Human Rights Declaration is similarly nonbinding. It requires that states provide an "adequate standard of living," which includes a number of guarantees; food, housing, clean drinking water, and a "safe, clean and sustainable environment" all fall within this right.[31] While inclusive, ASEAN rights are limited by important caveats. The text recognizes that the realization of rights can be limited by "political, economic, legal, social, cultural, historical and religious" factors, and that rights are subject to domestic laws that govern "national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society."[32]

While additional transnational frameworks exist that govern transnational investment projects, they make limited references to the rights of

[27] Mekong River Commission, 'Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin' (5 April 1995) www.mrcmekong.org/assets/Publications/policies/agreement-Apr95.pdf.

[28] ibid. [29] ibid ch 4. [30] ibid ch 5(B)(1)(b); art 7; art 8.

[31] Association of Southeast Asian Nations, 'ASEAN Human Rights Declaration' (18 November 2012) https://asean.org/asean-human-rights-declaration/.

[32] ibid art 8.

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natural persons. The 1996 China-Cambodia BIT,[33] the ASEAN Comprehensive Investment Agreement,[34] and the 2009 ASEAN China Investment Agreement[35] do not refer to human rights or sustainable development, nor do they suggest that these texts be interpreted in line with applicable domestic or international laws on either subject. Although this is not uncommon, model or draft BITs have increasingly begun to explicitly recognize these obligations in recent years.[36]

3.4 Domestic Legislation and Regulations

Human rights protections found in domestic laws and administrative regulations may have significant bearing on foreign investments and can require strict coordination between the parties to ensure compliance. In the case of Cambodia, the state's Constitution, the 2001 Land Law, the 1996 Law on Environmental Protection and Natural Resource Management, and the 1999 Sub-Decree on Environmental Impact Assessment Process are relevant.[37]

While Cambodia's Sub-Decree No. 11 on Build-Operate-Transfer Contracts,[38] the PRC Administrative Measures for Outbound Investment by State-Owned Enterprises,[39] and PRC Administrative Measures for Overseas Investment[40] are informative, none contain provisions related to human rights.

Cambodia's Constitution codifies legal protections for the ownership of private property,[41] stipulating that "Legal private ownership shall be protected

[33] Agreement between the Government of the Kingdom of Cambodia and the Government of the People's Republic of China for the Promotion and Protection of Investment (19 July 1996) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/571/download.

[34] ASEAN Comprehensive Investment Agreement (26 February 2009) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3095/download.

[35] ASEAN China Investment Agreement (15 August 2009) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2596/download.

[36] See, e.g., Netherlands Model Investment Agreement (22 March 2019) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download; Accord entre le royaume du Maroc et _____ pour la promotion et la protection réciproques des investissements [Agreement entered between the Kingdom of Morocco and ____ for the promotion and protection of reciprocal investments] (June 2019) https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5895/download (hereinafter Draft Model BIT Agreements).

[37] Other domestic regulations can be applied here but cover similar obligations. See also Royal Decree on National Protected Areas (1999); Sub-Decree on Water Pollution Control (1999); Sub-Decree on Solid Waste Management (1999); Forestry Law (2002); Law of Water Resources Management (2007); and Natural Water Resources Policy (2004).

[38] Sub-Decree No. 11 on Build-Operate-Transfer (BOT) Contracts (1997).

[39] 中央企业境外投资监督管理办法 [Measures for the Supervision and Administration of Overseas Investment by State-Owned Enterprises] (2017).

[40] 境外投资管理办法 [Administrative Measures for Overseas Investment] (2014).

[41] Constitution of the Kingdom of Cambodia (2018).

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by law. The right to confiscate properties from any person shall be exercised only in the public interest as provided for under the law and shall require fair and just compensation in advance."[42] Similar to the ASEAN Charter, however, constitutional rights in Cambodia can be subsequently limited by other laws.[43] The legal rights to property within the Constitution have not been abrogated by other instruments at the time of this writing.

The 2001 Land Law specifically reserves several articles describing the inviolability of the lands of Indigenous peoples. In relevant part:

> The exercise of all ownership rights related to immovable properties of a community and the specific conditions of the land use shall be subject to the responsibility of the traditional authorities and mechanisms for decision-making of the community, according to their customs, and shall be subject to the laws of general enforcement related to immovable properties, such as the law on environmental protection.[44]

Two exceptions can apply to these provisions, including the government's "acting in the public interest" or in states of emergency.[45] Neither exception was defined within the law.

Finally, the 1996 Law on Environmental Protection and Natural Resource Management and the 1999 Sub-Decree on Environmental Impact Assessment Process require corporations to work in tandem with the Ministry of Energy both prior to and during construction to preserve the environment and promote sustainable development. The former requires that EIAs be conducted prior to any project, "private or public," without exception.[46] The EIA must then be reviewed by the Ministry of Environment and the Royal Government for approval.[47] The 1999 Sub-Decree on EIAs includes the specific procedures for these reports and requires a "Project Owner" to conduct their assessments in consultation with the Cambodian Ministry of Energy.[48]

In sum, there are significant human rights obligations governing Cambodia's and China's efforts during the construction of the Lower Sesan II. While most restrictions applied directly to Cambodia, Chinese corporations operating in Cambodia were nevertheless obligated to comply with Cambodian laws and the mandatory measures for the protection of human rights. Declarations signed by China also informed the state of best corporate practices that would meet desirable human rights standards. The remainder of this case study assesses whether the above obligations have been met through a review of relevant

[42] The right to own property is limited to citizens of Cambodia. ibid art 44. [43] ibid art 31.
[44] Land Law (2001) art 26. [45] ibid.
[46] Law on Environmental Protection and Natural Resource Management (1996) art 6. A new law on environmental protection is being considered but currently remains under discussion. 'In Cambodia, a Sweeping New Environment Code Languishes in Legal Limbo' (*Mongabay Environmental News*, 26 August 2020) https://news.mongabay.com/2020/08/in-cambodia-a-sweeping-new-environment-code-languishes-in-legal-limbo/.
[47] Law on Environmental Protection and Natural Resource Management (1996) art 6.
[48] Sub-Decree on Environmental Impact Assessment Process (1999) art 3.

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parties' conduct. The analysis begins with the preparatory measures taken in advance of construction, moves on to the construction of the Lower Sesan II, and concludes with ongoing human rights implications.

3.5 Preparatory Measures

Under the above instruments, Cambodia and corporations involved in the project were obliged to undertake or enforce the following measures prior to constructing the Lower Sesan II: conducting an EIA to determine potential harms to the Mekong tributary, submitting an EIA to the Ministry of Environment, providing notification to parties of the 1995 Mekong Agreement, and consulting with Indigenous communities that might be impacted by the project.

Regarding the EIA, one of the corporations party to the Lower Sesan II project (Electricity of Vietnam) did commission such a report in 2008. Prepared by Key Consultants Cambodia, the report predicted exceptionally high damage to the Mekong region. By their estimation, approximately 5,000 people would face involuntary resettlement, 66% of local varieties of fish would be significantly impacted through the destruction of their migration roots, and 30,000 ha of forest would need to be flooded.[49] Reports from NGOs and academic publications further speculated that the authors or commissioners of the 2008 EIA reduced its initial predictions to project a less severe outlook.[50]

In response to this initial report, CHNG, an SOE, which has the controlling stake in the project, commissioned a second internal EIA that has not been shared with the public or its corporate partners.[51] As a result, it is not clear to what extent corporations operating on the Lower Sesan II project worked with Cambodia's Ministry of Energy to minimize anticipated environmental impacts. While the Ministry of Energy is required to disclose its work related to EIAs upon request under the 1996 Law on Environmental Protection and Natural Resource Management, this information has not been released.

The Mekong River Commission, tasked with gathering information on party compliance with the Mekong Agreement, produced a report on an "informal donor meeting" in 2013 during which the Lower Sesan II was the subject of controversy.[52] It suggested that other members of the Mekong Agreement appealed to Cambodia to provide more information on the project,[53] which was not provided. While the specifications of a project like the Lower Sesan

[49] '[Draft] Environmental Impact Assessment for Feasibility Study of Lower Sesan 2 Hydropower Project, Stung Treng Province, Cambodia – Executive Summary – OD Mekong Datahub' (n 6).
[50] W. Nathan Green and Ian G. Baird, 'The Contentious Politics of Hydropower Dam Impact Assessments in the Mekong River Basin' (2020) 83 Political Geography 102, 272.
[51] Human Rights Watch, 'Underwater' (10 August 2021) www.hrw.org/report/2021/08/10/underwater/human-rights-impacts-china-belt-and-road-project-cambodia.
[52] Mekong River Commission, 'Report: Informal Donor Meeting' (27–28 June 2013) www.mrcmekong.org/assets/Publications/governance/Report-IDM-2013-Complete-set-final.pdf.
[53] ibid C(7).

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II would only technically require Cambodia to merely grant notice to other parties, the gravity of the project's anticipated impacts suggested that it might fall under the Agreement's prohibition against negative impacts on the region.

Finally, consultations with Indigenous communities prior to the construction of the Lower Sesan II did occur but were regarded as insufficient by the impacted parties and civil society groups.[54] Approximately 200 community representatives from the Sesan, Srepok, and Sekong areas adjacent to the project drafted a Joint Statement in 2008 protesting its construction.[55] They anticipated that the Lower Sesan II would destroy farmland, pollute the water sources and alter its flow, induce the extinction of certain types of fish within the area, and fundamentally disrupt the existing social infrastructure.[56] The government did not provide a response and formally approved the dam's construction in 2012.[57]

A second Joint Statement was then submitted to Chinese Ambassador Bu Jianguo in 2013 by the Sesan, Srepok and Sekong Rivers Protection Network requesting that China withdraw its involvement in the project. Affirming that the local communities were in fact experiencing significant environmental disruptions, the representatives noted that "no stakeholders have taken responsibility for addressing the impacts we face or [are] finding a solution to remedy the problem."[58] The Chinese government did not respond. A subsequent 2014 letter to Ambassador Bu and other Chinese officials likewise did not receive a response.[59]

Finally, in 2018, communities impacted by the Lower Sesan II project filed a Complaint with the World Bank Office of the Compliance Advisor Ombudsman. The Complaint indicated "concerns related to community resettlement, impacts on livelihoods, threats against community members opposing the project, damage to sociocultural significant sites such as ancestral graves and spiritual forests, and impacts on the fish population of the Mekong, Sesan, and Srepok Basins."[60] The Complaint has passed the initial Eligibility and Assessment stages and is now under investigation for compliance measures undertaken during the dam's construction.[61]

[54] Human Rights Watch (n 51).

[55] 'Joint Statement by the Sesan, Srepok, Sekong Community Network' (*International Rivers*, 11 June 2008) https://archive.internationalrivers.org/resources/joint-statement-by-the-sesan-srepok-sekong-community-network-4306.

[56] ibid. [57] Human Rights Watch (n 51).

[58] Sesan, Srepok and Sekong Rivers Protection Network, 'The Joint Statement of the Communities along Sesan, Srepok and Sekong River to Madam Bu Jianguo Ambassador of the People's Republic of China in Kingdom of Cambodia' (*Mekong Watch*, 12 December 2013) 1 www.mekongwatch.org/PDF/LS2_statement_20131212_Eng.pdf.

[59] Sesan, Srepok and Sekong Rivers Protection Network, 'Urgent Request to Reconsider China's Investment in the Lower Sesan 2 Dam, Stung Treng Province, Cambodia' (26 May 2014) https://archive.internationalrivers.org/sites/default/files/attached-files/140512_cso_follow_up_letter_to_chinese_ambassador_-_final_-_english.pdf.

[60] 'Cambodia: Financial Intermediaries 01-03 | Office of the Compliance Advisor Ombudsman' www.cao-ombudsman.org/cases/cambodia-financial-intermediaries-01-03.

[61] ibid.

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3.6 Construction of the Lower Sesan II

Several protected rights were implicated during the construction of the Lower Sesan II. One major event concerned compensation for displaced persons and families. The right to own property is protected by all three levels of human rights instruments, and special rights are reserved for Indigenous persons or communities and their traditional lands. This right is intrinsically linked to the right to culture. In recognition of the historic and cultural significance of these regions, international law and Cambodia's domestic regulations have created substantive legal barriers to the displacement of Indigenous peoples.[62] In the event that individuals do become displaced from their homes, the state or an agreed party is required to offer adequate compensation in advance.[63]

Although Indigenous communities actively protested the taking of their ancestral lands, few adjustments were made to the project's initial plan to flood culturally significant areas, such as burial grounds and traditional areas for hunting and fishing.[64] Civil society organizations produced reports that the level of compensation provided to the families by CHNG were insufficient and did not accurately reflect the cultural or economic value of the lands; as many as 180 families refused to accept the amount or leave their homes.[65] A submission to the UN Special Rapporteur on Human Rights in Cambodia suggested that residents within the impacted zones were pressured and intimidated into taking the compensation offered by the corporation.[66]

The right to an adequate standard of living, which includes housing, clean water, and the continuous improvement of living standards, was also compromised through limited rehousing efforts. CHNG and other corporations working on the site did not publish their resettlement plan, but Human Rights Watch determined through interviews that a parcel of land was given to affected persons, as well as a choice between a pre-built home or US$6,000.[67] The parcels were located on unfavorable ground for farming and cut off from the river. As further construction compromised the peoples' access to clean water, most were isolated from basic means of subsistence.[68]

Other concerns related to transparency have also been revealed through interviews with various human rights NGOs and other stakeholders. The

[62] See, e.g., Land Law (n 44) art 26.
[63] Constitution of the Kingdom of Cambodia (n 41) art 44.
[64] 'Underwater' (n 51).
[65] ibid.
[66] 'Submission to UN Special Rapporteur on the Situation of Human Rights in Cambodia Hydropower Dam Development in Cambodia: Lower Sesan 2 and Stung Cheay Areng Hydropower Projects' (13 January 2015) https://earthrights.org/wp-content/uploads/submission_to_special_rapporteur_on_hydropower.pdf.
[67] 'Underwater' (n 51).
[68] 'Lower Sesan 2 Dam Compensation and Resettlement Program Implementation Impacts on Indigenous Communities' (*Mekong Watch*, 5 November 2015) mekongwatch.org/PDF/LS2_NotesCompensationResettlement.pdf; Submission to UN Special Rapporteur on the situation of human rights in Cambodia Hydropower Dam Development in Cambodia: Lower Sesan 2 and Stung Cheay Areng Hydropower Projects' (n 66) 26.

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authors interviewed participants across Cambodia, including those working with the United States Agency for International Development (USAID),[69] the Royal University of Law and Economics,[70] the Documentation Centre of Cambodia,[71] the Cambodia Human Rights Committee,[72] an NGO in Phnom Penh (name preserved to maintain anonymity),[73] and journalists in Chinese-language media.[74] Remarkably, none save one knew of the human rights dimensions of the project, despite their respective expertise in this area. While it is difficult to determine on these bases alone, it may be the case that this topic had been suppressed in the media, which is consistent with the state's recent crackdown on independent news organizations.[75]

Ultimately, 34,000 ha of land were flooded by the dam's construction.[76] While most of this was forest, 7,000 ha were used for farming.[77] The impact of the dam's construction on fish in the Mekong is still being realized, but reduced fishing yields and the projected extinction of regional species indicate that the region's biodiversity is in sharp decline.[78]

The impact of the Lower Sesan II's construction on the livelihoods of displaced communities in Cambodia has been profound – culturally, socially, and economically.[79] Many struggle to maintain their livelihoods on infertile ground far from the river and mourn the loss of sacred areas, including burial grounds and traditional hunting grounds.

3.7 Implications and Outlook

The Lower Sesan II was constructed to gradually improve the lives of Cambodians and may represent a significant step toward the realization of a

[69] Interview with Staff Member, USAID Cambodian Office, (Phnom Penh, Cambodia, 20 January 2023).

[70] Interview with Faculty Member, Royal University Law, and Economics (Phnom Penh, Cambodia, 17 January 2023); Interview with a Faculty Member, Royal University Law, and Economics (Phnom Penh, Cambodia, 19 January 2023).

[71] Interview with Upper Management Staff with the Documentation Center of Cambodia (Phnom Penh, Cambodia, 17 January 2023).

[72] Interview with an Attorney with Cambodia Human Rights Committee (online, 20 October 2022).

[73] Interview with Staff Member, An International Human Rights NGO's Cambodian Office (Phnom Penh, Cambodia, 17 January 2023).

[74] Interview with Journalist in Chinese language media (Phnom Penh, Cambodia, 17 January 2023); Interview with Journalist in Chinese language media (Phnom Penh, Cambodia, 18 January 2023).

[75] Human Rights Watch, 'Cambodia: Access to Independent Media Blocked' (2 August 2023) www.hrw.org/news/2023/08/02/cambodia-access-independent-media-blocked.

[76] Jensen-Cormier (n 8) 119. [77] ibid.

[78] EarthRights International, 'Lower Sesan 2 Dam' https://earthrights.org/what-we-do/mega-projects/lower-sesan-2-dam/.

[79] Chia Chi Hsu, 'Power to the People? Cambodia's Lower Sesan II Dam, Two Years On' (*Southeast Asia Globe*, 23 December 2020) https://southeastasiaglobe.com/lower-sesan-ii-dam/.

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collective right to a clean environment. The dam is projected to contribute to meeting rising energy demand in the Mekong region and decreasing the use of nonrenewable energy. In reducing Cambodia's reliance on electricity imports, it also promises to reduce everyday costs and promote accessibility to energy. While civil society organizations suggest that the dam's output is below what was initially projected,[80] it will reduce the complications that arise from the use of fossil fuels and sets a foundation for a regional shift toward renewable energy sources.

However, the lack of preparatory measures taken in advance of construction severely limited the intended environmental benefits. The most significant impacts referenced within the 2008 initial EIA were largely realized and will reduce the biodiversity of the Mekong exponentially over time.[81] Without knowing the full extent of the impact, it is difficult to weigh the harm to the Mekong against the benefits of establishing sources of renewable energy.

Finally, the historical and cultural sites cannot be recovered. Human rights law is predicated on the notion that the enjoyment of one's rights cannot extend to interference with another's. Substantive violations of binding international law, the failure to conduct a regional assessment under the transnational framework, and the rejection of domestic standards resulted in the flooding of sacred forests and burial grounds with great relevance to Indigenous people in Cambodia. It is clear that additional measures are needed to enhance human rights compliance in BRI projects.

4 Conclusion

The Lower Sesan II case is illustrative of the BRI's problematic engagement with applicable human rights instruments. This case and others suggest that Chinese SOEs like CHNG and host countries participating in BRI projects will need to carefully consider their human rights obligations at each level of governance to prevent further violations to human rights laws. To ensure compliance with applicable regulations, significant human rights due diligence should be conducted in advance, particularly with such large-scale projects.

This case offers insight into the short- and long-term impacts that can result from noncompliance with human rights regulations. First, the balancing of human rights – or the suppression of some rights to promote the enjoyment of others – created a problematic approach that minimized the rights of Indigenous peoples and likely reduced the environmental benefits produced by the Lower Sesan II.

These problems were exacerbated when Cambodia refrained from fulfilling or enforcing its human rights obligations. The Cambodian state and CHNG, which as an SOE is held to a higher standard of conduct under the UN Guiding

[80] ibid. [81] Jensen-Cormier (n 8) 119.

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Principles on Business and Human Rights,[82] did not engage with local communities, as required by Cambodian law, or consider the submissions of civil rights groups that suggested the dam would cause long-term environmental damage. As a result, significant harm was caused to impacted parties and the project's objectives were undermined. While Cambodia bears responsibility for the failure to ensure the rights of its citizens, both the Cambodian state and CHNG were complicit in ignoring applicable human rights standards.

Second, this case study reveals a significant gap in human rights protections between the bilateral and transnational level. The China-Cambodia BIT does not mention human rights within its text, which is inconsistent with the current model practice of including binding rights protections.[83] Moreover, the instruments that are on point provide significant exceptions that government actions might claim. Coordination at the level that governs the specifics of the relationships between the parties might be productive on human rights matters. Finally, further transparency will be essential in future projects if human rights are to be protected.

5 Discussion Questions and Comments

5.1 For Law School Audiences

1. One of the difficult questions presented by the Lower Sesan II case is how to – and if one indeed should – balance competing human rights interests. Human rights scholars and ethicists agree that some human rights are absolute, including the right to life.[84] The right to life cannot justifiably be leveraged against any other right or value. However, other rights may be subject to a balancing test when pursuing the common interest.[85] For example, privacy rights are frequently suspended in favor of public safety, like when a police officer acquires a warrant to search the home of a suspected criminal. In this case, the history, culture, and livelihoods of several communities were lost to the construction of the Lower Sesan II. Regardless of whether the corporate partners and the state followed ideal construction practices, once approved, the dam was projected to directly impact the cultural rights of nearby Indigenous communities. In contrast, the creation of the Lower Sesan II has generated a new source of clean

[82] UNGPS (n 20) at I(A)(4). [83] Model Bit Agreements (n 36).

[84] The United Nations Human Rights Committee acknowledges that "The right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation." UN Human Rights Committee, CCPR General Comment No. 36: Article 6 (The Right to Life) (3 September 2019) UN Doc CCPR/C/GC/36; see also Luminita Dragne and Cristina Teodora Balaceanu, 'The Right to Life: A Fundamental Human Right' (2014) 2 Social Economic Debates.

[85] Francesca Bignami and Giorgio Resta, 'Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance' in Eyal Benvenisti, Georg Nolte, and Keren Yalin-mor (eds), *Community Interests across International Law* (1st edn, Oxford University Press 2018).

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energy that may contribute to ameliorating the devastating impacts of climate change on a global scale. By reducing regional reliance on fossil fuels, the Lower Sesan II serves an important role in pursuing the human right to a clean environment. What considerations should be considered when balancing rights in this case? Should cultural rights be absolute, like the right to life? Does pursuing the common good of reducing global warming outweigh the specific interests of the impacted communities?

2. The legal scholar Ilias Bantekas argues:

> The persistent problem with investment-related human rights is not so much the indifferent or abusive behavior of foreign investors or their home States. It can generally be attributed to two factors: (1) host states' poor domestication and monitoring of their human rights obligations, which to some degree is predicated on the provision of investment guarantees that are detrimental to poor host states; and (2) the absence of a clear developmental plan and objectives [including human rights] in the pursuit of foreign direct investment.[86]

What do you think about this summary in relation to the instant case – were the parties' respective human rights obligations clear enough? And if Cambodia did indeed fail to provide a sufficient development plan in relation to the Lower Sesan II or enforce its rights laws, how much responsibility can be attributed to China's SOE that led this project, CHNG? Does the fact that Chinese representatives were on notice of these rights violations matter?

3. Relevant Cambodian law, international human rights treaties, and other regulations imposed binding human rights standards on the Cambodian government in this case. However, several other instruments that also bound China and CHNG, including the China-Cambodia BIT and China's domestic regulations (e.g., the PRC Administrative Measures for Outbound Investment by State-Owned Enterprises, and PRC Administrative Measures for Overseas Investment), do not include provisions related to human rights. Scholars are engaged in discussions of the merits of incorporating human rights obligations into transnational agreements, which is reflected in the growing consensus on incorporating rights goals within model BIT agreements.[87] Others like Bantekas, however, argue that the current model is proving insufficient in addressing major and ongoing corporate violations of human rights, and that domestic investment laws must evolve to meet these challenges. Would the inclusion of human rights

[86] Ilias Bantekas, 'The Human Rights and Developmental Dimension of Investment Laws: From Investment Laws with Human Rights to Development-Oriented Investment Laws' (2021) 31 Florida Journal of International Law 339, 340.

[87] See, e.g., Barnali Choudhury, 'International Investment Law and Noneconomic Issues' (2021) 53 Vanderbilt Journal of Transnational Law 1; Christine Sim, 'Strategies for Addressing Human Rights Violations in Investment Arbitration: Substantive Principles and Procedural Solutions' (2018) 12 Human Rights and International Legal Discourse 153.

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standards at the transnational level help to clarify the parties' rights obligations, or should this be left to the realm of each state's legislature? Or, conversely, is the existing international human rights law system sufficient?

5.2 For Policy School Audiences

In this case, local Cambodian NGOs shed light on environmental and social harms brought by the Chinese SOE-led infrastructure project. In the context of nondemocratic states, how can SOEs collaborate internationally to support each other to oppose projects that violate international human rights? How can supranational bodies like the UN provide greater support to such active players in the international system who are upholding international human rights norms and standards?

5.3 For Business School Audiences

How can businesses implement best-practice ethical investment principles in large, international joint ventures like the Lower Sesan II? Discuss.

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