

An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 1

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This article is the first in a series looking at dams in the Mekong. Part 2 can be accessed [here](#) and Part 3 [here](#).



Mekong River. Source: Rémy Kinna

The lifeblood of the region, the Mekong River (known as the Lancang in China) and its many tributaries flow through six countries: China, Myanmar, Laos, Thailand, Cambodia and Vietnam. Its resources affect the lives of over 70 million people who rely on it daily for food and/or work, but these livelihoods are facing growing threats.^{1,2,3} Today, the mighty Mekong is at an unprecedented juncture in its ongoing survival, particularly from hydropower dam development.

Damming the Mekong: Unprecedented threats to the river and its people

Much of the focus of the Mekong is divided between the upper Mekong, which includes China and Myanmar, and the Lower Mekong, encompassing the remaining four states. Eleven dams are being planned or built on the Lower Mekong Basin's mainstream with many more anticipated along its extensive tributaries.^{4,5} Most of these dams come with significant social and environmental impacts.

Introducing dams on the Mekong will severely impact fish migration and reproduction along the world's largest inland fishery.^{6,7} The Mekong River Commission's (MRC) three-year study released in 2015 found the eleven mainstream dams will wipe out approximately half of all its fisheries, severely impacting the communities relying on fishing for protein and/or employment.^{8,9,10}

Most dams trap fluvial sediment, creating erosion and reducing nutrients in the river, directly affecting agricultural production, so each additional dam means less rich soil downstream.¹¹ Agricultural outputs from Vietnam's Mekong Delta, particularly rice, have already been severely impacted via China's Lancang dams scheme.¹² The situation has become so critical that Vietnam recently went to the extent of asking China to discharge water from the Jinghong Dam on the Lancang in Yunnan Province to help alleviate conditions in the Delta and seems intent on requesting other upstream states to do similarly regarding river flows.^{13,14} Thailand's need for water during the current drought has led it to set up temporary pumping stations to divert 47 million cubic metres of water from the Mekong, causing concern for other downstream countries.²⁶ Additional Mekong dams, compounded by ongoing drought and rising sea levels due to climate change, will only exacerbate these issues.^{11,15}

While some riverine communities may be displaced as their fishing or farming lifestyles become unsustainable, other communities, often indigenous peoples with a strong cultural connection to their ancestral land, are being relocated to make way for dam reservoirs.^{16,17}

Thus, it is no wonder that disputes have emerged between various Mekong basin states as to the domestic, transboundary, environmental, and social impacts of certain dams. Part 1 of this three-part article examines the existing legal framework for regulating dam development in the Mekong and how its legal gaps and ambiguities have led to ongoing disputes, specifically regarding the Xayaburi Dam under construction in Laos.

1995 Mekong Agreement and MRC

Entering into force on 5 April 1995, the Agreement on the Cooperation for the Sustainable Development of the Mekong River (Mekong Agreement) for the Lower Mekong Basin states of Cambodia, Laos, Thailand, and Vietnam was the celebrated river basin treaty of its time and a major legal milestone.

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Divided into six chapters, the Mekong Agreement's provisions broadly set out the roles and responsibilities of riparian – being 'of the river' – states in governing the seasonal flows and major uses of the Lower Mekong Basin. It is accompanied by the Procedures for Notification, Prior Consultation and Agreement (PNPCA), which sets out key timeframes, standards, and processes for states regulating dam development. It contains separate procedures for projects on Mekong tributaries, plus *intra*-basin uses on the mainstream (proposing states are only required to *notify* fellow riparians of planned projects) versus inter-basin and other mainstream developments (proposing states must submit the project for *prior consultation* with MRC member states with the aim of reaching an agreement on any contested aspects). The PNPCA Guidelines elaborate further on implementing these processes. Both the PNPCA and Guidelines are not 'international treaties' in the strict legal sense as they are supplementary to, and thus sit outside of, the Mekong Agreement ratified by MRC member states.^{18,19}

The Agreement also established the MRC as an inter-governmental institution with the aim to foster cooperation between basin states to effectively manage river usage. Having not yet decided to join, China and Myanmar hold official observer status as MRC 'Dialogue Partners'.

As Bearden (2010)¹⁸ aptly suggests, the Mekong Agreement and the MRC have successfully epitomised what a transboundary watercourse agreement and river basin commission should be in many respects, especially given the ever-changing geo-political and environmental contexts of the basin and its member states. However, twenty years later, the Mekong Agreement and PNPCA have collectively shown identifiable legal weaknesses.



Mekong River. Source: Rémy Kinna

Legal gaps and limitations for governing dams

The following critical legal gaps in the Mekong Agreement and the PNPCA have led to varying interpretations on its basic standards, timeframes, and processes for dam construction thus fostering subsequent disagreements among MRC states:

- Lack of clear specifics for key processes under the Agreement and PNPCA's standards, timeframes, and procedures thus leading to inconsistency in their practical application;
- Exclusion of tributary dams from 'prior consultation' regulations under the PNPCA; and
- PNPCA and Guidelines being widely perceived as not legally binding on states.^{2,18,19,20,21}

Another significant limitation of the Mekong Agreement and the MRC is its circular mechanism for dispute resolution. As it stands, the Agreement requires states to peacefully resolve disputes or, when necessary, to refer the dispute to the MRC for further negotiation. However, the MRC refers unresolved matters back to states to use diplomatic means unless, as a last resort, they chose to invite third party involvement. Eventually, if no resolution is reached, states can essentially 'agree to disagree' as has occurred with the Xayaburi Dam and its PNPCA process (explored in Parts 2 and 3 of this article). Such stalemates often leave the disputing parties dissatisfied and can breed distrust for future processes.

Frustrated at the perceived inability to efficiently resolve disputes and clarify processes for dam developments, including the PNPCA, bilateral 'Development Partners' have considerably reduced their funding to the MRC for the 2016-2020 budget.^{22,23} Large-scale restructuring is scheduled and relocation of the Secretariat headquarters from Laos has even been suggested as a possibility.^{22,24} After years of calls for greater transparency and improved efficiency, the MRC is currently undergoing such significant changes that its ability to effectively govern the river's resources long-term is at stake.^{24,25}

Mekong in 2016: A basin under threat, agreement under scrutiny, institution undergoing change

As dam construction on the Mekong rapidly accelerates, states' legal obligations under the Mekong Agreement and PNPCA, as well as the mandate of the MRC to help guide and resolve disputed procedural matters, need clarifying and strengthening to evolve and cope with these challenges.

Given the issues outlined above, Part 2 of this three-part article will next investigate the practical implementation of the Mekong Agreement and PNPCA via the Xayaburi Dam 'prior consultation' process, examining the specific contested procedural and legal elements. The potential benefits of the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC) – the most authoritative global treaty concerning management of international rivers – being applied to the Lower Mekong Basin are subsequently explored.

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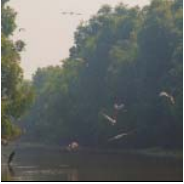
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