

An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 2

Rémy Kinna, Transboundary Water Law Global Consulting, Cambodia

This article is the second in a series looking at dams in the Mekong. Part 1 can be accessed [here](#) and Part 3 [here](#).



Fisherman on the Mekong River. Photo supplied by author.

Part 1 of this article discussed the key threats to the Mekong River and its people, specifically hydropower dam construction, before summarising the legal gaps in the Agreement on the Cooperation for the Sustainable Development of the Mekong River (Mekong Agreement) and its supplementary Procedures for Notification, Prior Consultation and Agreement (PNPCA) which together regulate dam development.

Part 2 now investigates the application of the Mekong Agreement and PNPCA to Laos' Xayaburi Dam project 'prior consultation' process, examining the specific contested procedural and legal elements and the role of the Mekong River Commission (MRC). Additionally, Part 2 will explore

how these issues would be addressed under 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.

The Xayaburi Dam dispute

The Xayaburi Dam project has received significant regional and global attention. It was the first Lower Mekong mainstream hydropower project submitted to the MRC for prior consultation under the PNPCA. Such a milestone was due in part to China not having signed the Mekong Agreement, thus its dams on the Lancang fall outside the MRC's purview, while the scope of the prior consultation process does not incorporate projects on Mekong tributaries. The Xayaburi PNPCA process itself has been widely analysed and critiqued, mainly in terms of its inability 'to reconcile the competing interests of the States concerned' based on the Xayaburi project proposal^{1,2}.

As highlighted in Part 1, many stakeholders are still deeply concerned about the dam's impending significant environmental and social impacts^{3,4}. The controversy over the project extends to the MRC's perceived inability to resolve disputes or to clarify timeframes and requirements regarding the different PNPCA processes. Key aspects of the Xayaburi dispute are separated into their key legal and PNPCA elements below.

Submission for prior consultation and reply

Under the PNPCA's procedural framework, Laos submitted the Xayaburi Dam project proposal for prior consultation to the MRC on 20 September 2010, and the MRC officially began the consultation process on 22 October 2010, whereby the other MRC states had six months to formally reply with any concerns about the proposal.⁵ On 14 Feb 2011, Laos released the initial Xayaburi Dam environmental impact assessment (EIA), which had actually been completed six months earlier before the proposal was submitted to the MRC. Due to this timing, there has been criticism that the EIA was not part of the original proposal submission; additionally, the EIA has been criticised for its overall poor quality, particularly its failure to take account of cross-border environmental impacts⁶. Between 13 and 15 April 2011, Cambodia, Thailand, and Vietnam each submitted formal replies raising concerns and calling for further investigation.

Obligation to cooperate in good faith and exchange information

Under the PNPCA, all states should cooperate in good faith with all potentially affected states and supply to them any available information relevant to a proposed dam project in a timely fashion. The MRC Secretariat's independent technical review of the Xayaburi Dam released on 24 March 2011 and entitled 'Prior Consultation Project Review Report' identified significant gaps and concerns in Laos' documentation and recommended further collection of baseline data and transboundary impact studies⁷.

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Downstream states, international non-government organisations (INGOs), civil society groups, and independent experts additionally claim that Laos' subsequent releases of Xayaburi project information, especially several EIA-related studies, have been variously incomplete, minimal, sporadic, and inconsistent – such as the Pöry report discussed below^{8,9,10}. That key project information has been released through media statements and not via direct communication to the other states or through the MRC is an example critics cite to demonstrate Laos has not engaged in the PNPCA process in good faith at all times^{11,12}.

Finally, the PNPCA is silent on whether project implementation is prohibited after submission (while waiting for replies) and during consultation. Nonetheless, eyewitness accounts, press reports, and records from the dam's construction company indicate that initial implementation began in late 2010 and continued throughout the MRC consultations held in 2011 and years subsequent which critics argue at the very least shows disinterest in following due process as agreed under the Mekong Agreement and PNPCA^{6,13,14,15}. Moreover, all of the actions detailed above when considered individually, even more so collectively, could be construed as directly at odds with the legal principle of states cooperating in good faith at all times, incorporating consultations and negotiations. This principle will be examined in more detail in Part 3.

Consultation & negotiation

A special session of the MRC Joint Committee was convened on 19 April 2011 to address states' concerns. Cambodia, Thailand, and Vietnam reiterated their apprehensions about the dam project and called for a six-month extension to the standard six-month prior consultation period (which had just ended) in order to conduct broader studies and consultations, but Laos said any concerns would be accommodated without an extension⁵.

Notwithstanding this assertion, Laos halted implementation and commissioned a Finnish engineering firm, Pöry to conduct a study in May 2011 regarding whether the Xayaburi complied with the MRC's dam safety standards and a 2009 report, 'Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin'^{6,16}. However, construction soon resumed with Laos citing Pöry's advice that the prior consultation process had been completed; the dam complied with MRC safety standards and guidelines in the 2009 report; and any other necessary design changes could be incorporated at a later stage^{6,9}. These assertions were strongly rebuked by independent experts and INGOs, plus an MRC Secretariat review of the Pöry report (released in August 2011) contested key technical design elements^{6,16,17}.

A subsequent study by a French consulting company which was commissioned by Laos to build on Pöry's report in order to allay dam design and transboundary impact fears was also widely discredited by INGOs^{18,19}. All the while, Cambodia and Vietnam both continued to consistently deny that there had been fulfilment of the prior consultation period and of Laos' validity in unilaterally proceeding with dam implementation^{20,21}.

Dispute resolution

In April 2011, the MRC Secretariat resolved to determine whether the PNPCA prior consultation period was concluded for the Xayaburi Dam project. The disputed issues could not be resolved via Secretariat-level negotiations, so the states agreed to table a decision, leaving it for the ministers from each member country to come together to debate and hopefully reach a consensus⁵. Despite preliminary studies and ongoing calls for the MRC to clarify both the status of the Xayaburi consultation period and PNPCA processes generally, these issues still remain largely unresolved^{22,23,24,25}. As of early 2016, the dam is over halfway complete, but updated project designs have yet to be made public²⁶.

UN Watercourses Convention

When Vietnam ratified the UNWC in 2014, as the 35th party, it triggered the UNWC's entry into force. Though all MRC member states voted for the UNWC adoption in 1997, Vietnam is the only Mekong basin state to accede to the UNWC so far²⁷. Covering all of the generally-accepted principles and procedures of international law for water, the UNWC represents the global 'rules of the game' for managing rivers shared by two or more countries. Its central feature is detailed but flexible processes requiring basin states to: cooperate in good faith; prevent pollution and protect ecosystems; notify, negotiate, and consult with each other on projects that can have major impacts to the basin; and try to avoid or peacefully resolve disputes through a variety of forums²⁸.

The UNWC's clearer processes and regulations stand out in contrast to the results of the Xayaburi project highlighted above. Unlike the Mekong Agreement and its PNPCA, the UNWC clearly defines the rights and responsibilities of all basin states for dams and other projects with possible cross-border impacts and is unequivocally binding on all parties. Moreover, Part III of the UNWC views 'notification' and 'prior consultation' as sequential stages within a larger process regarding any planned measures. The UNWC does not differentiate between tributary or mainstream projects whereas the PNPCA prior consultation process only applies to mainstream projects. Compulsory procedures under the UNWC include:



The author presenting on the UN Watercourses convention in 2016. Picture supplied by author.

- Notification to all states with all available data before planning or building a dam, including EIA results;
- Six months for reply (plus six months more if requested) during which the dam project is suspended;
- Six months consultation and, if necessary, negotiation (may ask for additional six months) with no dam construction if requested.

The UNWC is also much clearer on dispute resolution mechanisms. While the Mekong Agreement makes a circular loop permitting states to ultimately 'agree to disagree', the UNWC lays out a logical sequence of forums – including direct negotiation and third party mediation or conciliation – that states can essentially choose from to reach a resolution with a clear outcome. If six months after requesting negotiations the states cannot agree through these forums, an independent fact-finding body collects and verifies all available information applicable to the proposed project before providing impartial recommendations to the disputing parties. At any time, a state can apply to a third party to hear the case, including an arbitration tribunal and/or the International Court of Justice (ICJ) in The Hague.

A framework treaty, the UNWC is intended to support, not replace, existing and future basin agreements by filling in legal gaps and clarifying processes. All of which begs the question: what if the Mekong dam processes were clarified and strengthened? What if riparian states had more specific, and binding, expectations for the Xayaburi Dam process?

Part 3 of this article imagines an alternative reality where the UNWC along with the Mekong Agreement and PNPCA are collectively applied to the Xayaburi Dam process. This scenario reveals a potentially different outcome to certain disputed procedural aspects and legal elements. Consequently, a revitalised framework for the future sustainable development of the Mekong River is proposed.

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R  my Kinna is an Australian international water law, policy and governance specialist and Principal Consultant with Transboundary Water Law (TWL) Global Consulting (www.transboundarywaterlaw.com) currently based in Phnom Penh, Cambodia. He is an Honorary Research Associate with the Institute of Marine and Environmental Law at the University of Cape Town, South Africa, and an Expert – International Water Law and Policy with the London Centre of International Law Practice's Centre for International Water Law and Security. R  my can be contacted via email (remy@transboundarywaterlaw.com) or found on *Twitter*. All views and errors remain those of the author and do not represent those of the states, organisations and individuals mentioned in this piece.


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