

From Transparent to Transparency: The Evolution of the Mekong River Commission's Prior Consultation Process

By An Pich Hatda

Chapter III of the 1995 Mekong Agreement outlines the objectives and principles that underpin transboundary governance in the Lower Mekong Basin (LMB). But the powers and functions outlined in the Agreement and the Rules of Procedures for the standing bodies, and the non-interventionist approach that underpins diplomacy in the region, dictate how this is done.

While Chapter III of the Agreement outlines the intentions of transboundary governance, the more detailed processes that underpin water diplomacy were deferred to agreement on Rules for Water Utilisation and Inter-Basin Diversion, now the five MRC Procedures. These took another 20 years to finalize.

An Pich Hatda, CEO of the Mekong River Commission, explains that: “The mainstream hydrology is changing, affecting the timing and volume of reverse flows into the Tonle Sap Lake, and making any definition of the wet and dry seasons a moving target.”

The Procedures for Notification, Prior Consultation, and Agreement (PNPCA) may pose some of the biggest challenges for the Mekong River Commission (MRC). The Member Countries envisaged three forms of inter-State dialogue: **Notification**: applied to all uses on the tributaries and intra-basin use in the wet season; **Prior Consultation (PC)**: applied to intra-basin use in the dry season, and inter-basin diversion of water in the wet season; and **Agreement**: applied to inter-basin use in the dry season.

The three principles underpin these engagements. First, the extent of inter-State engagement through the MRC should be kept at a minimum; second, there was so much water available in the wet season that transboundary impacts would be unlikely; and third, provided that minimum dry season flows on the mainstream were maintained and existing downstream use would not be compromised.

There are several challenges to this approach. Sediment transport and fish migration are not accommodated. Most of the sediment is transported in the wet season, and the impacts of barriers to fish migration are not limited to the dry season. Tributary dams also trap sediment and change flow regimes, but escape the rigour of the PC. Additionally, there is no agreed definition of the wet and dry seasons. The mainstream hydrology is changing, affecting the timing and volume of reverse flows into the Tonle Sap Lake, and making any definition of the wet and dry seasons a moving target. Finally, climate change could complicate the situation via more intense droughts extending into the “wet season”. Thus, there is a need to think differently about the way the PNPCA is applied.

What is Prior Consultation?

The PC is defined as neither a right to veto the use, nor unilateral right to use water by any riparian without considering other riparian States’ rights. The Joint Committee (JC), which is empowered to undertake PC, therefore, cannot reject any proposed use, and must reach a decision through consensus. The MRC’s approaches to these challenges have evolved over the last 10 years, ever since the first notification for PC for the Xayaburi project in 2010.

The Xayaburi and Don Sahong Processes

The Xayaburi project was proposed as a “transparent dam” (i.e. without impact on the mainstream), driven by several factors: It’s run-of-river nature would not impact on flow regimes; fish passage facilities were provided, and were assumed to be effective; sediment pressure flushing facilities were provided and sediment transport

through the dam would eventually establish an equilibrium; and navigation facilities were provided.

There was also the perception that the Agreement required “no transboundary impacts”. As such, the first PC process focused on whether there was an impact, rather than whether Xayaburi was an acceptable use. Ultimately, there were calls for a 10-year moratorium on hydropower development on the mainstream. This was unacceptable to the notifying country and could be seen as a de facto veto. The PC was concluded without any agreement. Nonetheless, the process did prompt a redesign of the project and considerable additional investment in sediment transport and fish migration measures based on the review undertaken by the MRC. The process also prompted the Council Study, which has now added considerably to our understanding on the impacts of the Mekong System development.

The Don Sahong project followed much the same path. While the process outlined various measures to address expected impacts, the JC did not reach any conclusion. But the process flagged a key principle for transboundary water governance: There is no obligation in the Agreement to have zero impact, but rather the use must be reasonable and equitable, and every effort must be made in limiting any harmful effects.

The Pak Beng, Pak Lay, Luang Prabang and Sanakham Processes

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In response to JC's calls to improve the implementation of all the Procedures, the Pak Beng process focused on identifying measures to avoid, minimize, and mitigate the harmful effects (as per Article 7), focusing on potential transboundary harm. This process, for the first time, introduced a “Statement”, inviting the notifying country to take note of the review outcomes and make every effort to implement the measures. Importantly, there was no “yes or no” decision and the approach focused on building a better hydropower project rather than a “transparent” hydropower project.

This approach has evolved further in the subsequent processes. Specifically, by building in a post-PC process, it has helped promote transparency throughout the final design, construction, and operational phases. Ultimately, the agreed operational measures (or conditions as per the PNPCA) would be captured in the MRC's Procedures for Water Use Monitoring. Each successive process also saw increasing engagement of external stakeholders.

It was also recognized that some transboundary harmful effects cannot be eliminated. But transboundary compensation was not viable. The concept of a financing mechanism, or Mekong Fund, was therefore introduced, as was the concept of internalizing the external costs. While it is recognized that the concession model of hydropower development must be a viable business, it would not to be consistent with Chapter III of the 1995 Mekong Agreement for concessionaires to make disproportionate profits while avoiding operational measures that could further limit harmful transboundary impacts.

Conclusion

The PNPCA process has shifted from a technical discussion on whether the proposed hydropower project is ‘transparent’ to greater ‘transparency’ in the way that the PC and post PC processes are implemented. This reflects a shift from technical to water diplomacy solutions in transboundary river governance. Maintaining transparency and engagement in the post PC process through the implementation of Joint Action Plans and Joint Environmental Monitoring is critical in claiming the true success of PNPCA implementation in the LMB.

The MRC's transboundary river governance is much better aligned with the non-interventionist ethos or realpolitik of the region, and the intentions of the 1995 Mekong Agreement, which is developmental in nature. It is essential to further strengthen the MRC' Knowledge Hub as a transboundary management tool, rather than just a repository of data and tools.

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