

## **DAMS: DON'T RISK WHAT YOU CAN'T AFFORD TO LOSE**

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When people argue against a dam, they are often challenged to prove their claims that the dam will have significant costs that are unaccounted for. These costs are invariably underestimated and often simply ignored. And yet many impacts, such as reduced sediment delivery to the river mouth, which results in sinking deltas and loss of agricultural land, are, at least initially, invisible. Others, such as reduced subsistence fishing, on which the rural poor depend disproportionately, don't pass through markets and are inherently difficult to measure.

Dam proponents in the Mekong, however, typically operate under no such burden of proof. They don't have to demonstrate beyond a reasonable doubt that the project won't do significant harm. The decision making process is therefore flawed, as it only benefits dam proponents without sufficient consideration of the large impact likely to be borne by downstream countries and communities.

For example, Laos plans to build the 260 MW Don Sahong dam on a channel of the Mekong located 2 km from the border with Cambodia. Many independent fisheries experts conclude that the dam would have a serious impact on fish migration as the channel is the only one in the Khone Falls that is passable to migratory fish in the dry season, and is the major migration channel year-round. Scientists have raised concerns over the adequacy of the EIA, queried the proposed use of fish ladders as experimental, and labeled the belief mitigations measures would be effective as "faith based".

For Cambodia, this is a matter of national security. In 2013, the government reported that if all 11 dams on the Mekong mainstream were built, fish availability per person would be cut by 50% by 2030 in a country where fish provides 70% of the protein intake.

For Vietnam, a reduction in fisheries would threaten the multi-billion dollar catfish export sector, which depends on white (long range migrant) fish for feed.

This raises the question: how can such risky projects be approved?

To answer that question, you need to understand the nature of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, which was signed by Cambodia, Laos, Thailand, and Vietnam in 1995.

By design, the agreement gave the four countries considerable discretion over the use of waters within their national borders. At the time, this was seen as desirable, but recent experience shows that this limits the agreement's value in responding to new challenges, particularly the rapid pace of hydropower development.

The provisions in the Mekong Agreement regarding projects, such as dams, with potential large transboundary impacts are of unclear legal standing and are non-binding. The Procedures for Notification, Prior Consultation, and Agreement (PNPCA) do not form part of the main body of the agreement. It is not even a rule; it is a procedure and is, in effect, voluntary. In fact, Laos initially chose to ignore even this provision because it asserts that the dam is not on the Mekong mainstream and PNPCA only applies to mainstream dams.

In practice, if one country believes a project threatens their vital national interests, the best the Mekong Agreement offers is "agree to disagree". Given the critical importance of water to all four countries, an agreement that is unable to resolve disputes isn't fit for purpose.

As the pace of development accelerates, as the region's economies develop, the need for a clear and binding legal framework when it comes to harnessing the Mekong will only increase.

The internationally recognized rules of the game governing transboundary rivers such as the Mekong are encapsulated in the UN Convention on the Non-Navigational Uses of International Watercourses, which was approved by the UN General Assembly in 1997 and came into force in 2014 after Vietnam became the 35th country to ratify it. The convention, which codifies best practice in international water law, was specifically written to complement and fill the gaps in existing river basin agreements such as the Mekong Agreement. The fact that it augments and strengthens the Mekong Agreement offers new opportunities for avoiding and mitigating major adverse impacts from dam development.

When it comes to dams and other projects with a potentially large transboundary impacts, the Watercourses Convention, unlike the Mekong Agreement, clearly defines the rights and responsibilities of both parties. If after six months the parties cannot reach agreement, the convention mandates the formation of a fact finding commission to provide impartial information on the proposed project. If agreement cannot be reached, the convention allows the dispute to be referred to the International Court of Justice in The Hague. Meanwhile, the convention prevents the proponent from starting construction until agreement is reached. (Starting construction before an EIA is complete is common practice in the Mekong region.)

The convention also applies to the entire river system, not just the mainstream.

In effect, while the Mekong Agreement puts the burden of proof on the plaintiff, the Watercourses Convention puts it on the project proponent, a key difference.

The world has been wrestling with these issues for a long time. In 2000, the World Commission on Dams, an initiative that was facilitated by IUCN and included governments, businesses, and NGOs, published its report, *Dams and Development: a New Framework for Decision Making*. Its five key messages are:

1. Dams have made an important and significant contribution to human development, and the benefits derived from them have been considerable.
2. In too many cases an unacceptable and often unnecessary price has been paid to secure those benefits, especially in social and environmental terms, by people displaced, by communities downstream, by taxpayers and by the natural environment.
3. Lack of equity in the distribution of benefits has called into question the value of many dams in meeting water and energy development needs when compared with the alternatives.
4. By bringing to the table all those whose rights are involved and who bear the risks associated with different options for water and energy resources development, the conditions for a positive resolution of competing interests and conflicts are created.
5. Negotiating outcomes will greatly improve the development effectiveness of water and energy projects by eliminating unfavorable projects at an early stage, and by offering as a choice only those options that key stakeholders agree represent the best ones to meet the needs in question.

Fifteen years on, the Mekong region is struggling to act on these messages. Doing so would require good faith cooperation from all parties as part of a broader effort to select and develop dams that meet essential power needs without running excessive risks. As a 2012 Princeton University study on power and fisheries trade-offs put it: "sustainable development requires that unnecessary risks to ecosystems and environmental services, such as fish production and biodiversity, be avoided".

Or as signs around the gambling tables in Las Vegas remind you: "Don't risk what you can't afford to lose."