

**REGIONAL CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE STRENGTHENING CAPACITY FOR
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REGIONAL ENVIRONMENTAL LAW: A Case Study of the Xayaburi Dam

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Mekong Basin



- The Mekong is the tenth-largest river in the world.
- Its estimated length is 4,909 km, flowing through **six countries**: China, Myanmar, Thailand, Laos, Cambodia and Vietnam before its water flowing to Mekong delta.
- > 70 million people live in the Mekong River basin
- 8 out of 10 people depend on the basin for sustenance: fish and agriculture

Source:

https://sovanmonni.files.wordpress.com/2013/08/mekong_region_map.png



Mekong Mainstream Dams

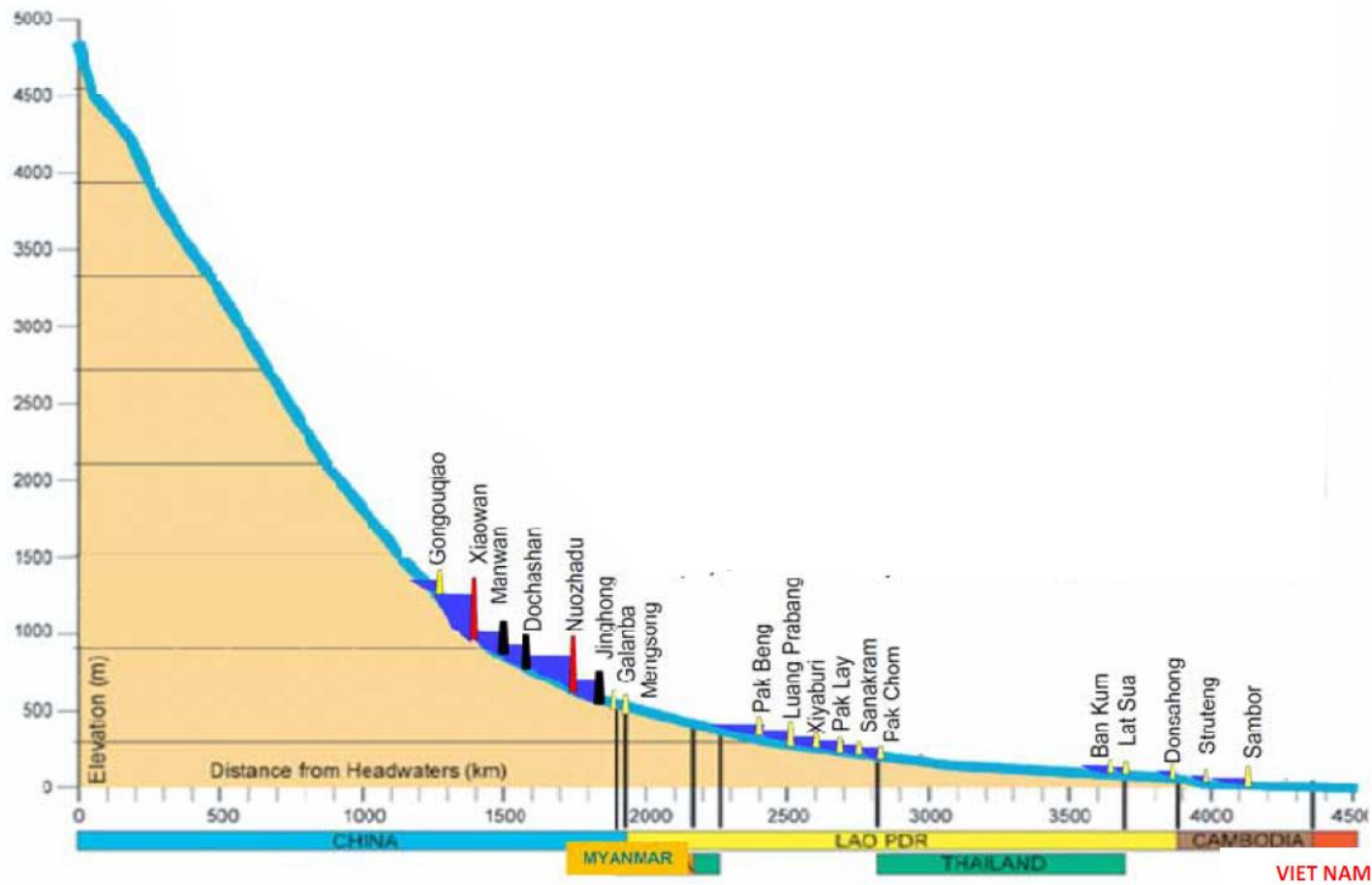


Source: MRC Strategic Environmental Assessment; ICEM, 2010
 *Initially proposed as a 3,300 MW project, 465 MW and 2,600 MW options are being studied.

- China has built six hydropower dams on the upper Mekong River (known as the Lancang in China), and planned cascade of up to 8 storage hydropower projects.
- In Lower Mekong Region 10 proposed mainstream projects would involve constructing dams across the entire river channel
 - 8 in Lao PDR
 - 2 in Cambodia.
- Another 2 projects near boundary between Lao PDR and Thailand.



Mekong Mainstream Dams



Source: <http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-FR-summary-13oct.pdf>



Summary of conflicting issues in the Mekong River Basin

- China controls upstream flows, but is not a member of the Mekong Agreement
- Myanmar want to develop its hydro resources on the tributaries
- The Laotians want capital and expertise to develop hydropower for export to Thailand and Vietnam
- The Cambodians need capital and infrastructure and to secure sustainable fishery resources in the Tonle Sap, thus more water required



Summary of conflicting issues in the Mekong River Basin

- The Thais want more water, and more electricity, so more dams
- The Vietnamese do not want any upstream development to exacerbate salt water intrusion in the Mekong delta during the dry season, but they also want more hydropower development

(Ben Boer, “Regional Environmental Law: Mekong Case Study on Dams, 2015)



Legal frameworks in the Mekong Basin

- **International Level**

- Agreement on the cooperation for the sustainable development of the Mekong River Basin, 1995 (called the Mekong River Agreement 1995)
 - **Parties:** Cambodia, Lao, Thailand and Vietnam (not including China and Myanmar)

- **National Level**

- No parties have specific laws to implement the Mekong River Agreement



Mekong River Agreement 1995

Article 5. Reasonable and Equitable Utilization

Mekong	Intra-basin use	Inter-basin diversion
A. - On tributaries - Tonle Sap	Notification to the Joint Committee	
B. On the Mainstream		
1. Wet season	Notification to the Joint Committee	Prior consultation by Joint Committee
2. Dry season	Prior consultation by Joint Committee	Specific agreement prior to any proposed diversion



Procedures for Notification, Prior Consultation and Agreement

- **Water Use/Utilization:** For the purpose of the present Procedures, it means **any use of water which may have a significant impact to the water quality or flows** regime of the mainstream of the Mekong River System by any member State. The Joint Committee may review and revise this definition from time-to-time as required for effective implementation of the Procedures.
- **Inter-Basin Water Diversion:** A diversion of water from the mainstream or a tributary of the Mekong River System into another basin.

Construction Dams on Mainstream - - > **“USE” / Utilization**



Procedures for Notification, Prior Consultation and Agreement

- **Prior consultation:** Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion under Article 26, that would allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. **Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights.**



Procedures for Notification, Prior Consultation and Agreement

**Process for Prior Consultation: Submission of document for PC
National Mekong Committee (of notifying States)**



submit documents (for prior consultation)



to MRC Joint Committee through the MRC Secretariat (in timely manner)



MRC Secretariat transmit documents to other States



Procedures for Notification, Prior Consultation and Agreement

Process for Prior Consultation: Evaluation and Reply to proposed use

Upon receiving the documents, the other member should **evaluate the proposed use and reply to MRC JC** through MRC secretariat

- If necessary, the notified States may request additional information by the MRC JC
- During the evaluation process period, the notifying States shall provide if requested.
- If necessary, the MRC JC may direct the MRC Secretariat to appoint a working group or technical advisory team to assist in the evaluation.



Procedures for Notification, Prior Consultation and Agreement

Process for Prior Consultation: Timing for Prior Consultation

- The timeframe for Prior Consultation **shall be six months** from the date of receiving documents on Prior Consultation.
- If necessary, an **extended period shall be permitted by the decision** of the MRC JC.

Process for Prior Consultation: Absence of Prior Consultation

In case that the required documents for Prior Consultation has not been provided, the MRC JC will request the relevant NMC to fulfill its duties/responsibilities of the Procedures.



Xayaburi Dam



The Xayaburi dam, as seen from above in early 2017 (Thien Y, The Mekong Eye)
Source: <https://www.mekongeye.com/2017/03/09/a-look-inside-xayaburi-dam/>



Xayaburi Dam



*Xayaburi Dam on the Mekong River, Laos –
via Pathedlao Lao, Jan 2016*

Source: <https://www.scientists4mekong.com/>

- The **Xayaburi Dam** is a hydroelectric dam on the Lower Mekong River approximately 30 KM east of Xayaburi town in northern Laos.
- Xayaburi is designed as a 33 meter high, 820 meter long.
- The dam development of a 1,285 MW power plant that will export approx. 1,225 MW (95%) of electricity to Thailand under a take-or-pay power purchase agreement with EGAT and supply about 60 MW to Laos.



Xayaburi Dam

- **The Xayaburi Power Company Limited (XPC)** is a limited liability company created under Lao law and is 50% owned by Ch. Karnchang Public Company Limited (CKPCL), 25% owned by Natee Synergy (subsidiary of PPT), 12.5% owned by Electricity Generating Public Company Limited (EGCO, EGAT retains a shareholding approx.. 25%), 7% owned by Bangkok Express, 5% owned by P.T. Construction and Irrigation Company Limited (a Lao-based company)
- **The project cost about US\$ 3.8 billion** . Financing loan provided by 5 private commercial banks; Bangkok Bank, Kasikorn Bank, Krung Thai Bank, Siam Commercial Bank and TISCO Bank and loan guarantee from the Export Import Bank of Thailand.
- The Xayaburi Dam was the first test of the Prior Consultation process under the 1995 Mekong Agreement.



Xayaburi Dam

- On 4 May 2007, the Lao government signed a memorandum of understanding with Thailand's CH. Karnchang Public Company **for the development of this hydropower project.**
- In September 2008, The MRC convenes a stakeholder consultation on the Mekong mainstream dams and fishery mitigation techniques amongst 14 of the world's top fishery experts.
- In February 2010, The **environmental impact assessment** was submitted.
- In March 2010, Thai company, Team Consulting and Swiss company, Colenco complete the Xayaburi Dam's feasibility study for Ch. Karnchang Company
- In June 2010, **XAYABURI POWER COMPANY, LTD. IS ESTABLISHED**
- In July 2010, a memorandum of understanding for power purchase was signed between the EGAT and the Lao government.



Xayaburi Dam

- **IN AUGUST 2010, ENVIRONMENTAL IMPACT ASSESSMENT FOR THE XAYABURI DAM IS APPROVED**

*The Xayaburi Dam's environmental and social impact assessments are approved, despite widespread criticism from experts in the region regarding **the poor quality of the assessments**. Among other concerns, **the assessments examined impacts only 10 km downstream from the dam site** and **no transboundary impact assessment** was carried out.*

- **On 20th Sep 2010, LAO GOVERNMENT SUBMITS THE XAYABURI DAM FOR PRIOR CONSULTATION**

*The Government of Laos submits the Xayaburi Dam for Prior Consultation under the MRC's "Procedures for Notification, Prior Consultation and Agreement" (PNPCA) required by the 1995 Mekong Agreement and facilitated by the Mekong River Commission. Documentation submitted to the MRC and member countries included the feasibility study, environmental and social impact assessments, **but no assessment of the dam's potential transboundary impacts**. The Xayaburi Dam was the first lower-Mekong mainstream dam to be submitted for regional consultation, and as such the **first test of the PNPCA process**.*



Xayaburi Dam

- **On 15 October 2010, STRATEGIC ENVIRONMENTAL ASSESMENT REPORT PUBLISHED**

The MRC Secretariat published the final version of the Strategic Environmental Assessment (SEA) of the proposed Mekong mainstream dams. The study recommended a 10 year delay on all dam building on the lower Mekong mainstream while further studies are carried out. It also stated that the river should never be used as a "testing ground" for new technologies. The study was never officially endorsed by the MRC, as Laos did not agree with the results.

- **20th Oct 2010 - 22nd Oct 2010, THE XAYABURI PRIOR CONSULTATION PROCESS OFFICIALLY BEGINS**

The MRC begins its first ever Prior Consultation process, formally initiated when the MRC Secretariat provides the Cambodian, Thai, and Vietnamese governments with Laos' documentation about the proposed Xayaburi Dam. The consultation process is required by the 1995 Mekong Agreement, and lasts for a period of six-months at which time member countries may request an extension for further studies and assessment.



Xayaburi Dam

- **On 29 Oct 2010, CONCESSION AGREEMENT FOR THE XAYABURI DAM IS SIGNED**

Despite the Prior Consultation process underway, the Lao government and Xayaburi Power Company sign the concession agreement for the Xayaburi Dam

- **JAN 2011- FEB 2011, PUBLIC CONSULTATIONS ON XAYABURI DAM ARE HELD**

The MRC governments of Cambodia, Thailand, and Vietnam hold limited national consultations over the proposed Xayaburi Dam. Laos does not hold consultations with the Lao public.

- **19TH APRIL 2011, TEMPORARY REPRIEVE - MEKONG GOVERNMENTS REQUEST EXTENSION OF PNPCA PROCESS**

Project delayed: At a special session of the MRC's Joint Committee in Vientiane, Laos, the four MRC governments "agreed that a decision on the prior consultation process...be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project." Cambodia and Vietnam requested a delay in the project, so that further transboundary studies could be carried out.



Xayaburi Dam

- **22nd April 2011, LAO GOVERNMENT DISAGREES WITH NEIGHBORS ON XAYABURI DAM PNPCA**

Following the special session of the MRC Joint Committee, Laos writes to the MRC stating that they believe the PNPCA process to be closed despite no regional agreement between all four governments and ongoing calls from Cambodia and Vietnam for an extension of the PNPCA process.

- **LAOS HIRES PÖYRY TO STUDY XAYABURI DAM WITHIN MAY 2011**

In April 2011, Cambodia and Vietnam asked Laos to postpone the Xayaburi Dam and study the project's potential transboundary impacts, instead Laos hired Finnish engineering company Pöyry in May 2011, to evaluate the Xayaburi Dam's compliance with MRC standards for safely building dams on the Mekong River.

- **On 8th June 2011, LAOS GIVES CH. KARNCHANG GREEN LIGHT TO PROCEED WITH PROJECT**
- **ON 9TH AUG 2011, PÖYRY PUBLISHES COMPLIANCE REPORT**
- **ON 5TH OCT 2011, THAILAND SIGNS POWER PURCHASE AGREEMENT FOR XAYABURI DAM**

The Cambodian and Vietnamese governments were not notified of this agreement.



Xayaburi Dam

- **JAN 2012, FIRST VILLAGE RESETTLED TO MAKE WAY FOR XAYABURI DAM**
- **2ND FEB 2012, THAI BANKS CONFIRM FINANCING FOR XAYABURI DAM**
- **April 2012, XAYABURI POWER COMPANY SIGNS EPC AGREEMENT FOR XAYABURI DAM**
- **24TH APRIL 2012, THAI VILLAGERS PROTEST AGAINST XAYABURI DEVELOPER CH. KARNCHANG**

Community representatives from villages along the Mekong River inside Thailand protested at Ch. Karnchang's headquarter in Bangkok, demanding the company to halt all construction activities occurring on the Xayaburi Dam.

- **13th July 2012, LAO GOVT ANNOUNCES POSTPONEMENT OF PROJECT FOR ENVIRONMENTAL STUDIES, BUT CONSTRUCTION CONTINUES.**
- **17TH JULY 2012, LAO GOVERNMENT ANNOUNCES XAYABURI DAM REDESIGN**
- **7th Aug 2012, LAWSUIT FILED IN THAILAND AGAINST XAYABURI DAM POWER PURCHASE AGREEMENT**

Thai villagers file a lawsuit in Thailand's Administrative Court against five Thai government agencies, arguing that they violated their constitutional rights and the 1995 Mekong Agreement in signing the Power Purchase Agreement for the Xayaburi Dam.



Xayaburi Dam

- **7th Aug 2012, LAWSUIT FILED IN THAILAND AGAINST XAYABURI DAM POWER PURCHASE AGREEMENT**

In this case, the plaintiff wishes to bring the case against the defendant for 3 grounds which are:

- 1) the PPA between the EGAT and the Xayaburi Power Co., Ltd. is invalid;
- 2) the Procedure for Notification Prior Consultation and Agreement : PNPCA process including the legal compliance as provided by domestic laws has not yet been complied with.; and
- 3) the approval of the cabinet and other defendants to sign the Xayaburi PPA is not legitimate.

- **7TH DEC 2012, LAO NATIONAL ASSEMBLY APPROVES THE XAYABURI DAM**



Xayaburi Dam

- **On February 15, 2013, the Administrative Court of Thailand denied jurisdiction to hear the communities' case based on three grounds:**

(1) the plaintiffs are not considered injured persons as conditions and compliances set by the Cabinet before concluding the power purchase agreement are considered part of the internal administrative process;

(2) the power purchase agreement is binding for contractual parties, such as EGAT and the Xayaburi Power Company, therefore third parties like the plaintiffs are not considered injured persons; and

(3) although the defendants did not comply with PNPCA, such process is not considered an administrative act and therefore the court is not able to hear the case.

- **On March 21, 2013 The Plaintiff filed an appeal.**



Xayaburi Dam

- **24th July 2014, THAILAND'S SUPREME ADMINISTRATIVE COURT ACCEPTS LAWSUIT AGAINST THE XAYABURI DAM PPA**

The Supreme Administrative Court found that incomplete information disclosure and public participation and non-legal compliances under the Thai Constitution and the Office of the Prime Minister's regulations on Public Consultation, B.E. 2548 are subject to an omission to act pursuant to Section 9 (2) of the Act on Establishment of Administrative Courts and Administrative Court Procedure.

The plaintiff is a direct stakeholder and will be likely affected from the PPA as they are living and dependent on Mekong River. They shall fully take part in participating, protecting, promoting and conserving the environment including the bio diversity in order to meet with sustainability.

....

The Court, hereby, makes an order that the first and second grounds shall be upheld pursuant to the trial's decision. **Only the third ground shall be accepted and reverted to the trial for further adjudication.**



Xayaburi Dam

- **ON 15TH OCT 2014, INJUNCTION FILED TO SUSPEND THE XAYABURI DAM'S PPA AGREEMENT**

The Network of Thai people in eight provinces filed an injunction with the Thai Administrative Court in Bangkok calling for the suspension of the Xayaburi Dam's Power Purchase Agreement. The injunction follows on from the appeal that was accepted by the Thai Supreme Administrative court in June.

- **ON 24TH JULY 2015, THAI COURT ACCEPT FINAL EVIDENCE IN CASE AGAINST XAYABURI DAM**

Thailand's Administrative Court accepted final evidence in the case against the Xayaburi Dam's Power Purchase Agreement. The plaintiffs, 37 villagers living in eight provinces of the Mekong from Chiang Rai to Ubon submitted their final testimony. It is then up to the Court to decide on a date for a hearing, where both the plaintiffs and the defendants - which include The Electricity Generating Authority of Thailand (EGAT) along with four other state agencies involved in the signing of the Xayaburi Dam's PPA - will give testimony in person.



Xayaburi Dam

- **November 30, 2015** - First case hearing - Court hears testimony from plaintiffs.
- **December 25, 2015** – The Court delivers final verdict in case, finding that state agencies involved in the Xayaburi Dam, have complied with Thai law by disclosing basic information about the project on their websites. **(Uphold the appeal)**
- **January 25, 2016** - Lawyers for the plaintiffs file an appeal with the Supreme Administrative Court to reverse the verdict of the lower court, and call for a re-examination of the case.



After January 25, 2016

- In January 2016, the construction of the **Don Sahong Dam** is the second of dam proposed for the LMR located in the Siphandone (Khone Falls) area of southern Laos, less than two kilometers upstream of the Laos-Cambodia border officially began for just 260 MW of electricity.
- On December 20, 2016 the Prior Consultation for the **Pak Beng Dam** officially began. Located seven kilometers upstream of Pak Beng town, in Oudomxay Province, Northern Laos. The 912 MW project is expected to generate 4,700 GWh of electricity per year, of which 90% will be sold to Thailand and the remaining 10% to Laos' state-owned utility, Electricite du Laos.
- On May 2017, the **Xayaburi Dam** construction is more than 70% complete.
- On 8 June 2017, *the Network of Thai people filed a complaint at the Administrative Court against Thai government agencies for their involvement in the Pak Beng Dam.*



Source: MRC Strategic Environmental Assessment: ISEM, 2010
 *Initially proposed as a 3,000 MW project; 465 MW and 2,600 MW options are being studied



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Thank you



‘Water is not for sale’

STOP DAM

SAVE the Mekong

