

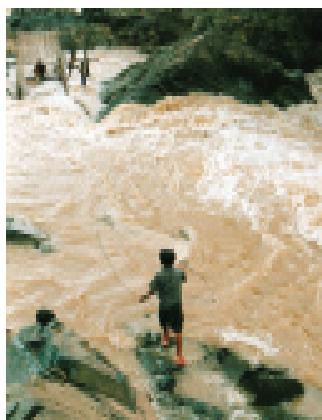
National Interests and Transboundary Water Governance in the Mekong

**Philip Hirsch
Kurt Mørck Jensen**

with

**Ben Boer
Naomi Carrard
Stephen FitzGerald
Rosemary Lyster**

May 2006



In collaboration with
Danish International
Development Assistance



The University of Sydney

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Foreword

Most of Southeast Asia and China is currently experiencing rapid economic growth accompanied by increased pressure on natural resources and the environment. The Mekong River is vital for the subsistence livelihoods of millions of poor people as well as for development initiatives which serve the national economies of the region. As such, it has been variously interpreted as a valuable ecological asset to be protected, as a source of sustenance and cultural meaning, and as a set of resources to be exploited for human gain and economic growth. Reflecting this, the Mekong is both a uniting and dividing force for Southeast Asia and the focus of various initiatives in the areas of good water governance and sustainable development. It is also the central character in a drama of international politics played out through a variety of institutions - not the least of which is the Mekong River Commission.

The first four decades of Mekong cooperation from the 1950s till the early 1990s were constrained by conflict and political turmoil. The 1995 Agreement between the four Lower Mekong countries - Laos, Cambodia, Vietnam and Thailand - included the establishment of the Mekong River Commission and its mandate for sustainable development and management of the river and its resources. The Agreement was viewed by the donor community as a constructive state-of-the-art development framework with a primary concern for the environment and the peoples whose livelihoods depend on the river.

Many donor countries decided to cooperate with the Mekong River Commission, and Denmark was one of them. The rationale behind the increased donor assistance was to develop the MRC's capacity to implement the 1995 Agreement. The focus of attention was, and still is, the MRC's technical Secretariat, currently located in Vientiane. The expectation was that with increased technical and managerial capacity - based on global lessons learned in river basin management - the MRC would be able to further implement its regulatory and water governance mandate. And the net result of this endeavour would be to develop while avoiding the environmental disasters - and their human consequences - that have occurred in river basins elsewhere in the world.

Donor assistance has resulted in much relevant capacity in the MRC's Secretariat such as knowledge production about the Basin's fisheries and its natural environment, water allocation procedures and transboundary environmental impact assessment guidelines. But there appears to be reluctance to take the next steps towards a more regulatory and water governance role for the MRC. These steps are political and can only be taken if the MRC's member countries see this as relevant for their national interests and consequently are willing to vest more authority in the MRC. This in turn would naturally have consequences for national sovereignty.

It was the uncertainties linked to questions about national interests, the role of upstream China and the nature of future donor assistance to the MRC that led to the formulation of this study.

We realised that it was not only a matter of delivering the best technical models for managing the Mekong's water resources and its environment. It was also about national and regional politics. Consequently, as the MRC's largest source of funding since 1995, we in the Danish Foreign Ministry felt that it was important to be better informed about the reasons behind what we see as the MRC's current impasse or limbo. In other words, where will the Mekong River Commission go from here? Will it advance in the direction of becoming a stronger regulatory and water governance entity in the region? And what would be the appropriate strategy for further collaboration between donors and the MRC?

The study is funded by the Danish Foreign Ministry's development research grant scheme set aside for independent applied research on more complex development situations than the ones surrounding particular projects or programs. The study is meant to provide inputs to Danish foreign policy for the region and to development cooperation strategies for the Mekong River Commission and elsewhere in the region. The value of the study is very much its independent nature where we - and hopefully also the MRC's member countries, civil society in the region and other donors - are able to benefit from the independent assessments and recommendations of the authors. We welcome the study team's bold and innovative approach and analysis as well as the many constructive recommendations. They represent the team's independent views and not necessarily those of the Danish Ministry of Foreign Affairs.

We have been fortunate to engage Sydney University's Australian Mekong Resource Centre for the study. It has been an ambitious arrangement involving many academic disciplines ranging from environmental law and geography to political science and sociology. The study has been coordinated by Philip Hirsch, Director of the AMRC, and Kurt Mørck Jensen who has been seconded to Sydney University from the Danish Ministry of Foreign Affairs for the entire study period.

We hope that the study will generate relevant debates and discussions not only among donors and the international expert community but also in the Mekong River Commission, its member governments as well as in civil society and academia in the region.

Susan Ulbæk
Head of the Asia Department
Danish Ministry of Foreign Affairs
Copenhagen, 20th of May 2006

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The Study Team

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Philip Hirsch is Associate Professor in the School of Geosciences and Director of the Australian Mekong Resource Centre, University of Sydney. He has published widely on development, environment and natural resource management in Southeast Asia. He has extensive applied research experience in Thailand, Laos and Vietnam, and more recently in Cambodia. He has undertaken research work relevant to water governance over the past decade including projects supported by the Australian Research Council, AusAID, International Development Research Centre, Australian Water Research Facility, BothEnds/Gomukh and the Australian Centre for International Agricultural Research. Phil is a co-researcher in a Major Collaborative Research Initiative on Agrarian Transitions in SE Asia supported by Canada's Social Sciences and Humanities Research Council, which will include a study of agrarian change and water governance.

Kurt Mørck Jensen

Kurt Mørck Jensen has a background in interdisciplinary work on water resources management primarily in Asia and the Middle East. He has been working as a Senior Adviser in the Danish Ministry of Foreign Affairs since 1987. He has also worked for the World Bank (1994-97) on irrigation management, water supply and forestry in Asia (India, Nepal and Indonesia) and has done social science research in Bangladesh and India (1982-86). His work for Danish development cooperation has involved policy formulation and management of projects and programs in water and environment in India, Bhutan, Bangladesh, Vietnam, Indonesia, the Philippines, Afghanistan, Egypt, Palestine, Kenya, and Sudan. Kurt has worked in developing countries (Egypt, India and Bangladesh) for ten years. He has been involved in Danish assistance to the MRC since 1997 with a particular focus on the Basin Development Plan.

Ben Boer

Ben Boer has been Professor in Environmental Law, Faculty of Law, University of Sydney since 1992 where he specialises in international environmental law, Asia and Pacific law, heritage law and the legal aspects of sustainable development. He was a foundation director of the Australian Centre for Environmental Law Sydney, of which he is still a member. Ben has served as a consultant to various intergovernmental and non-governmental organisations in a number of developing countries, primarily in Asia and the Pacific, and for the Australian Government. He has published widely in the area of environmental and natural resources law and policy. Ben is primarily responsible for the international law and the MRC transboundary water governance aspects of the study.

Naomi Carrard

Naomi Carrard has been working as a researcher at the Australian Mekong Resource Centre since 2004. Her research has been focused on water governance in Australia and the Mekong region as part of an Australian Water Research Facility project on water governance and development assistance in Asia and the Pacific. In 2005 she completed a Masters degree in Environmental Law following attainment of an undergraduate degree in Geography. Naomi began her association with the AMRC in 2001 when she participated in the Mekong field school investigating rural livelihoods and environmental change in Southeast Asia. Naomi has been working as a Research Assistant for the duration of the Study.

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Stephen FitzGerald is a specialist on China, East Asian international relations and Australian foreign policy. Formerly Australian Ambassador to China, he has developed projects or academic programs in China and most Southeast Asian countries. Until 2003 he directed the UNSW's Asia-Australia Institute, dedicated to East Asian regional integration. He works on development cooperation, particularly governance, and relations between development cooperation partners. He has published several books and numerous articles on China and Australia's relations with Asia. He is an Adjunct Professor at the Graduate School of Government, University of Sydney.

Rosemary Lyster

Rosemary Lyster is Director of the Australian Centre for Environmental Law (Sydney) in the Faculty of Law, University of Sydney. She is also co-editor of the Asia Pacific Journal for Environmental Law, the leading environmental law journal for the region. Rosemary specialises in Water Law, Energy Law, Asia Pacific Environmental Law and Environmental Dispute Resolution, all of which she teaches at a postgraduate level in the Master of Environmental Law program. She has also lectured in the Masters unit of Sustainable Development Law in China at Wuhan University, Peoples' Republic of China and in Natural Resources Law at the University of the South Pacific, Vanuatu. Rosemary is a member of the IUCN - The World Conservation Union's Commission on Environmental Law. She is also Chair of the Commission's Special Working Group on Water and Wetlands and serves on the Special Working Group on Energy and Climate Change. She has published widely in domestic and international journals and is the author of a number of books. Rosemary is primarily responsible for the national water law and water governance aspects of the study.

Glossary and Abbreviations

AMRBC	ASEAN-Mekong Basin Development Cooperation
AMRC	Australian Mekong Resource Centre
ARF	ASEAN Regional Forum
ADB	Asian Development Bank
ASEAN	Association of Southeast Asian Nations
ASEAN+3	ASEAN plus China, Japan and South Korea
ASEM	Asia-Europe Meeting
AusAID	Australian Agency for International Development
AWGWRM	ASEAN Working Group on Water Resource Management
BDP	MRC Basin Development Plan
CWP	Country Water Partnership
Danida	Danish Agency for International Development Assistance
DCG	Donor Consultative Group
DIIS	Danish Institute for International Studies
ECAFE	Economic Commission for Asia and the far East
EIA	Environmental Impact Assessment
EP	MRC Environment Programme
FMMP	MRC Flood Mitigation and Management Programme
FP	MRC Fisheries Programme
GDP	Gross Domestic Product
GEF	Global Environment Facility
GWP	Global Water Partnership
GWPSEA	Global Water Partnership Southeast Asia
HYCOS	Hydrological Cycle Observing System
ICD	International Cooperation Department, Vietnam
IDA	International Development Agency
IWRM	Integrated Water Resources Management
JC	MRC Joint Committee
Lao PDR	Lao People's Democratic Republic
LMB	Lower Mekong Basin
LWR	Law on Water Resources, Vietnam
MARD	Ministry of Agriculture and Rural Development
MCM	Million Cubic Metres
MDBC	Murray-Darling Basin Commission
MoNRE	Ministry of Natural Resources and Environment, Vietnam
MOWRAM	Ministry of Water Resources and Meteorology, Cambodia
M-POWER	Mekong Program on Water, Environment and Resilience
MRC	Mekong River Commission
MRCS	Mekong River Commission Secretariat
MWRAS	World Bank Mekong Water Resources Assistance Strategy
NGO	Non-Government Organisation
NMCs	National Mekong Committees
NWRC	National Water Resources Council, Vietnam
ONWRC	Office of the National Water Resources Council, Vietnam
PPCs	Provincial People's Committees
REPSI	Regional Policy Support Initiative
RID	Royal Irrigation Department of Thailand
SEATAC	Southeast Asia Technical Advisory Committee
SIDA	Swedish International Development Agency
TrEIA	Transboundary Environmental Impact Assessment
TVA	Tennessee Valley Authority

UN	United Nations
UNDP	United Nations Development Program
VNWP	Vietnam Water Partnership
WB	World Bank
WCD	World Commission on Dams
WRCC	Water Resource Coordination Committee, Laos
WRL	Water Resources Law, Laos
WUP	Water Utilisation Programme

Executive Summary

Why now?

For the Mekong River Commission, this is a critical time. In fact, it is “crunch time”. Questions are being asked about its future, and there are real and difficult choices to be made. What kind of agency should it become? What kind of agency must it *not* turn into? Many such questions are posed by donors anxious about the MRC’s recent strategic shift towards a greater role in investment facilitation. Yet even before this, uncertainty and apprehension about the MRC’s role in the Mekong has been simmering for years, not least in civil society and non-government circles. Soon, choices will have to be made; and it is the ultimate aim of this study to help make those choices wise ones, for the sake of the MRC, its constituents, its stakeholders and donors, and for the sake of the Mekong River itself.

Objectives and Origins

The study’s immediate objectives are twofold: to understand how the MRC and other water governance arrangements in the Mekong mediate transboundary, national government and civil society interests; and thence to identify ways in which water governance in the Mekong can be improved, particularly insofar as this affects the future role of the MRC.

The impetus for the study was a perception that donor assistance to the MRC’s capacity development was not taking the MRC forward as an engaged river basin organisation. The MRC’s resource data and technical information is impressive, and the intentions of the 1995 Mekong Agreement are good. Why, then, are they not being used more proactively for Mekong water governance and regulation?

Hypotheses and Premises

The central hypothesis of this study is that high-level government interest in the MRC is in short supply because *national interests* are stronger than *transboundary interests*. Countries are reluctant to give up sovereignty. Moreover, there is no strong sense that there is a water crisis; if there were, it might unite countries in a common cause.

What is the MRC’s *raison d’être*? One of our fundamental premises in this study is that the MRC’s overriding purpose is to act in the best interests of sustainable development and the environmental well-being of the river basin – over and above what countries do in their national interests. The other major premise is that ultimately it will be the *political* choices of riparian countries that decide the ecological fate of the river basin and the economic and social future

of its people. International law on watercourses, principles of sustainable development, national water laws and specific agreements between Basin countries will all play a part, but the decisive factor is going to be politics.

Key issues, findings and recommendations

1. Is the legal and institutional framework capable of ensuring good water governance in the Mekong?

Governance of the Mekong Basin is effected through a plethora of legal, policy and institutional instruments, in particular the 1995 Mekong Agreement, globally accepted principles of sustainable development, and national legislation and institutions for water resource management within each lower Mekong state.

Historically, given the political, economic and social conditions prevailing at the time the Mekong Agreement was drafted, it is a remarkable achievement. Today, however, its success can be measured only against what is actually taking place on the river: the developments, the environmental degradation, and the increasing pressure on resources. In terms of these realities, this study finds the Mekong Agreement seriously inadequate: it is weakly drafted, and it encourages rather than commands. It lacks the legal “teeth” to enforce any of its provisions, and therefore, though sustainable development is its noble intention, it is incapable of translating this intention into real substantive achievements.

Member countries jointly established a number of “Procedures” while implementing the Mekong Agreement. These include *Procedures for Notification, Prior Consultation and Agreement*, *Procedures for Water Use Monitoring* and *Procedures for the Maintenance of Flow on the Mainstream*. Unfortunately, these procedures lack the force of legal “Rules” and so do little to strengthen the enforceability of the Mekong Agreement’s provisions.

There is no real consistency between the Mekong Agreement and the national water policies and legislation of the states that are signatory to it. Moreover, scarcely any reference is made in their legislation and published policies either to the Agreement or to any of the MRC’s work. If a part of the member states’ mandate is to implement the MRC’s programs, and to do so through their National Mekong Committees, there needs to be more consistency between jurisdictions.

The environmental and natural resources laws in each of the member states’ jurisdictions do not generally measure up to contemporary international standards for legislation in these fields. To make these domestic legal regimes capable of underpinning good water governance will require a good deal of capacity-building and institutional development over the next few years.

A decade has passed since the Mekong Agreement was drafted. It is now time to consider how best to implement, or amend, it in a manner consistent with current principles of sustainable development and with emerging international law on the non-navigable use of watercourses. If the MRC can at least be made aware that the legal, policy and institutional framework under its jurisdiction does not measure up to other international and national water and natural resources regimes, this is a good first step – particularly if it is to transform itself into a transboundary river basin agency with the requisite authority to ensure that the needs of all stakeholders, including the ecosystems of the river basin, are equitably catered for.

Recommendations

We recommend that both the MRC and the national governments of member states initiate a process of moving from softer to harder law to support water governance in the Basin.

For the MRC, amending the 1995 Agreement would rely on some preconditions, most importantly that countries are willing to accept limitations on sovereignty over water flowing through their territories to ensure that the river is managed as a common good. In pursuit of this, the MRC must work towards political and legal change in a manner attuned to and consistent with the ASEAN political culture and must promote inclusion of the views of all stakeholders or potential stakeholders.

For the national governments, a journey from softer to harder law to support domestic and transboundary governance requires that there is a much stronger national political commitment to the MRC as a more independent water governance authority than is currently the case. Also required is a concerted capacity building program in all the agencies that manage water in participating jurisdictions and in the National Mekong Committees. Following this, National Mekong Committees should develop policies on the alignment of national legislation with the 1995 Agreement and its related policies and introduce such documents into national legislatures.

It also considers the status of China in the context of the MRC and its potential accession to the Mekong Agreement.

2. Can “national interest” be transcended for the sake of the Mekong’s future?

The Mekong Agreement is a pact between four sovereign states. Their respective governments represent the national interests of these states. Or so it is often assumed. In this study, we challenge that assumption and ask whether the diverse range of interests in the river and its resources are really given fair representation and a reasonable hearing.

Within each country the interests of the full range of riparian stakeholders – government, private industry, local communities, environmental groups, and so on – are not captured by the

single, reductive descriptor “the national interest”. Furthermore, “in the national interest” is a discursive strategy often invoked to legitimise large infrastructure projects whose environmental and social consequences may in fact be quite disastrous. In these cases, the appeal to “national interest” is not driven by any sense of nationwide crisis – a water shortage, perhaps, or threats to water quality. Far from it, the appeal to “national interest” is a way of masking, under a guise of “inclusiveness” and “objectivity”, considerations that actually focus on economic benefits to the exclusion of all else. It is this narrow usage of “national interest” that underpins how member states see the MRC’s role.

The actual diversity of interests in water and river basin management in each country is a complexity left to “civil society” to grapple with. This is not easy. There are different degrees of political freedom in the six Mekong countries. The rights of civil society and NGOs to assert their interests in the river basin, to participate in decision-making, or to express “alternative” views vary considerably and cannot always be guaranteed. Unless the MRC can better understand how the interests of these diverse stakeholders are accommodated, represented and mediated at national and local levels, and until it can find a way to engage with them directly, it is hard to see how it can be truly effective as an agent of integrated water resources management.

Member states tend to represent their “national interests” to the MRC neither through high-level, high profile political commitment, nor through civil society or publics convinced that the MRC exists to represent the common good. Rather, national representation and interaction by riparian states is through narrowly focused bureaucratic bodies called the National Mekong Committees and through single-ministry representation on the Joint Committee. Ministerial-level representatives on the Council are quite distanced from MRC’s core work. There is, in short, an “ownership vacuum” on the part of both governments and civil society.

Recommendations

In order to become more service-oriented and demand-driven, the MRC should develop and implement a public engagement strategy that follows basic IWRM principles of stakeholder involvement in water resources management. The MRC Secretariat should give higher priority to stakeholder and community issues in its knowledge generation. The Secretariat should transfer knowledge and develop capacity in the NMCs so they can engage more proactively with the public.

NGOs also need to improve their capacity for better analytical strategic and advocacy work. It is particularly important that NGOs develop their own capacities in working with river science. The MRC on its part needs to find ways to make river science more accessible and usable by non-specialists.

3. China?

The prospect of joining the MRC now appears to have support in China's official decision-making circles. There are three reasons for this. First, there has been a general shift in Chinese foreign policy since 1995 from a bilateral to a strongly multilateral position. Second, there has been a significant upgrading of China-ASEAN relations, which includes the decision to create a China-ASEAN free trade agreement. Third, alarm bells have been ringing over the pollution in the Lancang and Songhua rivers and over more widespread environmental degradation brought on by the policy of "development at any cost".

Nevertheless, China's membership of the MRC is not guaranteed and will require a reconciliation of conflicting internal Chinese government positions on the approach to membership. Furthermore, China appears to be in no hurry to become a member; any impetus for it to do so would have to come from the existing member states. There are obstacles too, notably the 1995 Mekong Agreement, which is generally regarded in China as favouring the interests of existing members to China's detriment. Chinese academics specialising in this area have begun canvassing possible negotiating positions.

In this study we argue that Chinese membership would strengthen the MRC's capacity to be an effective water governance institution. Chinese membership would provide for a closer involvement of all riparian states and more satisfactory consultation between all parties, replace suspicion with fact, increase understanding of how decisions are made on water-related issues, and establish the potential for the discussion and resolution of disputes. It would bring China's knowledge and experience of water management to the MRC and enhance its capacity as a knowledge centre.

Recommendations

Based on these advantages, the Study recommends that member governments at an early date discuss Chinese membership together and then individually with the Chinese government and seek to establish a timetable for membership to be arranged. The MRC Secretariat should give policy and operational advice on this process. In negotiating Chinese membership, The MRC member governments should consider a cooperation framework that includes a focus on management of flow regimes associated with existing dams to achieve appropriate social, economic and environmental outcomes.

4. Could the MRC more effectively integrate with the region?

The MRC is surrounded by arrangements and institutions of Asian regionalism that seem to occupy Mekong member governments more than the business of the MRC. The MRC is

challenged by its lesser prominence to examine where it fits, to clearly articulate and to assert its comparative advantage.

Recommendations

For both policy and functional reasons, the MRC should position itself more distinctively in relation to other Southeast Asian regional institutions, in particular existing water development and governance institutions including ASEAN, GMS, and GWP. The MRC should also engage with universities and research centres in the region.

There are significant opportunities for the MRC to use its comparative advantage in transboundary water governance and accumulated resource data and technical information as an asset for the region. It should establish a closer relationship with ASEAN, particularly through the ASEAN+3 Environment Ministers' meetings, the ASEAN Working Group on Water Resource Management and the ASEAN-Mekong Basin Development Cooperation. Through such a relationship, the MRC could add value to ASEAN water policy and governance.

The MRC should abandon its competitiveness with the GMS and instead focus on the comparative advantage it has in providing knowledge in water governance. The MRC appears to have little or no relationship with the Global Water Partnership Southeast Asia (GWPSEA), and this is illogical. It should establish an active partnership with the GWPSEA with the aim of institutionalising principles of IWRM throughout Southeast Asia.

5. Can the MRC's institutional culture be reconciled with Southeast Asia's political culture?

There appears to be a long-standing tension between the MRC's institutional culture and the dominant Southeast Asian political culture. This has significant implications for the MRC's future and must be addressed.

The political culture of Southeast Asia is illustrated by the concept of the "ASEAN Way", which includes principles of non-interference, dispute resolution by "flexible procedures", and consensus decision-making. What challenges the MRC most about this culture is the overriding importance of hierarchy, top-down decision-making, and its preference for "soft law" over "hard law". There is an inherent contradiction between such a political culture and the kind of rules-based regulatory approach necessary for a transnational water authority to be effective. The way forward for the MRC is to acknowledge and accept this political culture, particularly in its relations with ASEAN and the four Mekong member states, and work toward a rules-based regime that emanates from trust and a greater sense of joint ownership of, commitment to and "mutual self-interest" from the Mekong River among the riparian states.

There is no doubt that an enforceable rules-based regime for the Mekong cannot be achieved in the short term. It will require a long-term strategy by donor governments to build consensus and encourage cooperation amongst the region's high-level political leadership. This will be an incremental process. A first step should be to hold a summit meeting of the heads of state or government of the four countries. This should be followed by targeted capacity-building programs for national institutions that deal with natural resources and environmental law in domestic and transboundary settings, as well as the technical and policy aspects of managing the river basin.

Recommendations

The institutional culture of the Secretariat should thus be encouraged to be re-orient itself to reflect the political culture of the region while retaining global state-of-the-art expertise applied within the framework of a developing rules-based regime. As such, the MRC should aim for cultural diversification, particularly at senior levels in the Secretariat, to change it from an institution that still retains much of the character and identity of an expatriate agency into one that is comfortably integrated with and representative of the Southeast Asian region.

The MRC must capture the public interest that is currently absent and, as part of these efforts, build capacity in National Mekong Committees (NMCs) to improve their interaction with the public and civil society groups in the basin. In doing so, the MRC should give higher priority to stakeholder and community issues in its knowledge generation. As a first step, the Secretariat should develop and implement a public engagement strategy that follows basic IWRM principles. Based on the strategy, the Secretariat should transfer knowledge and develop capacity in the NMCs so they can engage more proactively with the public.

6. What role should donors play?

For geopolitical and development reasons, foreign interests, experts and donors have always played an important and at times dominant role vis-à-vis the MRC. Their development interests have largely had to do with integrated water resource management principles and “good practices” from other river basins.

There has been strong donor support to implement the Mekong Agreement, and the activities of the MRC are largely donor driven; indeed its budget depends almost entirely on donor funding. It is our view, however, that donors should not be driving the MRC's agenda. To date, they have done so largely by default – they fill the vacuum created by member countries' lack of interest.

Donors have looked upon the MRC more as a technical-managerial vehicle for running projects and programs, and less as a water governance organisation. Only recently have they begun to show interest in the longer-term strategic and political role of the MRC; and they have reacted against the MRC's recent strategic turn towards investment facilitation.

Divergence in donors' views and policies vis-à-vis the MRC reflects the different degrees of understanding and insight they have into the MRC's strategic role, as well as the different degrees of experience and interaction they have with the MRC itself. Some donors are more engaged than others.

The World Bank has entered the Mekong water governance debate with its Mekong Water Resources Assistance Strategy (MWRAS). Some of the strategy's investment priorities are on transboundary tributaries and could be controversial. This presents both a challenge and an opportunity for the MRC.

The GMS is perceived by some as a competitor to the MRC. A closer relationship between the MRC and the GMS based on comparative advantages and distinct functional roles would have a number of benefits, not least if the GMS institutes a water investment program in the region. The establishment of such a program would be welcomed as a way to coordinate Mekong infrastructure investments under a single "umbrella" that has considerable country ownership and includes China. Such an initiative would also offer an opportunity for the World Bank to put aside its MWRAS strategy by dovetailing with a GMS program. This would reduce the number of players in the region, bring clarity to agency agendas, and render the World Bank's MWRAS superfluous.

Recommendations

In broad terms, donors need to be better informed about the MRC and the Mekong; they need to engage in a more consistent policy dialogue with the MRC's political level; and as a group, they need to better coordinate their policies and programs. Individually too, donors need to better coordinate their bilateral country programs and the assistance they give, under the MRC, in transboundary water resources management.

Donors should start considering exit strategies to disengage themselves from the MRC. Assuming that they and the MRC can reach agreement in 2006 on outstanding policy and strategy issues, donors still need to consider a long-term (possibly 10 years) – and phased – exit strategy. They also need to think about a short-term exit strategy, in case the MRC pursues strategic directions that are incompatible with their own policies; it would be inappropriate for donors to pressure the MRC to pursue policies unacceptable to its executive governance bodies. Such a strategy would entail that donor assistance be terminated after current financial

commitments were “wound up” over a nominated period of time (roughly three years).

In addition to considering what the appropriate donor-MRC relationship should be in the future, donors could be proactive in supporting other Mekong stakeholders and water governance arrangements, such as civil society groups and networks, and regional NGOs and academia.

7. Who runs the MRC, and for whose benefit?

Whose agency is the MRC? To date, this question has mainly been raised in the context of donor influence versus riparian ownership. But ownership is only part of the story. The issue of who runs the MRC is also significant in that its identity and image as an organisation run by and for Mekong citizens is integral to its wider acceptance as an embedded governance agency in the region.

For whom does the MRC exist? With its commitment to sustainable development, the straightforward answer is “the people of the Basin”. In reality the answer is not so simple. Riparian countries, increasingly, are exploiting the resources of the Basin for national economic growth, as well as for people and places outside the Basin.

What role or roles should the MRC play? Should it be a planning agency, an organisation that facilitates investment, an institution for regulation and water governance? On this question the Mekong Agreement is open to interpretation: nowhere does it definitively stipulate what the MRC’s primary role should be. This is where the controversy lies. There is less controversy about the MRC having a role as knowledge centre and as a stakeholder forum.

Articles 11–30 of the Mekong Agreement structure governance of the MRC through the Council, the Joint Committee and the Secretariat. The Secretariat now subscribes nominally to IWRM principles, which in turn require a strong and clear stakeholder orientation. However, the Council and the Joint Committee have not adapted to become stakeholder-oriented within the riparian countries. Each riparian state has its own political way of dealing with diverse stakeholder interests for domestic matters, but this diversity within and between states is not accommodated in the MRC’s governance – which is limited to achieving consensus between quite narrow and bureaucratically defined “country interests”.

The regulatory role of the MRC is debatable. According to the MRC itself, the Mekong Agreement is not a regulatory instrument and the MRC is not a regulatory authority. On the other hand, its core programs are intended to build a knowledge base in support of rules governing water sharing, transboundary impact assessment, and the prioritising of development plans. Some people in the MRC do acknowledge that this amounts to “some degree of

regulation”.

In its application of river basin knowledge to rule-making, the MRC has sought very little input from riparian stakeholders except from the national bureaucracies that are responsible for the MRC. As a result, rules are seen as technical procedures for technocratic application rather than governance devices that mediate interests among different basin stakeholders.

The challenge for the MRC is to move beyond its current “woolly thinking” on regulation and governance. As a transboundary agency, it must transcend narrow national agendas and embrace a more representative range of national interests, not least the interests of basin communities and stakeholders.

Recent efforts to give the MRC an investment facilitation role could destroy the trust and confidence of donors and civil society for whom it is supposed to be an impartial body for sustainable development and with the interests of the river and those who depend on its resources at heart. Investment facilitation already has its champions, such as development banks. The MRC should instead dedicate itself to knowledge provision and to governance mechanisms that use that knowledge to achieve “triple bottom line” outcomes, as well as the representation and involvement of all stakeholders.

What measures are needed to make the MRC an agency that is owned, run by and benefits the principal stakeholders? Most fundamental here is that it should respond to a perceived need and occupy an important and recognised governance niche. The perceived need is sustainable development, and the governance niche includes looking after the interest of the river and those who depend on it through equitable management of conflict and the involvement of the riparian public. The MRC has yet to become engaged in either of these areas.

Recommendations

Based on our analysis of the MRC’s governance potential, we suggest that the future role of the MRC should be to secure a “triple bottom line” for the Basin: in other words, to address the economic, environmental and social/cultural needs of stakeholders as well as to protect the Basin’s ecosystems. In doing so, the MRC should pay particular attention to ensuring that economically-driven investments are compatible with the Basin’s environmental and social well-being. This means achieving development outcomes that are livelihood-oriented, sustainable, and focused not only on the narrow criteria of project viability and economic growth.

To be effective in this task, the MRC must concentrate its energies on scientific knowledge production and use this knowledge to advocate on behalf of the river and those who depend on it. The MRC should develop better ways to link its programs and wider knowledge-production about the Mekong to practical water governance in the Basin. Each program needs a clear

strategy for conveying its independent and objective knowledge about, and advice on, the river to bureaucratic and political decision-makers at governmental levels and to other stakeholders and civil society in the Basin. Proactive public information strategies should be geared toward “hotspot” areas where there is the most immediate interest in these outputs. The MRC should not avoid being involved in decision-making on “mega projects” and Basin “hotspots” where there is high potential for conflict, such as the Nam Theun 2 and 3, the proposed Thai Water Grid project, and the 3S projects in Vietnam which affect downstream Cambodia.

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Chapter 1

Introduction

1.1 Background

The overall objective of this study is to better understand how the MRC's (and other) water governance arrangements in the Mekong mediate transboundary, national government and civil society interests. Accordingly, the study seeks to identify ways to improve water governance in the Mekong, particularly in relation to the future role of the MRC.

This study was launched because of a sense that the MRC was not yielding the expected results with regard to the implementation of the 1995 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (the Mekong Agreement) and was failing to take a stronger regulatory and water governance role. Many regional stakeholders, as well as donors themselves, expected that donor assistance to the MRC's core Programs – the Water Utilisation Programme (WUP), the Basin Development Plan (BDP) and the Environment Programme (EP) - would help to develop the guidelines, procedures and rules necessary for the MRC to engage in water governance. Donor assistance in the development of the MRC technical capacity was not seen as helping the MRC to become a more proactive river basin organisation. Considerable amounts of data, knowledge, guidelines, IWRM methodologies and approaches have been developed by the MRC but it seems they have not led to a more proactive engagement in Mekong water governance. The extent to which such governance implies regulation has neither been well considered nor debated in wider forums, nor has the meaning of regulation with respect to laws, rules and procedures.

An important forerunner to this study was a question many people were asking as to whether the 10 years of donor money spent on building technical capacity in the MRC's Secretariat

had been worthwhile. This is a straightforward concern of every donor organisation; it relates not only to development policy, objectives and impact, but also to accountability, namely, whether taxpayers' money has been well spent. The concern relates not only to the 1995 Agreement but also to the development situation in the Basin, where all indications suggest that pressure on water resources and the environment is increasing.

For the above questions and concerns to gain "legitimacy" they must be related to the basic assumption underlying much of the donor assistance to the MRC: that is, as more capacity is developed, the MRC should become a more proactive and engaged river basin manager. The study means to analyse this assumption in the context of member countries' apparent lack of interest in the MRC. This lack of interest is manifested in their seeming reluctance to accept that Integrated Water Resources Management (IWRM) in an international river basin requires that limits be placed on sovereignty over the river within national boundaries. By implication, this results in a failure to recognise and promote the MRC's role in Mekong water governance and regulation. It is quite normal, of course, that for many national decision makers, national interests take precedence over transboundary interests. Nevertheless, they have shown an ability to cooperate and form regional agreements for the sake of "mutual self-interest", even where this has required some cost or investment. This situation suggests that national interests need to be better understood, that other regional cooperation arrangements need to be investigated, and that the role of China needs to be considered. The key question for future donor assistance is therefore whether development of the MRC's *capacity* for better river management will actually result in the MRC implementing better river management.

Another forerunner for this study was a joint initiative by Danida and the Danish Institute for International Studies (DIIS) on *Conflict Prevention and Mitigation in Water Resources Management*. That study reviewed current understanding of water-related conflicts as well as lessons learned vis-à-vis governance and the prevention and resolution of conflict, in integrated and transboundary water

resources management. The project included an international conference in December 2003: *From water “wars” to water “riots”? The role of the poor and implications for water management institutions in future water related conflicts.*

The focus on governance and national interests in this report arises from two key premises. One is that the MRC’s *raison d’être* is to act in the interests of sustainable development and the environmental well-being of the Basin, over and above what countries do in their national interest. The other is that countries do not have clearly articulated simply stated or uniform “national interests”, despite the way they often represent them as such. That is why the DIIS study and conference were useful to our research, because they made it clear that even in transboundary basins, an understanding of conflict and competing interests at sub-national/societal levels is vital and raises important issues for transboundary governance.

In the larger context of IWRM and river basin management, the study also considers Mekong water governance by analysing the legal, social and political aspects of water management and cooperation. A great deal has been done on the more technical and managerial aspects of water resources and environmental management. The legal and particularly the political aspects have been less frequently reviewed globally and in studies and research on the MRC and the Mekong. Indeed, this is a general weakness of transboundary water research, policy work and IWRM implementation all over the world. As one of the keynote speakers at the 2005 International River Symposium in Brisbane put it:

For the last ten years we have been saying that water resources management is a holistic and multidisciplinary affair. Globally we have considerable knowledge and many lessons learned on the technical, engineering and managerial aspects of IWRM and river basin management. What remains to be achieved is a better understanding of the political constituents of water governance. To my mind the challenge is to now focus on a better and more refined understanding of the political dimensions of IWRM and river basin management¹.

¹ Torkil Jønych-Clausen, DHI-Institute of Water and Environment and previously Head of the Global Water Partnership’s Technical Advisory Committee.

This study comes at a time of great importance for the MRC because many questions are now being asked about what it should or should not be in the future. A great number of these questions has arisen from donors' concerns about the MRC's shift in strategic direction in recent months. But uncertainty and apprehension about its role in the Mekong have been simmering for many years, not least in civil society and NGO circles. We have attempted to monitor the growing controversy and take the view that it is "crunch time" for the MRC. There are real and difficult choices to be made for the organization, its constituents and its donors. After ten years of smooth sailing, the MRC suddenly seems to be in rough waters. The challenges for the future are complicated.

With this complexity in mind we have brought together a multidisciplinary team of six academics / professionals from quite different backgrounds and with different approaches and different degrees of experience of the MRC and the Mekong. The team represents the disciplines of geography, sociology, anthropology, environmental law, political science, and development policy. The study team also represents a novel form of collaboration between a national donor organisation and a university-based critical research unit. Getting such a diverse team off the ground and keeping it going for seven months has in itself been a daunting governance task. The lesson we learned here is that having a team with such diverse members can sometimes lead to tension and controversy – much like in water governance – yet it can also achieve some remarkable results.

1.2 Framework and perspective

The study inhabits the volatile world of politics and law. It is our view that the development of an appropriate legal framework and institutional context for managing the river and its resources is subject to real world conditions of national and regional politics, the pressures of economic growth, and the legitimate struggle by other stakeholders in the river for a secure livelihood and a sustainable resource base. Consequently, we have embarked on a difficult and controversial journey by exploring the consequences

for Mekong water governance and the MRC of what is sometimes called a “soft law” situation, both at the national and transboundary level.

The argument concerning “soft law” in environmental law is that without binding legal requirements and solid institutional foundations at both the regional and national level – which provide mechanisms for consistently high-quality administration, equitable allocation of resources, and resolution of conflict – the hopes and aspirations of all relevant stakeholders are much more difficult to achieve. It must also be recognised that the experience of many “hard law” environmental governance regimes is that “soft” obligations, in the form of guidelines and policy, have often been introduced slowly and then transformed gradually into more concrete legal obligations. In our view, the Mekong governance regime is currently undergoing such a process. The question is, should it be going any faster?

Our “journey” thus includes an analysis of the MRC’s legal and institutional regime, based on globally accepted principles of international law and policy governing environmental matters in general, and water governance principles in particular.² To add adventure and suspense, the journey also takes in the unfolding story of the MRC and how it is influenced by donors, national and regional politics, and the complexity of national interests. Along the way, we encounter thorny impasses: dilemmas with which the

² Documents outlining these principles and policies include the following:

The principles contained in the 1992 *Rio Declaration on Environment and Development*.

Chapter 18 of *Agenda 21* of 1992: “Protection of the quality and supply of freshwater resources: application of integrated approaches to the development, management and use of water resources”.

The 2000 *United Nations Millennium Development Goals*.

The 2002 *Plan of Implementation* of the World Summit on Sustainable Development, especially Article 25 on the need to develop Integrated Water Resources Management systems on a global basis.

The *Global Water Partnership*.

The international law of watercourses, and especially the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UN Doc.A/RES/51/869, 21 May 7 1997, 36 *International Legal Materials* 700 (1997).

MRC is confronted. These include (apart from those mentioned above): regulation versus an environment that promotes good development; attention to equity from transboundary level to societal level; donor cultures versus the “ASEAN Way” and the “Mekong Spirit”; and the million-dollar question of whether or not China should join the MRC .

In trying to mediate between law and politics, and while adopting a multidisciplinary and holistic approach, the study also analyses the MRC’s activities in the context of the overall well-being of the river from the perspectives of sustainable development, good water resources management, environmental protection, people’s livelihoods, and the interests of civil society. There is of course widespread agreement on these principles, both globally and among the various Mekong and MRC actors. But it is in the details of how these principles are interpreted and then implemented “on the ground” that such widespread agreement is transformed into controversy and conflict.

As with other transnational river basins, the ecological health of the Mekong River and its tributaries is the objective of international law and international principles of sustainable development,³ as well as national legislation and specific agreements. However, it is ultimately the political choices, actions and agreements between riparian countries that will decide the ecological fate of the river basin and the economic and social future of its people.

Another important feature of this study is an awareness of the history of the Mekong region and the development of Mekong cooperation since the early 1950s – in particular the political, economic and social realities that are a constant backdrop to the debates on the MRC and its future direction. Part of this backdrop are the concepts of the “ASEAN Way” and the “Mekong Spirit”; another part is the quest by some donors, NGOs, academics and others to transform the MRC into an institution that is far more engaged in regulation and water governance.

³ As set out in the 2002 Plan of Implementation of the World Summit on Sustainable Development.

Each chapter of this report has its own particular focus and should be of interest in its own right. Each chapter also forms part of a larger jigsaw of different angles and perspectives, which together provide a more comprehensive picture of what the water governance challenges in the Mekong are and of how we can get the future role of the MRC right.

1.3 Methodology

A condition of undertaking this study in a relatively short period of time (seven months) was that it should be based on knowledge and research on the MRC and the Mekong that was already in existence. The Australian Mekong Research Centre at the University of Sydney has been a major source of information in this regard, both in terms of written documentation and body of work and experience of staff at the centre. Some members of the study team have also brought to the project their own academic and professional networks, which have been of great value to the team as a whole. The team has also benefited from exchanges, debates and discussions with many academics, water experts, Mekong and MRC officials, and representatives of NGOs and civil society in the Mekong region (including China) and in Australia, Denmark, Sweden and elsewhere. These exchanges have been electronic or through arranged discussions with one or several individuals.

The study team made a field visit in December 2005, with the aim of updating existing information and discussing study hypotheses and related issues. We met with a wide range of individuals and organisations in Thailand, Cambodia, Laos, Vietnam and China, including government representatives, NGOs, academics and donors. We interviewed representatives from the MRC (its Secretariat and NMCs), and at a workshop at the MRC Secretariat in Vientiane on 12 December 2005 we presented and discussed some of our preliminary findings.

A draft of this report was circulated to a wide range of individuals and organisations for comment, and we have subsequently made

significant revisions to it. There were two areas in which the comments indicated a consensus of opinion. First, they suggested that we needed to sharpen and reinforce the point that the MRC Secretariat should be “riparianised” and professionalised. Second, there was general disagreement with the idea, floated in the draft report, that the Secretariat should be decentralised to bring it closer to the Basin public. In response, we have adapted our analysis and adjusted our recommendations to emphasise the need to strengthen the capacity and broaden the outreach potential of NMCs rather than to dilute and fragment the work of the Secretariat itself. We are pleased to have been able to put forward these ideas and to have benefited from this early response. Indeed we see our study as an overdue floating of informed ideas about governance rather than as a conclusive and watertight research exercise. As such, the study process remains incomplete until the report findings and recommendations have been discussed and acted upon.

1.4 Dissemination strategy

Many of the comments on the draft report stressed that the study has come at the “right time”: that is, the time is ripe for the MRC, donors, riparian governments (including China) and other Mekong stakeholders to address the many difficult challenges, raised in the report, with which the MRC and the Mekong are faced.

How can the study contribute constructively to this process? In other words, what is our strategy for disseminating this report? We hope the report will generate discussions in the MRC, not just at the level of the MRC Secretariat but also in the NMCs, at other bureaucratic and political levels in the MRC member countries⁴ and in China. More specifically, there is the opportunity for the MRC to consider the report’s findings and recommendations before it finalises its Strategic Plan 2006-2010 and before it prepares the final proposal for the second phase of the Basin Development Plan (to be ready for implementation by the end of 2006). The upcoming donor-sponsored independent review of the MRC Secretariat and the NMCs⁵ could also benefit from

⁴ The MRC Joint Committee and Ministerial Council and beyond.

⁵ The review is expected to be conducted by mid 2006.

consulting this report.

The report's findings and recommendations could assist the NGO community in their efforts to build a clearer and more focused advocacy approach in the Mekong Basin and particularly in their dialogue and interaction with the MRC.

Donor organisations can benefit from the report in two ways. First, they can use the report for "internal consumption" to improve their level of knowledge and possibly their cooperation policies vis-à-vis regional programs which include the MRC, bilateral work on water resource management in the individual Mekong countries, and interaction with riparian as well as international NGOs/civil society. Secondly, the MRC donor group should discuss the report with the aim of reaching consensus on its findings and recommendations. Donors should decide what issues they agree upon, or do not agree upon, and where they want to go in their cooperation with the MRC. Such a discussion could be held as a workshop in connection with the next informal MRC donor meeting. Subsequently, some of the policy issues and decisions that emerge from the workshop could be put on the agenda for the next MRC Donor Consultative Group meeting.

In order to contribute further to the MRC's strategic planning process, and to benefit all Mekong stakeholders, it is recommended that the MRC Joint Committee host an inclusive two- to three-day "Mekong and MRC Water Governance Workshop" in October or November 2006. The workshop would address and discuss current Mekong water governance issues as well as the MRC's strategic direction and management challenges. It would bring together the following documents, programs and analyses to discuss key governance themes:

- the MRC's draft Strategic Plan 2006-10
- the outcome of the donor-sponsored independent organisational review of the MRCS and the NMCs
- the World Bank's MWRAP and ADB activities
- the Mekong Water Governance Study (this report).

Themes to be covered would include:

- the niche role of the MRC vis-à-vis other regional

initiatives

- the BDP, WUP and other important activities of the MRC such as data and information management, public engagement, communication
- an inclusive discussion to identify and prioritise matters of MRC core business
- a strategic discussion of how the MRC member countries will eventually take full financial responsibility,⁶ and how donors will shift from core support to continuing program funding.

It is recommended that the MRC put the drafting of the Strategic Plan 2006-10 on hold⁷ and instead use the next MRC Council meeting in June 2006 to decide on holding the “Mekong and MRC Water Governance Workshop” proposed above. Results from the workshop, including inputs and changes to the Strategic Plan, would then be presented at the MRC Council meeting in December 2006, after which the Strategic Plan can be finalised.

The proposed “Mekong and MRC Water Governance Workshop” should be owned by the MRC Joint Committee. Members of the JC would constitute a Workshop Organising Committee, and this would be supported by a Technical Advisory Group⁸ to assist in preparing and conducting the workshop. The Workshop Organising Committee would request donors to assist in funding the workshop.

Preparations for the workshop would require a fair amount of lead time. They would include the background work of familiarising stakeholders/participants with the above mentioned documents, programs and analyses. Preparations would therefore have to begin immediately after a green light is given by the MRC Council in June 2006.

⁶ It is argued in this report that a ten years donor exit strategy would be appropriate.

⁷ The Strategic Plan is planned to be approved at the next MRC Council meeting in June 2006.

⁸ The Technical Advisory Group for the Workshop would include the following professionals: An internal and riparian expert on river basin management, an academic with Mekong and MRC expertise; a donor professional with Mekong and MRC expertise; representatives from IUCN and regional NGOs.

Finally, a workshop focussing on more academic issues as well as policy issues for donors is now being planned for late 2006 in Copenhagen, under the auspices of the Danish Institute for International Studies.⁹ This workshop will have a Nordic character and will seek collaboration with environmental research institutes in Sweden and Finland.

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⁹ The academic part would concentrate on water governance aspects and the donor policy part would discuss how donor policies could benefit from the report’s findings and recommendations.

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Chapter 2

Background – The Mekong and the Mekong River Commission

This chapter introduces the Mekong River Basin and the MRC, setting the scene for a discussion of national interests and international water cooperation in the Mekong region. Amidst the plethora of material already written about the Mekong, there are numerous descriptions and discussions of the river basin in terms of its geography, political landscape, and framework for cooperative management.¹ As such, we have not attempted to provide a comprehensive review of the Mekong and its governance landscape. Instead, we describe the geography of the river basin and then emphasise points of relevance to the interplay between transboundary river basin management, national interests and the people of the basin.

2.1 The Mekong River Basin

From Yunnan Province in China down to the delta in Vietnam, the Mekong River Basin stretches over diverse and dynamic landscapes. Beginning its journey on the Tibetan Plateau, the river meanders through Burma, Thailand, Lao PDR and Cambodia before flowing through southern Vietnam into the South China Sea.

The Mekong is one of the mighty rivers of the world. It is the twelfth longest river and the tenth largest in terms of discharge (approximately 475,000 MCM/year). The Basin covers a land area of 795,000 square kilometres, making it the 21st largest basin in the world. From the heights of Tibet, the river drops a total of 5000m altitude before reaching the delta. As a tropical climate system, the river is defined by the flood-pulse hydrology

¹ For example, an excellent summary can be found in Phillips, D, Daoudy, M, et al. (2006) *Trans-boundary Water Cooperation as a Tool for Conflict Prevention and for Broader Benefit-sharing*; Phillips Robinson and Associates, prepared for the Ministry of Foreign Affairs, Sweden, draft report 2006.

associated with marked seasonal variation.

The area encompassed by the Mekong Basin is as diverse as it is expansive. Through China, the riparian landscape is characterised by deep gorges and sharp drops in altitude. For this reason, in Yunnan hydropower is favoured over irrigation as the best use of Mekong water resources. In Burma and northern Laos, before the river forms the border between Laos and Thailand, the Mekong waters are used for irrigation to support both subsistence livelihoods and more intensive agricultural production. For Laos, the hydropower potential of the river and its tributaries is also considered significant, with hydropower export constituting key earnings for the Lao economy.

*The area encompassed
by the Mekong Basin
is as diverse as it is
expansive*

In Cambodia, the defining part of the Mekong system is the Tonle Sap Lake. The Tonle Sap fills each year at the start of the wet season, when a peak in Mekong water levels causes a natural reversal of flow up the Tonle Sap River and into the lake. During the wet season the lake covers an area five times greater than in the dry season. The ecology of the region is defined by this flood-pulse. One of the primary uses of the river resources in this area is fishing, with fisheries being significant for the subsistence livelihoods of riparian communities and for the national economy. Consequently, overfishing for both commercial and subsistence uses constitutes a threat to the health and sustainability of fisheries in the lake.

Reaching the delta in Vietnam, the river flows into a series of channels before pouring out into the South China Sea. The area is densely settled. It is also ecologically sensitive, being exposed to the impacts of any upstream developments and to the dynamics of the flood-pulse including flooding and saltwater intrusion. The mangrove networks and freshwater wetlands are a significant habitat for migratory birds. Shrimp farms and fisheries are important for sustaining the livelihoods of the 18 million people for whom the delta is home. The primary water use in the delta is abstraction for irrigation, with the area responsible for generating more than half of Vietnam's annual rice production.

Feeding the mainstream Mekong as it journeys through the Basin is an extensive network of more than 100 tributary watercourses. Tributaries are very significant to the health of the basin and to flows on the mainstream, with tributary watercourses contributing about 40% and 45% of the mainstream flow during the dry and rainy seasons respectively.² Of the tributaries, notable river systems include the Se San, Tonle Sap, Mun Chi, Nam Ngum and Nam Theun. Some of these tributary watercourses are wholly within the boundaries of a single riparian state. Others are transboundary rivers in their own right, such as the Se San–Sre Pok–Sekong system which spans Lao PDR, Vietnam and Cambodia.

Feeding the mainstream Mekong as it journeys through the Basin is an extensive network of more than 100 tributary watercourses

2.2 Resources and livelihoods

Societies in the Mekong Basin are diverse in terms of language, culture, economy and political organisation. Thailand is characterised by rapid industrialisation and economic growth. The government is organised according to democratic principles and Thailand is home to an active civil society sector. Vietnam is a one-party socialist state with little room for civil action. It is also undergoing rapid industrialisation and development and is one of the fastest growing economies in Asia. Laos and Cambodia have experienced less economic growth. They are poorer than their neighbours and experience persistent and widespread poverty, particularly in rural areas. Laos, like Vietnam, is a one-party socialist state. It is landlocked and its economy is still much more heavily dependent on primary production, including natural resources, than other riparian states. Cambodia is an emerging democracy but with many of the problems associated with a post-conflict society relating to a lack of bureaucratic capacity and widespread corruption.

Despite these differences, uniting many basin communities is a common reliance on river-related resources for subsistence and livelihood. Riparian lands are utilised for agriculture, most

² These figures are from data collected and published by Toda, O, Tanji, H, Somura, H, Higuchi, K and Yoshida, K (2004) "Evaluation of Tributaries Contribution in the Mekong River Basin During Rainy and Dry Season", paper presented at the second conference of the Asia Pacific Association of Hydrology and Water Resources, Singapore, 5-9 July and based on measurements at Kratie.

Uniting many basin communities is a common reliance on river-related resources for subsistence and livelihood

notably rice cropping.³ Water from rivers offers opportunities for irrigation; and the flood-pulse of the Mekong, in facilitating the exchange of water, sediment, nutrients and organisms, creates floodplain land which is highly arable during the dry season. This is particularly true for those living in the lower Basin.

Also particularly significant in the lower Basin, but common to all riparian communities, is a reliance on fish. There is an abundance of fish in the Mekong system, and a high diversity of fish species. The level at which fish are abstracted ranges from small-scale subsistence to capture fisheries and aquaculture. Most notably, the Tonle Sap is one of the world's most productive inland fisheries,⁴ with fisheries in Cambodia contributing 16% to the GDP.⁵ Figures for subsistence fishing are less comprehensive but thought to be equally significant. The freshwater fish catch of the Mekong Basin is the largest in the world, and the Basin has the world's third most biodiverse fishery. Studies by the MRC's Fisheries Program have greatly expanded our knowledge of the fishery; we now know for example that it is much larger than initially thought.

Just as significant as the realities of livelihood dependence on the river are the realities of large scale resource and infrastructure development and the faith among powerful decision makers that economic growth precedes all other considerations. The Basin lies at the heart of one of the world's most dynamic economic regions, and there are designs on its water, energy and forestry resources. The dominant model of economic growth still adheres to the "trickle-down" philosophy that poverty is alleviated through "growth first and mitigation later". These sometimes conflicting realities shape tensions, decisions and river basin management in the Mekong at a fundamental level.

At present, in terms of these development pressures, the Mekong

³ Rice cultivation is significant both economically and culturally. Almost half the land in the Mekong Basin is used for rice production (see McElwee and Horowitz 1999). Rice production has been a way of life for Mekong societies for hundreds of years.

⁴ See Fox 2004 Fox, C and Sneddon, C (2005) *Flood Pulses, International Watercourse Law, and Common Pool Resources: A Case Study of the Mekong Lowlands*, Research Paper 2005/22, Expert Group on Development Issues, United Nations University and World Institute for Development Economics Research.

⁵ MRC http://www.lars2.org/Proceedings/vol1/Mekong_River_system.pdf.

is commonly characterised as “relatively undeveloped”. Indeed, compared with other transboundary river basins (for example the Jordan, Rhine or Murray-Darling) this is true; there are only a few dams on the Mekong mainstream (all in China). For this reason, unlike other river basins, water is abundant in most parts of the Basin and there is no sense at the political level of a resource crisis.

However, a focus on water alone is too narrow. The ecosystem and the “ecological balance” of the Mekong Basin is under threat from water resource development that fails to take into account the fragile interconnections between water, soil, forests and fisheries. At the local level, ecosystems and livelihoods have been degraded by industrialisation, urbanisation and the over-exploitation of resources, which have led to deforestation, salination, water pollution, declining fish stock, loss of biodiversity, and soil degradation. The relative abundance of water, and the fact that compared with other river basins the Mekong has fewer diversion and retention structures on the mainstream, should not obscure these real and immediate threats to ecosystems and livelihoods in the Basin.

The ecosystem and the “ecological balance” of the Mekong Basin is under threat from water resource development that fails to take into account the fragile interconnections between water, soil, forests and fisheries

2.3 History of cooperation

The Mekong River Basin has one of the most significant institutional histories of river management, with regional dialogue on transboundary water cooperation dating back to the early 1950s. In 1957, the Mekong Committee was established with assistance from the United Nations Economic Commission for Asia and the Far East (ECAFE). The Committee brought together Thailand, Laos, Cambodia and (then) South Vietnam.

The 1957 Agreement was shaped by the political goals of the emerging nation-states (following the withdrawal of France) of Vietnam, Laos and Cambodia. It was motivated by a general consensus on the benefits that could be gained from developing the waters of the Mekong, particularly in the areas of hydropower, navigation and irrigation. The Committee continued to negotiate throughout the Vietnam-America war, during which time South

The Mekong River Basin has one of the most significant institutional histories of river management

Vietnam and Laos maintained a generally cooperative relationship with Thailand. However, the war put development initiatives on hold, and many of the planned projects were never put into effect.

In 1975, still under the auspices of the Mekong Committee, the *Joint Declaration of Principles for the Utilisation of the Waters of the Lower Mekong Basin* was signed. This Joint Declaration emphasised “resources of common interest” and effectively gave riparian states a veto power over plans by other nations to divert water from the mainstream.

However implementation of the 1975 Agreement was impeded by conflict and political reform. Vietnam, Cambodia and Laos all underwent changes in political regime following the end of the Vietnam-America war. As a result, in 1976 and 1977 the Mekong Committee did not meet, and looked set to fail.

Then, in 1978, Thailand, Laos and Vietnam established an interim body (the Interim Mekong Committee) to encourage the continuation of dialogue. Cambodia, under the rule of the Khmer Rouge, did not participate in the Interim Committee, and the Committee was therefore limited in its capacity to undertake Basin-wide planning.

This partial collaboration continued until 1991 when Cambodia resumed negotiations with the other Lower Basin countries. However, they could not reach agreement on a draft Mekong Committee Declaration, primarily due to a disagreement between Vietnam and Thailand over the diversion of water by the upstream state as part of the planned Khong-Chi-Mun project. Thailand pushed for a review of the 1975 Joint Declaration, the principles of which had guided cooperation in the Interim Committee.

The UNDP intervened in the early 1990s, establishing a Working Group to investigate future collaboration. It was during Working Group meetings in 1993 and 1994 that the draft *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (the Mekong Agreement) was developed.

2.4 The 1995 Mekong Agreement and the Mekong River Commission

On 5 April 1995, the Mekong Agreement was signed by Thailand, Lao PDR, Vietnam and Cambodia. The Agreement codified principles of regional cooperation and established the Mekong River Commission. Under the Agreement, MRC member countries agree to cooperate in all fields of sustainable development, and in the utilisation, management and conservation of water and related resources in the Mekong River Basin – for example, navigation, flood control, fisheries, agriculture, hydropower, and environmental protection. The Mekong Agreement is discussed in more detail in Chapter 3.

The emergence of the Mekong Agreement and the MRC in 1995 was hailed as a “win” for international peace and cooperation in a region plagued by geopolitical conflict throughout the preceding decades. This unique cooperative relationship has been characterised as the “Mekong Spirit” – defined by mutual respect between riparian states and a willingness to engage in dialogue towards cooperative river basin management.

As embodied by the “Mekong Spirit”, the Mekong cooperation story is in many ways one of continuity. Dialogue between riparian states has continued in one form or another from the early 1950s through to the present day. Furthermore, the Mekong Agreement includes many of the provisions of the previous Mekong Committee Rules for Water Utilization and reflects the principles and wording of international watercourse law.⁶

Yet in other ways the Mekong Agreement and the MRC represent a new initiative, with governments working to forge new territories for cooperation that supersede past antagonisms and build on successful initiatives in regionalism. While not diminishing the significance of historical cooperation in the region, it is important to recognise that inter-governmental

⁶ For example the definition of “reasonable and equitable utilization” found in the Mekong Agreement is taken from the Helsinki Rules developed by the International Law Association; see Report of the Fifty-Second Conference, Helsinki, 1966, International Law Association, London 1966. The Helsinki Rules were replicated to a large extent in the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses* (see note 6, above).

negotiations within the Mekong cooperation framework are shaped by the area's recent emergence from a history of ideological dispute and violent regional and internal conflict.

Inter-governmental negotiations within the Mekong cooperation framework are shaped by the area's recent emergence from a history of ideological dispute and conflict

Under the Mekong Agreement, the MRC has a three-tiered institutional structure comprising a Ministerial Council, a Joint Committee and a Secretariat. The Council is the highest body within the organisation and is responsible for overseeing MRC activities and directing MRC policies. The Joint Committee is responsible for implementing Council initiatives and supervising the activities of the Secretariat.

The Secretariat, currently based in Vientiane, is responsible for the day to day administration of MRC affairs and for the development and implementation of MRC programs. For reasons of neutrality, the Chief Executive Officer of the Secretariat is of non-riparian nationality. In order to maintain a representative number of riparian staff, the Secretariat has a policy of employing equal numbers of staff from each member state. Under MRC policy, to enable a greater number of riparian staff to benefit from working within a river basin management organisation, staff tenure is limited to six years.

The Secretariat is intended to provide the knowledge base and river science that is necessary to support planning and decisions that are in the Basin's best interests. To this end, the Basin Development Plan (BDP) is emerging as the overarching framework for integrating river knowledge into development decision-making.⁷ The BDP has been instrumental in transforming the Secretariat from an organisation (under the old Mekong Committee) that essentially presented a menu of infrastructure projects to donors, into a process-oriented river basin organisation that could plan the development and management of the river in a truly sustainable and equitable way.

⁷ Article 2 of the Mekong Agreement obliges members "To promote, support, cooperate and coordinate in the development of the full potential of sustainable benefits to all riparian States and the prevention of wasteful use of Mekong River Basin waters, with emphasis and preference on joint and/or basin-wide development projects and basin programs through the formulation of a basin development plan, that would be used to identify, categorize and prioritize the projects and programs to seek assistance for and to implement at the basin level."

In support of the BDP came two other core programs. The Water Utilisation Program has been charged with developing a sophisticated hydrological modelling system to enable agreement on and implementation of water-sharing rules. The Environment Programme enables the MRC to understand the implications of different development scenarios for the ecology of the river and therefore also for the diverse agricultural and fisheries-based livelihoods that depend on it. Additional programs, including fisheries and flood mitigation and management, were established to develop expertise in key sectors, both to support line agency management in riparian member countries, and to feed into the core programs so that collective governance decisions by the Joint Committee and Ministerial Council could be well informed.

In parallel with the intergovernmental governance structure of the MRC are the National Mekong Committees (NMCs). Although the NMCs are not mentioned in the Mekong Agreement and thus have no legal status at a regional level, they nevertheless play an important role. They are responsible for coordinating the work of the MRC within each of the riparian member states. They also coordinate the representation of each member state at the MRC. The composition, capacity and effectiveness of NMCs varies considerably from one country to another.

The Secretariat is intended to provide the knowledge base and river science that is necessary to support planning and decisions that are in the Basin's best interests

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Chapter 3

Legal and Institutional Framework for Mekong Water Governance

This chapter deals with the international and national legal and institutional frameworks relevant to the governance of the Mekong River Basin. It canvasses the concept of Integrated Water Resources Management (IWRM) as the guiding principle in water governance. The emerging international law on the non-navigable use of watercourses is also explored. Against this background, and in light of current notions of sustainable development and the principles that underlie it, we briefly set out the legal and institutional water governance arrangements for IWRM in Thailand, Vietnam, Laos and Cambodia. We also suggest that the 1995 Mekong Agreement needs to be revisited in terms of the adequacy of its provisions and that the procedures for water utilization and inter-basin diversion developed under the Agreement should be transformed into enforceable rules pursuant to Article 26 of the Agreement. Some tentative directions for reforming the Mekong Agreement are also indicated.¹

Underlying this legal and institutional discussion is the question of how the “ASEAN Way”² or “Mekong Spirit”, discussed in Chapter 7, possibly conditions the way in which the Agreement is viewed by the MRC, the Secretariat, member states and other stakeholders in the Basin. Is the Agreement seen as a binding legal document, framing rules that must be followed, or is it regarded as a set of guidelines which can be adhered to when members consider it convenient to do so? While the Agreement contains a wide range of obligations expressed in reasonably general terms, it also contemplates under Article 26 the making of specific and binding

Is the Agreement seen as a binding legal document, or is it regarded as a set of guidelines which can be adhered to when members consider it convenient to do so?

¹ Further material on the international legal aspects of this study is found at http://www.mekong.es.usyd.edu.au/projects/mekong_water_governance.htm

² See for example, Koh Kheng Lian and Robinson, Nicholas, A. “Strengthening Sustainable Development in Regional Intergovernmental Governance: Lessons from the ‘ASEAN Way’” (2002) 6 *Singapore Journal of International and Comparative Law*, 640-682.

rules for water utilization and inter-basin diversion. The fact that the Joint Committee has not carried out the clear legal obligations to formulate such rules in the 10 years since the Agreement came into force seems to indicate that there is neither the motivation to do so on the part of the MRC executive nor the requisite political will on the part of the member governments.

3.1 Integrated Water Resources Management and water governance

Legal and policy frameworks are increasingly recognised as fundamental to effective water governance around the world, particularly in the light of the concept and associated principles of sustainable development. The three interdependent and mutually reinforcing components of sustainable development, now recognized by the 2002 World Summit on Sustainable Development *Plan of Implementation*, are environmental protection, social development, and economic development³. The integration of these components is particularly important in river basins such as the Mekong, where the pressure for economic development has the potential to dominate environmental and social values. In the water sector, the concept of sustainable development is put into effect through the principles of Integrated Water Resources Management (IWRM) and has been widely adopted as the international community has moved towards a common understanding of the need to protect water resources and to manage them in a way that reflects the reality of the connection between water and the surrounding ecosystems.

Agenda 21 took a holistic approach to water management. It stated:

Integrated water resources management is based on the perception of water as an integral part of the ecosystem, a natural resource and a social and economic good, whose quantity and quality determine the nature of its utilization. To this end, water resources have to be protected, taking into account the functioning of aquatic ecosystems and the perenniality of the resource, in order to satisfy and reconcile needs for water in human activities. In developing and using

³ See 2002 World Summit on Sustainable Development, *Plan of Implementation* http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIChapter1.htm.

water resources, priority has to be given to the satisfaction of basic needs and the safeguarding of ecosystems.⁴

Chapter 18 of *Agenda 21* proposed the following programs for the freshwater sector, all of which are directly applicable in the Mekong River Basin:

- Integrated water resources development and management
- Water resources assessment
- Protection of water resources, water quality and aquatic ecosystems
- Drinking-water supply and sanitation
- Water and sustainable urban development
- Water for sustainable food production and rural development
- Monitoring the impacts of climate change on water resources.⁵

Following the World Summit on Sustainable Development, these approaches were specifically reinforced in paragraph 26 of the 2002 Johannesburg Plan of Implementation, which refers to the need to develop IWRM and water efficiency plans. The prescriptions of paragraph 26 are fundamental to this study, and in summary they are to:

- develop and implement national and regional strategies, plans and programs
- employ the full range of policy instruments
- improve the efficient use of water resources
- develop programs for mitigating the effects of extreme water-related events
- facilitate the establishment of public-private partnerships.

The Global Water Partnership (GWP), one of the most influential international bodies in the field, identifies IWRM as the guiding concept behind water governance, defining it as:

a process which promotes the coordinated development and management of water, land and related resources, in order to maximise the resultant economic and social welfare in an equitable manner without compromising the

⁴ Chapter 18.8

⁵ These are the program areas in Ch 18 of *Agenda 21*, “Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources”.

sustainability of vital ecosystems.⁶

The MRC adopts this definition in its subscription to the need to implement IWRM, stating: “This approach allows for a holistic view of the needs and interests of the countries sharing the river system. With this approach, the MRC believes a well-balanced, equitable and sustainable development process can be facilitated — for the mutual benefit of all Mekong riparian countries”.⁷

3.2 International watercourse law

International watercourse law forms part of the broad area of public international law and is governed by the same general principles. The primary source document setting out some of the latest thinking on international water law is the 1997 *Convention on the Law of the Non-navigational Uses of International Watercourses*.⁸ This instrument was drafted by the International Law Commission over many years and is intended as a framework convention, setting out a wide range of principles and definitions.⁹

3.3 The Mekong Agreement and transboundary water governance

Substantive provisions

As the first preamble paragraph makes clear, the Mekong Agreement¹⁰ is concerned above all with the sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin. Whilst the Agreement contains a range of obligations to cooperate, support, promote and coordinate, its articles are drafted in such a way that these obligations are little more than hortatory: they merely exhort or urge member states to work together for the sustainable development of the river. One exception to these

Whilst the Agreement contains obligations to cooperate, support, promote and coordinate, its articles are little more than hortatory

⁶ See MRC Website: http://www.mrcmekong.org/mekong_program_ceo.htm#integrated_water

⁷ See MRC Website: http://www.mrcmekong.org/mekong_program_ceo.htm#integrated_water

⁸ For a detailed analysis of international watercourse law, see McCaffrey, S., *The Law of International Watercourses: Non-Navigational Uses* Oxford University Press 2001.

⁹ The 1995 Mekong Agreement and the 1997 Watercourses Convention are briefly compared in Attachment 3. found at http://www.mekong.es.usyd.edu.au/projects/mekong_water_governance.htm

¹⁰ The full agreement can be obtained at www.mrcmekong.org

“soft” obligations, is Article 3 by which the parties agree “To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects”. A second exception is the obligation under a combination of Articles 5, 6 and 26, to draft *rules for water utilization and inter-basin diversions*. Whilst these provisions are expressed in mandatory language, the Agreement lacks the legal “teeth” to enforce its provisions and is therefore unable to bring about the realisation of its aspirations. Whilst this is understandable given the political, economic and social conditions under which it was drafted, it may now be time to consider either substantially amending the Agreement or preparing a Protocol which sets out detailed mechanisms for implementing the Agreement in the future.

Articles 1 to 10 set out the Agreement’s objectives as well as the principles that govern how members should jointly plan and implement projects and to protect the environment. The principle of reasonable and equitable utilization of the Mekong river system is included. These first articles also set out principles for the prevention and cessation of harmful effects, for recognising state responsibility for environmental damages, and for guaranteeing freedom of navigation.

The Mekong River Commission (MRC) is identified in the Agreement as the institution through which international cooperation is to be achieved (Article 11). Its mandate – to carry out member states’ objectives in projects, programs and planning, as part of the basin-wide package they have agreed to – is stipulated in Article 2, as follows:

To promote, support, cooperate and coordinate in the development of the full potential of sustainable benefits to all riparian States and the prevention of wasteful use of Mekong River Basin waters, with emphasis and preference on joint and/or basin-wide development projects and basin programs through the formulation of a basin development plan, that would be used to identify, categorize and prioritize the projects and programs to seek assistance for and to implement at the basin level.

The MRC has overarching responsibility for the management of the river basin from both economic and ecological points of view, rather than existing primarily to promote economic development and investment in the basin

Article 2 clearly recognises that the MRC should concern itself primarily with joint and/or basin-wide development projects and basin programs, and that it should do so by drawing up a Basin Development Plan. The plan is conceived as the vehicle for conducting detailed appraisals of basin-wide projects and for facilitating their implementation. Consequently, the MRC may be characterised as an organisation that has overarching responsibility for the management of the river basin from both economic and ecological points of view, rather than as an agency that exists primarily to promote economic development and investment in the basin. The vision of the Mekong River Commission, as spelled out in the 2004 Annual Report underlines this characterisation. That vision is for the MRC to be “A world class, financially secure, international river basin organisation serving the Mekong countries to achieve the basin vision”. The vision for the basin is to be “An economically prosperous, socially just and environmentally sound Mekong River Basin”.¹¹

The ecological responsibilities taken on by the MRC are made clearer in Article 3, in which the member states agree:

To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

As with similar international basin agreements, there are no detailed regional regulatory mechanisms provided for in the Agreement, nor does it give any indication of what legally-backed environmental standards are to be aimed for. This is because international water principles concerning the precise rules as to what is equitable and reasonable are normally “determined in the light of all the relevant factors in each particular case”.¹² A basic principle of international watercourse law on which the

¹¹ *Annual Report 2004*, Mekong River Commission, page 2. Building on this vision of the MRC, the *mission* of the MRC is seen as “To promote and coordinate sustainable management and development of water and related resources for the countries mutual benefit and the people’s well-being by implementing strategic programs and activities and providing scientific information and policy advice”.

¹² See *Helsinki Rules on the Uses of the Waters of International Rivers*, International law Association, Helsinki, 1966.

Agreement rests is that of “equitable and reasonable utilization” of water resources. This is set out in Article 5.

To utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances, the Rules for Water Utilization and Inter-basin Diversion are provided for under Article 26 and the provisions of A and B of Article 5.¹³

Thus the Agreement specifies that rules are to be formulated at basin level (under Article 26; see below), as well as specific agreements for inter-basin diversions. Article 26 is in mandatory language (the use of “shall”). It provides

Rules for Water Utilization and Inter-Basin Diversions:

The Joint Committee shall prepare and propose for approval of the Council, inter alia, *Rules for Water Utilization and Inter-Basin Diversions* pursuant to Articles 5 and 6, including but not limited to; 1) establishing the time frame for the wet and dry seasons; 2) establishing the location of hydrological stations, and determining and maintaining the flow level requirements at each station; 3) setting out criteria for determining surplus quantities of water during the dry season on the mainstream; 4) improving upon the

¹³ Article 5 A and B provide:

A. On tributaries of the Mekong River, including Tonle Sap, intra-basin uses and inter-basin diversions shall be subject to notification to the Joint Committee.

B. On the mainstream of the Mekong River:

1. During the wet season:

a) Intra-basin use shall be subject to notification to the Joint Committee.

b) Inter-basin diversion shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.

2. During the dry season:

a) Intra-basin use shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.

b) Any inter-basin diversion project shall be agreed upon by the Joint Committee through a specific agreement for each project prior to any proposed diversion. However, should there be a surplus quantity of water available in excess of the proposed uses of all parties in any dry season, verified and unanimously confirmed as such by the Joint Committee, an inter-basin diversion of the surplus could be made subject to prior consultation

mechanism to monitor intra-basin use; and, 5) setting up a mechanism to monitor inter-basin diversions from the mainstream.

In the absence of detailed legally-binding Rules developed under Article 26, the implementation of the provisions of the Mekong Agreement is presently left to informal “Procedures”

In the absence of detailed legally-binding Rules developed under Article 26, the implementation of the provisions of the Mekong Agreement is presently left to informal “Procedures”, and on the implementation of national regulations and standards. However, such national level regulations and standards have not been yet been enacted (see 3.4 and 3.5 below).

The informal Procedures have now been agreed upon by the four member countries, include *Procedures for Notification, Prior Consultation and Agreement* and *Procedures for Water Use Monitoring*, both signed in November 2003, and *Procedures for the Maintenance of Flow on the Mainstream*, approved in principle by the Council after long and difficult negotiations between members.¹⁴ These procedures are to be governed by certain principles laid down in the Agreement: sovereign equality and territorial integrity; equitable and reasonable utilization; respect for rights and legitimate interests; and good faith and transparency.

As explained above, these Procedures appear not to be able to be characterised as the Rules referred to in Articles 5 and 6 and specified under Article 26. This is made clear in the first objective of the *Procedures for Notification, Prior Consultation and Agreement*: “To provide steps for the MRC member States to support the establishment of the *Rules for Water Utilization and Inter-Basin Diversions*.” These procedures thus “beg” a number of important questions: What is their precise legal status? To what extent can they be relied upon by the parties when a dispute arises? Are the Procedures in any sense enforceable under the Agreement? If the current Procedures for water utilization and inter-basin diversion were to be converted into the Rules contemplated in Article 26, it would be desirable to make them more precise.

All in all, the wording of these provisions leaves a good deal

¹⁴ The *Procedures for the Maintenance of Flow on the Mainstream* were approved in principle at the last Council meeting and have now been approved by the Thai cabinet. At present, the MRCS is consulting with Member States to determine a suitable date for signing.

to be desired. Without the formal Rules contemplated by these provisions, much of the framework for implementing the substantive aspects of the Agreement remains informal or “soft”. This is not to say that the Agreement is thus rendered impossible to implement. Given the political history behind the Agreement’s drafting, the progress made in cooperative initiatives in the Mekong Basin is in some ways remarkable. Nevertheless, the potential to achieve much greater gains seems to be limited in part by the lack of clearly defined directions for the MRC, and in part by the lack of “hard” legal rules.

A further issue in the context of formulating binding procedures and rules under the Agreement concerns transboundary environmental impact assessment. While basin-wide environmental and social impact assessment processes have been in place since 1998, there appear to be no legally-based standards for conducting those assessments. It would be desirable to formulate such standards and include them in rules or in a protocol to the Agreement. An important starting point for drafting such mechanisms would be the *Convention on Environmental Impact Assessment in a Transboundary Context*, which obliges signatories to “take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities” and to take legal and administrative measures to implement these provisions.¹⁵

While basin-wide environmental and social impact assessment processes have been in place since 1998, there appear to be no legally-based standards for conducting those assessments

Institutional and procedural provisions

Articles 11 to 25 of the Mekong Agreement deal with the institutional structure and procedures of the MRC. On the surface, its structure and processes are stated clearly enough. The MRC comprises a Council, a Joint Committee and a Secretariat; and it enjoys the status of an international body, being able to enter into agreements and obligations with donors and members of the international community. But from the point of view of integrated water resources management, the MRC’s sphere of influence is too limited. If holistic management of the river basin is the goal, then China and Burma will need to join the MRC. As

¹⁵ *Convention on Environmental Impact Assessment in a Transboundary Context 1991*, Articles 1 and 2; see also *Protocol on Strategic Environmental Assessment*; no Asian countries are members of this Convention.

long as these countries participate in meetings only as observers, the legal regime for managing the basin cannot be regarded as complete.

From the point of view of integrated water resources management, the MRC's sphere of influence is too limited

Another unsatisfactory aspect of these provisions is that there are no adequate mechanisms for resolving disputes (see Articles 18C and 24F). Compared, for example, with the provisions of the *Convention on the Law of the Non-Navigable Uses of International Watercourses*, the Mekong Agreement's clauses on dispute resolution are formulated in a weak form. No doubt these provisions are a product of the particular time that the Agreement was drafted, as well as reflecting the underlying paradigm of the "ASEAN way" or "Mekong spirit", where hard and fast rules are desirably avoided.

The MRC itself has little capacity within the Agreement to intervene if and when disputes arise. Even when the Rules on Water Utilization and Inter-Basin Diversion are finalised under Article 26, it would appear that the MRC will not be in a strong legal position to implement and enforce them. Arguably, then, the MRC will not be able to wield the necessary authority over member countries when it comes to the management of major works in the basin.

From the history of the MRC and its antecedents, it seems clear that there has been some confusion about the MRC's role and the level of its authority. The Mekong Agreement gives the MRC an outline of its responsibilities, but the descriptions of its functions and authority are rather vague. From a legal point of view, it is thus not the most effective organisational mechanism for transboundary water governance in the Mekong. The lack of a clear legal basis has flow-on effects in terms of the authority of the Basin Development Plan, the Water Utilization Plan and the Environment Programme.¹⁶

The Agreement's limitations need also to be scrutinised in light of the fact that the Basin Development Plan is now approaching its second incarnation yet still lacks the necessary legal backing

¹⁶ See Basin Development Plan Phase 1 and the proposal for Basin Development Plan Phase 2.

to realise its objectives. Specifically, there is no appropriate legal framework for transboundary environmental impact assessment; there are no guarantees to ensure public participation; and there are no adequate mechanisms for dispute resolution. As hinted at previously, a more precise legal mandate for the MRC and its programs could be set out in the Agreement itself, or in a Protocol to the Agreement.

3.4 Water governance at the national level

3.4.1 National level legal institutions for water governance

This section is focused on the legal and institutional mechanisms for water governance in the individual member countries of the Mekong River Agreement. In assessing the effectiveness of water governance at a national level, the following can be taken into account:

- **The Constitution.** Does it include a right to water? Can it be relied upon by civil society to force a government to achieve IWRM?
- **Water resources legislation.** To what extent does it reflect the goals of IWRM?
- **Administrative agencies responsible for resource allocation and water quality.** Is there a lead agency for water? If not, how much coordination is there between all of the agencies responsible for water?
- **Government–community partnerships.** Does civil society, and particularly women, have the opportunity to participate effectively in water resource management?

The law and policy issues are discussed in more detail in Attachment 3 found at http://www.mekong.es.usyd.edu.au/projects/mekong_water_governance.htm

3.4.2 National water governance and the MRC framework for transboundary water governance

An examination of the legislation and published policies of the participating countries reveals that scarcely any reference is made either to the Mekong Agreement or to the work of the MRC.

Examination of the legislation and published policies of the participating countries reveals that scarcely any reference is made either to the Mekong Agreement or to the work of the MRC

At first sight, this is difficult to explain, especially given that the intended role of the National Mekong Committees (NMCs) is, according to the latest available MRC Annual Report (2004), to coordinate MRC programs at the national level and provide links between the MRC Secretariat and the national ministries and line agencies. The Annual Report adds that the principal implementing agencies of MRC programs and projects are the line agencies of the riparian countries.¹⁷ Why is the work of the MRC not being referred directly to the administrative agencies responsible for water resource management in each country? Why are these agencies not drafting legislation to give effect to the decisions of the MRC, and tabling it in their legislatures? Perhaps more importantly, why is legislation not the clearly preferred vehicle for achieving IWRM in these countries? And, where legislation does exist, why does it not include any binding legal obligations on agencies and civil society?

The answers to these questions lie partly in the fact that legislation in environmental protection and natural resources management *in general* is not well developed in the countries of the lower Mekong. It is thus not surprising that specific provisions to implement the Mekong Agreement do not exist in water resources law in these jurisdictions. However, it is now 10 years since the Agreement was signed: it is time to consider how best to work with and/or improve existing national legislative instruments in order to better implement the Agreement.

3.4.3 The status of water resource law and administrative agencies at national level

Thailand

Water legislation

There is no discrete water *resources* legislation in Thailand at present, but it may soon be enacted. The Water Resources Bill, which took 10 years to finalise and was subject to extensive public participation procedures, was submitted to cabinet for approval in August 2005. The Bill places authority in river basin committees to approve basin development plans, including plans to divert

It is now 10 years since the Agreement was signed: it is time to consider how best to work with and/or improve existing national legislative instruments in order to better implement the Agreement

¹⁷ ; See http://www.mrcmekong.org/annual_report/2005/MRC.htm.

water to rivers in need.¹⁸

As for existing water law, here are some preliminary observations. First, there is a separate piece of legislation for managing *groundwater*. This failure on the part of the Thai government to recognise the hydrological interconnectivity shows a continuing hiatus between law and environmental reality. Second, there are separate pieces of legislation governing *irrigation*. This is problematic since the granting of irrigation licences should be integrated with the management of the resource as a whole. Third, issues of *water quality* are dealt with separately under several further pieces of legislation. Water laws in Thailand are thus generally fragmented, overlapping, and lack a coherent framework.

Water administration agencies

There are a number of, agencies responsible for water governance in Thailand, managing inadequate and often conflicting legislation. Irrigation projects, for example, which are a major user of water, are handled by the Royal Irrigation Department (RID). Water delivery is not always properly managed by the RID, which caters mainly for rice farmers in the central region. As a result, large-scale and medium-sized irrigation systems do not meet the needs of competitive mixed farming linked to agro-industries and competitive global export markets. In fact, most irrigation schemes have little regard for the concept of basin or sub-basin planning. Such planning comes under the responsibility of the Department of Water Resources.

The National Water Resources Committee (NWRC) is also subject to criticism. NGOs report that the Committee's agenda is dominated by government, with key decisions being taken prior to Committee meetings, with the result that there is limited scope to debate issues. This paves the way for NGOs serving on the Committee to be criticised for not making sufficient inroads into the water policy debate. According to some, the NWRC is perceived as not serving a useful function, although it was credited with providing leadership in its earlier days. Also, it is not clear

¹⁸ See *Bangkok Post*, 9 July 2005.

to what extent the NWRC continues to enjoy political support. Although an Office of the NWRC (ONWRC) was established in 1996 with some 80 officials, its budget is limited and its staff lack experience.¹⁹ These limitations of ONWRC in turn constrain the role of the NWRC in formulating meaningful water policy. Enactment of the new Water Resources Act may see the NWRC reconstituted. In the meantime, a Department of Water Resources (DWR) has been established within the Ministry of Natural Resources and Environment. But the DWR has not become the peak water agency that was anticipated, and coordination with RID at many levels is still poor, leaving many areas of competition and overlap. Finally, in spite of arrangements established for multi-stakeholder River Basin Committees, many large-scale water projects are not subject to public participation. This, as may be expected, has led to conflicts over water management, yet there appear to be no institutional, legislative or procedural mechanisms for managing these conflicts.

Vietnam

Water legislation

Vietnam has a discrete piece of water legislation, the *Law on Water Resources* No 8, of 20 May 1998. However, there are insufficient mechanisms in the Act to ensure its provisions are enforced. There is also inadequate capacity at the agency level to implement the Act; the collected water fees are not enough for the management, operation and maintenance of water infrastructure, including hydro-electric schemes.²⁰ There are no regulations to give detail to the general provisions of the *Law on Water Resources*. Although it provides the framework for the permit system, it seems to provide little guidance on sustainable water management. Most of the regulatory activity surrounding water resource management under the LWR serves primarily to set up administrative agencies. Most of the executive activity has been

¹⁹ Sacha Sethaputra, Suwit Thanopanuwat, Ladawan Kumpa, Surapol Pattanee "Thailand's Water Vision: A Case Study" in *National Water Visions in SouthEast Asia* at 86

²⁰ Dr Pham Xuan Su, Le Duc Nam, Le Quang Tuan, MARD, 'River Basin Organization in Vietnam and its Contribution to Water Resources Development in the Future' presentation given at 1st General NARBO Meeting, 23 -26 February, 2004, BaTu – Maland, Indonesia.

directed at creating one bureaucratic organisation after another, including the National Water Resources Committee (NWRC), River Basin Organisations (RBOs), the General Office of River Basins Management Planning, the Office of River Basin Planning Management Board. Yet there is no legislation mandating precisely what these agencies should be achieving. Rather, they have been given coordination and planning functions of a general nature. Also, the Ministry of Natural Resources and Environment (MoNRE) and the Ministry of Agriculture and Rural Development (MARD) have still not, by 2005, established a mechanism for inter-ministry collaboration on RBO management; indeed in that year MARD prepared its own independent decree on integrated River Basin Management.²¹

None of the legislation and executive decisions reviewed to date makes any mention of the need to coordinate the water resource management planning process with the work of the Mekong River Commission. In a paper written by MARD about the role of RBOs in Vietnam, the MRC is mentioned not even once; the same paper nevertheless refers to UN organisations, the World Bank, Asian Development Bank (ADB), SEATAC, and GWP.²² In another document, the Director General of the International Cooperation Department at MARD gives a very comprehensive account of the water sector in Vietnam as well as the governance arrangements, but again there is not a single reference to the MRC. This is a rather telling indictment of the MRC's relevance to government water management agencies in Vietnam.

None of the legislation and executive decisions in Vietnam make any mention of the need to coordinate the water resource management planning process with the work of the Mekong River Commission

Water administration agencies

The Director-General of the Office of the NWRC (ONWRC) reports that the NWRC experienced a period of inactivity between 2001 and 2003, but that it is now functioning effectively as an advisory body for government. He notes, however, that the ONWRC is still small and inexperienced, and that this has created delays in its efforts to support the work of the NWRC. He adds that in order to carry out the Strategic Plan, and to engage with stakeholders, the ONWRC needs to be well-organised. It also

²¹ Ibid.

²² Pham Xuan Su et al above note 27.

needs greater budgetary commitments from government, and more skills development for staff in the areas of management and organisational skills; technical skills; skills in participatory approaches; policy development; information management; communication; and writing and reading legal and other technical documents.²³ These recommendations are supported by officers at MARD, who report that staff are unfamiliar with market mechanisms, are limited in their foreign language abilities, cannot update or use technical information adequately, are constrained by their level of education and the fact that their age means they were trained in an era when such skills were not imparted, and that in general the technical and scientific skills in the agencies are insufficient.

It is also significant that the membership of the NWRC comprises only government agencies and water experts. Compared with Thailand, it seems that civil society in Vietnam has very little input at the national level into developing policy for IWRM.

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All is not well with RBOs either. The people engaged in river basin management need more training and the central and provincial levels of the RBOs need to be better coordinated. Furthermore, as mentioned above, RBOs receive very little guidance from the executive in terms of how to actually set about developing plans and performing other functions. Funding is also a serious constraint.²⁴ In addition, implementation is hampered because of a lack of public education regarding water resource management. Nevertheless, the Srepok RBO is being given assistance with IWRM by a team of consultants: to develop an IWRM plan for the basin; to set up Sub-Catchment Councils; to liaise with the MRC and other MRC partners; to collect and share data, and to help with environmental science and hydrology.²⁵ It seems that RBOs are rendered effective only when they receive major support from consultants and external funding. There are problems at the local level too. Provincial People's Committees (PPCs) are proving unable to implement broader

²³ Id.

²⁴ Ibid.

²⁵ See <http://www.carlbro.com/en/Menu/References/Water/RiverBasinManagement> (last visited 18 November 2005).

water resource policy, are failing to achieve significant improvement in irrigation infrastructure or efficiencies in its use, and are failing to set fees for irrigation water that reflects its economic value. Because there are no proper sanctions when water fees are not paid, irrigation works are becoming degraded.²⁶ The Global Water Partnership's national arm, the Vietnam Water Partnership (VNWP), a facilitative organisation, has no role in developing river basin management plans.

On the other hand, the Vietnam Mekong Committee, established under the coordination of the Ministry of Agriculture and Rural Development,²⁷ seems to be quite active, and is moving towards inter-agency cooperation concerning the Mekong. A meeting chaired by the Minister of Agriculture and Rural Development in early 2006 reviewed the Committee's activities, and urged relevant ministries, agencies and localities "to closely coordinate with each other to effectively use water and other resources of the Mekong river and devise projects related to pollution, landslide and alluvium management". In addition, the National Mekong Committee assisted the Vietnamese Prime Minister "to concretise cooperation plans with member countries of the Mekong River Commission and protect Vietnam's interests in exploiting water and other resources in the Mekong Basin".²⁸

Lao PDR

Water legislation

Laos does have a discrete piece of water legislation, known as the *Water Resources Law* (WRL) 1996, yet water management legislation is still fragmented and vests responsibility in a number of different agencies. The WRL itself is a piece of framework legislation which establishes very basic duties, rights and principles regarding water resource management. There is scant mention of the basic principles of IWRM, nor is there any specific mention of the Mekong Agreement; it is referred to only by implication in the section on treaties. Also, there are no penalty

²⁶ Cheeseman and Bennett above note 32.

²⁷ See **Government Decree on Functions, tasks, authorities and organizational structure of Ministry of Agriculture and Rural Development, Vietnam 2003.**

²⁸ See **VietNamNetBridge, Vietnam Mekong Committee discusses tasks for 2006** <http://english.vietnamnet.vn/tech/2006/04/560961/>

provisions set down in the legislation, so that prosecutions for a breach of the law would be virtually impossible. Where concepts like water catchments and protected areas *are* mentioned, the provisions are merely descriptive and place no associated duties on administrative agencies to achieve any specific objectives in managing catchments.

A recent *Policy on Water and Water Resources* gives agencies guidance on how policy should be developed.²⁹ However, policy alone is a notoriously ineffective way of achieving measurable and definable outcomes. Policy simply sets out the guiding framework for managing the resources, and it is not legally binding. So even after spending a great deal of time and effort developing this policy, the water management framework in Lao remains nebulous and exhortatory.

Water administration agencies

It is clear that the terms of reference of the Water Resource Coordination Committee (WRCC) are very limited. It is also clear that responsibility for water management is highly fragmented at the agency level. There is minimal representation of civil society on the WRCC.

The one feature of the WRCC which is distinguishable from the apex bodies in Thailand and Vietnam is that it includes the Lao National Mekong Committee. The Committee was established by a decree in 1999, which specified its organisational and personnel structure.³⁰ The Secretariat of the Committee is given the status of a department of a Ministry, under the supervision of the State Planning Committee.

²⁹ See Pholchaleun Nonthaxay, Chanthanet Boulaphs, Choung Phanrajsavong, Le Huu Ti and Thierry Facon 'From National Water Visions to Action: A Framework for IWRM in the Lao People's Democratic Republic' available at <http://www.fao.org> (last visited 20 November 2005).

³⁰ Decree on the establishment and operation of the Lao National Mekong Committee, 1999.

Cambodia

Water legislation

Cambodia still does not have a discrete piece of water legislation even though one has been in development since 2001. This legislation was intended to go before the Cambodian legislature in March 2005. In the case of water management, as can be gathered from the documentation listed in Appendix 3, there are only policy documents and strategies. A national water strategy is, however, being formulated through the integration of relevant sector strategies by the Ministry of Water Resources and Meteorology (MOWRAM), but this will still be a generic type of policy instrument.

Water administration agencies

The Ministry of Water Resources and Meteorology is the lead water agency although the following Ministries also have responsibility for water management: Industry; Mines and Energy; Rural Development; Public Works and Transport; Phnom Penh Water Supply Authority; Agriculture Fisheries and Forestry; and Economics and Finance. Governance arrangements between Ministries do not appear to be well coordinated.

The Cambodian National Mekong Committee, which had been in existence for some years, was officially constituted by a sub-decree in 2004.³¹ Its mission is to act as a national institution operating directly under the Royal Government of Cambodia, to assist and advise the latter in all matters relating to the formulation of water policy, strategy, management, preservation, investigation, planning, restoration and the development of the water and other related natural resources of the Mekong River Basin within the whole country contributing to the sustainable development of national economy and infrastructure for the benefit of the country and people. Representatives of ten line Ministries constitute the Committee's membership. The mandate of the Committee includes coordination with the Mekong River Commission and other NMCs in all activities relating to the Mekong matters. It

³¹ Role and Functions of the Cambodia National Mekong Committee, February 2004.

There is considerable variation between the four signatories to the Mekong Agreement in their legislative frameworks for environmental protection and the management of natural resources

Thailand and Vietnam have the best developed legislative schemes on environmental matters, but these nevertheless lack the detailed regulations necessary for effective environmental management

can propose a work program to the MRC and monitor, advise and assess the implementation concerning works undertaken by the Committee and those of Cambodian line agencies. It must also prepare progress reports on all its activities.³² The planned changes to the organisation and structure of the Committee indicates a desire to expand its reach to address Mekong river management activities more satisfactorily.

3.4.4 Inconsistencies in national legislation and between administrative agencies

There is considerable variation between the four signatories to the Mekong Agreement in their legislative frameworks for environmental protection and the management of natural resources. There is also a great deal of variation in the way the respective administrative agencies are established and how they operate. If part of their mandate is to implement the programs of the MRC, and to do so through their National Mekong Committees, there is a strong case to be made for greater consistency between jurisdictions. Furthermore, the environmental and natural resources laws of the four jurisdictions do not generally measure up to contemporary international standards for legislation in these fields. Thailand and Vietnam have the best developed legislative schemes on environmental matters, but these nevertheless lack the detailed regulations necessary for effective environmental management. This lack of consistency and detail are particularly pertinent in the case of water resources.

3.8 Conclusion

From a legal and institutional point of view, the MRC has some substantial obstacles to overcome before it can effectively use its authority to prevent the basin's resources being over-exploited and to encourage better conservation in the region. Legal reform is necessary to ensure that the high-level work now being undertaken and underwritten by the donor community is properly supported by tighter legal provisions at both the regional and national levels.

³² <http://www.camnet.com.kh/cnmcs/>

The reluctance of many countries in the Asian region to agree to hard and fast rules on regional and international matters can have important implications for the law and policy framework in the Mekong.³³ This attitude is encapsulated in the phrases “the ASEAN Way” and the “Mekong Spirit” previously alluded to. This results in “rules” being drafted as “procedures” and legal mechanisms for implementation and enforcement at regional and national levels being generally weak. There are signs that this “soft” law approach is changing, yet its culture remains strong. The challenge, as argued later in this report, is to know how to work with this cultural attitude so as to bring member governments to a point where they will support a stronger approach to the implementation and enforcement of the relevant laws and regulations in their own countries as well as of the Mekong Agreement itself.³⁴ One answer is to make the most of the cooperative framework which the Mekong Agreement represents; to build, over time, the capacity of professionals working in the basin as well as at the level of the NMCs; and to promote the use of consistent standards and modern environmental planning and impact assessment techniques. Together, these actions would promote a culture of sustainable development within the basin.

The function of the NMCs also needs to be reconsidered. Ideally, the Ministries represented in the NMCs should be taking back to their respective jurisdictions a coherent water resource policy framework, based on MRC guidelines that can be implemented. In the medium term, this ought to be translated into coherent legislative frameworks for water resources management at national level. It may well be that the “missing link” between MRC policy and its implementation at the national level is in fact the lack of a coherent basinwide approach taken by the NMCs. This deserves further investigation.

To sum up, there are clear legal inadequacies in the way the Mekong Agreement and its associated procedures and rules are drafted – as measured against other international and national

It may well be that the “missing link” between MRC policy and its implementation at the national level is in fact the lack of a coherent basinwide approach taken by the NMCs

³³ See Mushkat, Roda, *International Environmental Law and Asian Values*, University of British Columbia Press 2004.

³⁴ See Chapters 6 and 7.

in the way in which the member countries approach the task of carrying out their obligations under the Mekong Agreement and the extent to which they are integrating their water resource management strategies with those being developed by the Mekong River Commission. Awareness of these inadequacies, and confidence that they can be addressed, are the necessary first steps if the MRC is to transform itself to become a fully fledged river basin organisation which can conduct itself with the requisite authority to ensure that the needs of all stakeholders, including the ecosystems of the river itself, are equitably catered for.

Chapter 4

Beyond National Interest in the Mekong?

4.1 Representing and transcending national interest

Transboundary water governance of an international river basin means going beyond national interests. Yet in the Mekong, national interests prevail: governments jealously maintain sovereignty over their own stretches of the river, and they invoke the discourse of “national interest” to legitimise development of the basin’s resources. “National interest” dominates the Mekong River Commission (MRC) too, and this is a problem. The problem in fact is twofold. First, to what extent is supra-national or basin-wide governance feasible if riparian states always put national interest before the common good? Second, how can the diverse views and interests in a country be adequately represented at the transboundary institutional level (e.g. the MRC) by that country’s official “national” position? In this chapter, we look at the implications of national interest for the MRC if it is to be an effective Integrated Water Resources Management (IWRM) institution, and for transboundary water governance more generally.

“National interest” in the Mekong can be understood in several different ways. First, it is usually assumed that each country has an “objective” geographically-based interest deriving from its location on the river, topography and benefits derived or sought from the river and its resources. Second, as opposed to this assumption of a singular, objectively definable national interest, there is an array of diverse political and social interests *within* each country. Each country, moreover, has different ways and mechanisms for understanding, negotiating, optimising and mediating these diverse interests. Third, and in sharp contrast to this picture of complexity, there are the narrow, formal structures through which “national interest” is represented at the MRC. To

In this chapter, we look at the implications of national interest for the MRC if it is to be an effective institution

be effective, transboundary governance needs to mediate between these different manifestations of national interest.

4.2 “Objective” national interests

The geography of the Mekong, presented in Chapter 2, would suggest that each country pursues its goals based on “objective” criteria such as its position upstream or downstream and whether it lies in wet areas of sharp relief suited to hydroelectric generation, dry areas requiring irrigation, flat low-lying areas subject to flooding, or coastal areas subject to saline intrusion. Each country’s interests would also be determined by the specific benefits it actually or potentially derives from the river system, whether they be food staples (rice or fish), energy or navigation benefits.

According to such “objective” criteria, China would have interests in hydropower and navigation, and, being an upstream country, would have everything to lose and little to gain from the constraints of riparian regulation. Lao PDR would have interests in hydropower and, to a lesser extent, dry season pump irrigation. Thailand would have its eye on water to irrigate the dry northeast and perhaps to supplement the central region’s water supply through an inter-basin diversion. Cambodia would have interests in maintaining fish production, enhancing flood mitigation, and developing irrigation infrastructure. Vietnam’s interests, in the Delta, would be in flood mitigation, prevention of saline intrusion, and dry season irrigation; and in the Central Highlands, in groundwater management and hydropower development. These partly competing and mainly infrastructural development priorities are often assumed to drive negotiations about rules and procedures at the MRC and also to shape relations between China and countries downstream.

To what extent, can a nation’s interests be defined objectively based on its geography?

The MRC bases its interpretation of national interest along these lines. To what extent, though, can a nation’s interests really be defined objectively and in such a simplistic way based on its geography? The notion of national interest, in our analysis, tends to mask, even subordinate, a much more complex and diverse landscape.

None of these supposedly objective national interests is driven by any sense of crisis, shortage of water, or threats to water quality. As a result, “objective” considerations of “national interest” tend to focus on whatever economic benefit countries think they can extract from the river, and this drives their views about what the MRC should be doing. Considerations of “national interest” do not advocate on behalf of the river.

So does this mean there is no crisis? Certainly, the Mekong is not (yet) in the same critical condition as the Rhine, the Murray-Darling and other rivers. Yet there are crises within the Mekong system, but they are quiet, localised and apparent only at a level of detail to which the MRC framework does not currently pay attention. They are the crises of the Sesan communities in Cambodia affected by Yali Falls Dam; of the fishing communities in northern Thailand threatened by the upper Mekong/Lancang navigation channel; and of the Xe Bang Fai villagers, whose future is uncertain if the Nam Theun 2 dam exacerbates flooding by an already flood-prone river. They are the longer-term crises of the river becoming isolated from its vast floodplain, with dire implications for fish abundance and diversity. They are the crises of altered sediment flux, with the potential to fundamentally change the river’s ecology. Given the immense amount of work put in to studies of the river by the Secretariat, why is the MRC seemingly oblivious to the crisis potential of existing water resource developments? We need to turn to the diversity of interests at a societal level to find some answers.

“Objective” considerations of “national interest” tend to focus on whatever economic benefit countries think they can extract from the river, and this drives their views about what the MRC should be doing

4.3 The complexity and diversity of national interests

The 1995 Mekong Agreement is between the governments of four sovereign states. These governments are assumed to represent the national interests of these states. In one sense, that is correct; and it appears to be the assumption that informs the work of the MRC Secretariat. Yet even in the most effective international institutions, there is always the question of how states’ interests should be mediated to achieve a reasonable equity of hearing and some fairness of outcomes. There is also the question of whether governments can or do reasonably or

fairly represent the interests of their diverse and often competing constituents.

The architects of the MRC, and those who provide most of its funding, share a general expectation that it should serve not exclusive or sectoral interests but the broad public interest

“National interest” is now a loaded term and one of the most contested ideas in contemporary public discourse. In water resource development and management it is habitually invoked and frequently fought over; and it is ultimately a matter of who comes out on top. That *every* side in a dispute over water resources may have merit in its arguments and a legitimate interest in water points to the fact that “national interest”, when it is invoked, more often than not represents, privileges and legitimises the exclusive interests of one sector.¹

The architects of the MRC, and those who provide most of its funding, share a general expectation that it should serve not exclusive or sectoral interests but the broad public interest. The public interest includes development but also encompasses the interests of those who live alongside the river and are most affected by what happens to it - the poor, the weak and the disenfranchised – as well as the sustainability of the water resource and the environmental and habitat values of the river system itself. There is now a widespread perception amongst many civil society actors whom we talked to extensively throughout this study that the MRC does not fulfil this expectation.

Within each government, too, the articulation and representation of the “national interest” is fragmented and closely equated with sectoral interests, which are themselves much in dispute. In Vietnam, for example, two ministries have been quarrelling for nearly two years to gain control of the portfolio responsible for the MRC and for the resources that go with this portfolio. The matter has still not been resolved. In Thailand, the NMC is closely associated with the Department of Water Resources (DWR) and has little presence in other line ministries. The DWR is itself in

¹ The Nam Theun 2 hydropower project in Laos is a case in point as the Laotian government’s and the World Bank’s justification for this project (and hence the Laotian ‘national interest’) is that it ultimately leads to poverty alleviation in a larger national development context. While there is no organised national opposition to the project in Laos, external NGOs and academics have questioned the benefits of the project and spoken on behalf of the affected communities who have been negatively affected thus launching other ‘interests’ than those of the Laotian government. See Attachment 1.

competition with the Royal Irrigation Department for control of the budget and the management of the country's water resources.

In all four countries, membership of NMCs is associated with more immediate pecuniary interests - the “perks” that go with travel to meetings and the possibility of a job in the Secretariat. In Cambodia, members of the NMC are largely preoccupied with the narrow interests of their respective ministries and are unwilling to promote a unified Cambodian position. In all four countries, planning authorities and environment authorities are invariably at odds, and planning interests tend to prevail – for reasons of power, not merit. And if China were to become a member, responsibility for water in that country would lie with nine different ministries, or “nine dragons ruling water” as they are known; and none is said to agree with another.

Where in all this is the voice of the public? For the most part, it is not strong, rarely heeded and almost never heard. This is a function of the state of evolution of the respective political systems and the relationships between their governments and their publics. Communities and other local interests concerned about what happens in the control and disposition of water have little recourse within the respective political systems. The diversity of interests in water and river basin management is a complexity left to “civil society” to deal with within each country; and a key issue for civil society in the Mekong Basin, and a particularly difficult issue for a centralised river basin agency to deal with, is that civil society in the region is itself extremely diverse. This reflects the very different degrees of political space for expression of alternative views, and assertion of different interests, among the six Mekong countries.

Communities and other local interests concerned about what happens in the control and disposition of water have little recourse within the respective political systems

In Thailand, civil society is well developed, very active and widely represented through NGOs and other civic groups. It has evolved from relatively non-politicised local activity in community development work to more advocacy-style civic movements in direct opposition to mainstream and bureaucratic thinking and practices. These movements include chambers of commerce, provincial civic coalitions, and even members of official bodies

Interaction between civil society and the state in Thailand is highly polarised, particularly in river basin affairs

such as river basin organisations (RBOs) established at the sub-basin level. The latter, however, continue to be dominated by bureaucratic interests, at least for the time being.

Interaction between civil society and the state in Thailand is highly polarised, particularly in river basin affairs. In part this is the legacy of disputes over large dams. The result is that there are few inclusive and deliberative forums making use of research and data such as those produced at MRC, but there is a lot of scope for development in this area.² To date, Thai NGOs and other civic groups are either alienated from the MRC or have only the vaguest idea of what its role and activities are. On the one hand, this is indicative of the river basin agency's lack of engagement with the wider Mekong public. On the other, it reflects the limited capacity of NGOs to engage in dialogue and influence the higher levels of bureaucratic and political decision-making amongst the MRC's member states and donors. Attempts to overcome this by including local stakeholders in a process-oriented first phase of the Basin Development Plan have established neither a wider nor a more systemic degree of involvement.

In Vietnam, China and Lao PDR, civil society is highly constrained

In Vietnam, China and Lao PDR, civil society is highly constrained, while in the case of Burma it is almost non-existent except in human rights and other civic groups outside the national borders. In Laos, the government proscribes national NGOs. In Vietnam, national NGOs tend to adopt a non-critical stance on most issues and particularly on sensitive issues such as the social and environmental impacts of hydropower projects. Cambodia has seen the emergence of assertive NGOs prepared to criticise the government, present alternative views, and represent the interests of those marginalised or adversely affected by development; however, recent crackdowns are cause for concern. And in Cambodia, as in Thailand, even peak NGO organisations such as NGO Forum have little or no engagement with the MRC either directly or indirectly (i.e. through the NMCs). China is

² See for example David E. Thomas, Pornchai Preechapanya and Pornwilai Saipothong, *Developing Science-Based Tools for Participatory Watershed Management in Montane Mainland Southeast Asia* (Chiang Mai, International Centre for Research on Agroforestry, 2004); available at http://www.iapad.org/publications/ppgis/RF_2000_GI_086_ICRAF_FinalReportLR.pdf

similarly authoritarian, yet the recent emergence of environmental NGOs creates not just a socio-political space for questioning domestically, but also a potential influence on China's behaviour as an upstream country intent on water resource development. This raises the question of how China's "national interest" will be represented in the event of closer engagement with downstream riparian countries.

From interviews with civil society groups that we conducted for this study, two strongly prevailing views emerged. First, all of them feel that the MRC is a distant organisation, inaccessible to NGOs let alone to the communities who depend on the river and its resources. There is a perception that the MRC is reluctant to protect the interests of the weak, be they sections of society vulnerable to the impacts of infrastructure development, or weaker member states (notably Cambodia, whose position geographically means it is also inherently most vulnerable to the impacts of development on the river.) Second, all feel that the MRC should adopt a pro-active and regulatory role in river governance rather than dutifully carrying out projects conceived and funded by external interests. Rightly or wrongly, there is a very strong public perception that the MRC dances to the tune of international donors.

Civil society groups feel that the MRC is a distant organisation, inaccessible to NGOs let alone to the communities who depend on the river and its resources

As we have seen, in some Mekong countries NGOs are allowed greater freedom than in others. Yet even in countries with less political space for NGOs, there exist mechanisms for dealing with diverse interests. However, these mechanisms operate predominantly within their national contexts. When it comes to the international or transboundary level, diversity of interest within countries is less easily accommodated. It is unlikely that the MRC would, for example, play any role in intra-Party discussions on hydropower development in the one-party socialist riparian states, or that anything other than the official party line would be articulated to the MRC. However, unless the MRC better understands and engages with the diverse interests of stakeholders at national and local levels, it is hard to see how it can be truly committed to IWRM.

National interests are in fact narrow bureaucratic interests that reflect neither the true national priorities of the country nor the diversity of views within it

4.4 Representing national interests at the MRC

Our analysis of how riparian countries' "national interests" are represented to, and by, the MRC has suggested a couple of fundamental problems. First, these supposedly *national* interests are in fact narrow *bureaucratic* interests that reflect neither the true national priorities of the country nor the diversity of views within it. Second, the MRC presents its own version of "what countries want" as if it actually knows.

Weak national ownership

Whose interests prevail in the MRC? Clearly it is not those of the wider public. It is also not those of "government" in a whole-of-government sense. Rather, it is the narrower interests of a bureaucracy to whom all four governments have delegated responsibility for Mekong affairs. There is, in other words, something of an "ownership vacuum" on the part of these governments. Politically, as far as senior governmental leaders are concerned, the MRC appears not to be a core concern, or perhaps any concern at all; and as far as we know, it has never been discussed in any of the Cabinets since the decisions were made to enter into the Agreement in the first place. In terms of ministerial representation on the Council, it is technical agencies, not powerful policy agencies, which send their representatives; and the status of these representatives can be as low as Vice-Minister – not the most powerful position in any of these governments. The agenda for Council meetings is prepared by the Secretariat; and apparently, when it is circulated to the National Mekong Committees, it elicits no more than one or two responses, usually of an administrative nature. The Secretariat has observed that it "can't get a substantive discussion going" in the Council,³ which is probably as telling a measure as any of the four governments' perception that core national interests are not at stake, or that if they are, they will not be dealt with in the Council or Joint Committee of the MRC. When member states have a real issue, as with the Sesan dispute between Cambodia and Vietnam, they do not vent it in the Council and they only reluctantly involve the

³ Discussion with a senior representative of the MRC Secretariat on December 9, 2005. However, in the last Council meeting there was a substantive discussion on the procedural rules for dry season water sharing on the mainstream river.

MRC at the official level.⁴

The four member states' behaviour vis-à-vis the MRC might be seen as consistent with an aversion to multilateralism understandable if it were characteristic of the way they conduct their political affairs in other matters, but it is not. Compare, for example, their participation in ASEAN, or more appositely the GMS: although the GMS may not (yet) have a secretariat, it does have a cycle of ministerial meetings and a biennial prime ministerial summit, which they all attend (at the most senior political level and in large numbers) and use to mark their "ownership" of this emerging regional institution.⁵ Why then is ownership of the MRC at the political level so weak? Of course, it is not ownership of the MRC as an institution that we are concerned with here, but that for which it was established: the river and its natural resources. And at the political level there appears to be little sense of anxiety about the river's future and no sense of urgency about improving joint efforts to look after it. The four states have a "soft" and ambiguous "Mekong Spirit" Agreement, one that is even described by some at the MRC as "beautiful", and they seem to be in no hurry to develop a more "hard law" Agreement or Agreement-based regulations. However, further delays in making the MRC engage more actively in the regulatory management of the Mekong's water resources could result in insurmountable problems. It could turn out, quite simply, to be too late.

Why is ownership of the MRC at the political level so weak?

At both the political and the official levels, however, the focus is on other matters. In keeping with the imperatives of the fast moving economies of this region, the riparian governments and their water agencies appear to be in more of a hurry to plan and implement joint infrastructure developments for energy, irrigation and so on. Some of these are for purely economic purposes (e.g. Laos-Thailand projects on energy and water exports) rather than for the conservation of water resources and protection of the environment. Although member countries do raise environmental

4 The MRC Secretariat was asked to facilitate bilateral meetings between Vietnam and Cambodia on the Sesan but the dispute was not dealt with at the MRC's political level, see Attachment 1.

5 See also Chapter 6.

In the interviews for this study no serious alarm was raised by government officials in any of the four countries about the water resource, either in regard to its quantity or its quality

concerns,⁶ it would appear that they do so reluctantly; their level of concern does not reflect that of international environmental groups and of communities already affected by local development projects, who feel that the overall wellbeing of the river is under threat. In the interviews for this study, for example, no serious alarm was raised by government officials in any of the four countries about the water resource, either in regard to its quantity or its quality. The focus of their attention was more on national plans and the supposed need for projects on the river to meet the requirements of national economic development. Civil society and NGOs were more focussed on the river, and raised concerns about the local impact of specific projects, for example pollution from mining industries in Yunnan or the impact on fisheries in downstream tributaries of hydropower projects (e.g. Sesan). Perhaps the one area in which concern was more general or widespread was seasonal floods and droughts. Flooding is of course being dealt with by the MRC through the Flood Management and Mitigation Programme. As for droughts, although for example the Thai government and the MRC Secretariat raised with our study team the problem of the drought in northeastern Thailand, this was perhaps due not so much to a concern for the environment as to a desire that Thailand's overall water resources should meet the requirements of a fast moving economy (i.e. more water to be taken off the river and its tributaries for irrigation and other economic purposes).

Community interests

In principle, community interests are represented by the MRC's National Mekong Committees, and in a broad, undifferentiated sense this may be the case from time to time. But in practice, local communities are physically and administratively remote from the agencies that sit on these NMCs; and when a community has an issue with development proposals or has already been affected by a development decision, it is difficult for them to know where to go, arduous for them to obtain a hearing, and near impossible to have their concerns seriously raised through these administrative structures. Even in Thailand, where there

⁶ Cambodia asked for an impact assessment of the Nam Theun 2 on the Tonle Sap and on the downstream effects of the Vietnamese hydropower project on the Sesan.

is more public participation and greater media freedom, the case of the Pak Moon Dam demonstrates how difficult it is for a village community to bring an issue to national attention through formal channels – even where the development project is small, and even with the support of urban NGOs capable of articulating the community’s cause. The community lost the case in any event. To take another example, the Sesan communities of northeast Cambodia also found that the best way to voice their concerns to the government was via NGOs. Furthermore, their concerns received attention, if not satisfaction, from a negotiated arrangement between the Cambodian and Vietnamese governments, not through the Cambodian NMC.

In the MRC Secretariat, public and community concerns, to the extent they are addressed, are dealt with not through direct engagement but by top-down formal consultations with international NGOs or sectoral local interests.

4.5 Working with and beyond national interest in Mekong water governance

We have tried to show in this chapter that governance by the MRC is dysfunctional largely because the MRC gives priority to a concept of “national interest” that fails to reflect the real diversity of interests within each nation and that fails to address the long-term interests of the river itself. These realities are seriously at odds with the “national interest” discourse so often invoked to legitimise large projects that have severe local consequences. The management of a transboundary river needs to transcend the sovereign interests of riparian countries, but this is not a path the MRC seems willing or capable of taking.

Although the riparian countries are home to diverse interests, they currently represent their *national* interests to the MRC through narrow, bureaucratic channels that are biased toward infrastructure development, primarily hydropower and irrigation. At this bureaucratic level there is little sense of crisis, despite critical situations arising in many localities and with increasing frequency as a result of river engineering.

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Chapter 5

China

China is not party to the MRC. The reasons why are subject to conjecture and suspicion. With dams on the mainstream and unilateral widening of the navigation channel, and a record of development laying waste to the environment, it is widely held that China remains outside the MRC so that it will be under no obligation to submit its actions to consideration by other countries.¹

The official Chinese position seems to have shifted in favour of membership

One of the most interesting findings of this study, and one of the most portentous for the MRC, is that during the seven months the study was under way, the official Chinese position seems to have shifted in favour of membership, or at least membership has gained the support of a majority in the decision-making loop.² There is of course much that would have to happen for China's accession to become possible, particularly the resolution of issues concerning the Mekong Agreement.

Why now and not ten years ago? It may be that China refused to join the MRC so it would not be constrained by the Agreement or the views of downstream riparians. But more importantly, China's relations with the MRC are a function of Chinese foreign policy, and Chinese foreign policy at the time of the conclusion of the Agreement in 1995 was resistant *in general* to regional multilateral initiatives. Until the mid-90s, Beijing was an adamant bilateralist, on issues both central and peripheral to its interests. At the same time as it did not join the MRC, for example, it rejected initiatives by Southeast Asian states to multilateralise the South China Sea. It had even resisted broader initiatives for consultative arrangements

¹ See, for example, Milton Osborne, *River at Risk*, Lowy Institute Paper 02, Sydney, 2004.

² Members of the Study Team visited China twice and had extensive discussion with officials in government agencies in Beijing and Kunming, academics and NGOs. The government agencies included the Ministry of Foreign Affairs, the Ministry of Water Resources, the State Environmental Protection Administration, the Ministry of Commerce, the Yunnan Province Foreign Affairs Office and the Yunnan Environmental Protection Bureau.

such as the ASEAN Regional Forum (ARF), which it finally agreed to with the greatest reluctance.

This began to change in the second half of the decade, initially because of some fundamental re-thinking about how to handle relations with the United States, then because of a need to manage and hedge against the volatility in the Clinton Administration's China policy. Regional multilateral initiatives at the time, such as ASEM and particularly ASEAN+3, presented useful opportunities for hedging, and China also became the only non-ASEAN state to join in the founding of the ASEAN-Mekong Basin Development Cooperation in 1996. In the Asian financial crisis in 1997, the inter-connectedness of the region and the direct payoffs for China from being friend to all the neighbours from Korea to Indonesia, irrespective of the United States factor, became starkly apparent, and China began more actively to adopt the role of regional player. The full dimensions of China's new thinking took some time to emerge, but by the early 21st century its foreign policy stance had been clearly repositioned in two ways relevant to the Mekong. One, China had become an ardent and activist multilateralist.³ And two, Southeast Asia had acquired a visibility and importance in its foreign policy that it had never had before. This has meant the emergence of a China-ASEAN overlay to China's bilateral relations with Southeast Asian countries. China has signed the ASEAN Treaty of Amity and Cooperation; it has been an active participant in ASEAN+3 and related initiatives, such as the recent Asia Summit in Kuala Lumpur; and it has joined with ASEAN in an agreement in mid-2004 to grow a China-ASEAN Free Trade Area, the most momentous development for the region since the end of the Pacific War and the establishment of communism in China.

This transforms the way Chinese and Southeast Asians see themselves and the region and it alters the dynamics of their

³ To ensure that everyone gets the message, Chinese spokespeople are pointing out that the section on foreign policy in the late-2005 report of the 16th National Congress of the Communist Party of China uses the word 'common' seven times: common development, common promotion, common interests, common efforts, common prosperity, common consultation, common preservation. See for example, excerpt from a recent speech at Peking University by the Chinese Ambassador to Australia, Mme Fu Ying, printed on the editorial page of the *China Daily*, 20 February 2006.

relations. For China, positive and untroubled relations with the region are strategically, politically and economically critical to its foreign policy and domestic economic growth. In Beijing there is now an awareness of the southern border and cross-border issues that simply did not exist before, as well as greater sensitivity to Southeast Asian views. This is confirmed by people in and out of government in Beijing and Kunming.

So the Mekong and the MRC now come under scrutiny in a very different context.

In-principle objection to multilateral transboundary water governance arrangements has been removed. What Southeast Asians think and want is important. China has a range of issues with Southeast Asian neighbours that it has to work through to bring relations with them into line with contemporary Chinese foreign policy objectives. And the river as an element in relations with Southeast Asia is now visible to the central government, and an issue it must address.

It may seem curious from an MRC perspective, but until recently the Mekong, or Lancang, did not figure at all prominently in Beijing's thinking. There are seven water resources commissions in China, but none for the Lancang, which in name and not much else comes under the remote Yangtze River Commission. Reasons suggested by a number of people in China are that these rivers are in an area of low population and little economic importance to the central government, there is little river navigation, and the rivers do not flow through other Chinese provinces (even though they may flow through other countries – a disarmingly Sinocentric view). Development along these rivers seems to have been left largely to Yunnan Province, where development interests are said to have had unfettered sway in both provincial and prefectural government; and, as in most provinces, fulfilment of quotas for investment projects is a requirement for official promotion.

Since late 2005 the environment has been pushed to the top of the agenda by the government

This may be about to change. Since late 2005 the environment has been pushed to the top of the agenda by the government. A politically well-connected Vice Minister of the State Environment Protection Administration (SEPA), Pan Yue, began explicating

this publicly in mid 2005. Since then, on a regular basis, he has gone on record condemning the culture of “development at all costs” of which Yunnan is said to be a good example. In early 2006 the development-at-all-costs policy is being officially condemned as “wrong”. This represents a major repudiation not only of that policy but by implication also of the people who promoted it. This is not lightly done in China.

On policy specifics, SEPA have been given what amounts to a right of veto on development projects; its views must be sought and if its approval is withheld a project cannot proceed. Even before this, SEPA had been promoting the Green GDP, and Yunnan, which has refused to sign up to the Green GDP, had been attracting national media scrutiny for its poor environment record. New regulations, penalties for environmental despoliation, and other environment protection measures are issuing from SEPA every week. The environment is the subject of daily reporting and discussion in the media.

Some observers doubt that China will be able to enforce this new environmental policy; and given the huge size of the country and the vast number of projects and the relative weakness of SEPA, this doubt is not unreasonable. There is, however, no doubting the seriousness of intention or the sense of alarm that seems to inform much of the environmental statements issuing from the government.

It is in this context that high-level attention to transnational rivers has been prompted, first by the controversy over dams on the Nu (Salween) River and then by the disaster on the Songhua River in China’s northeast. The first helped put the sensitivities of transboundary river management higher on the central government agenda than they have ever been, since it was Prime Minister Wen Jiabao who dealt with the controversy, and the environmental impact review which he approved has recommended (January 2006) that there should be only four dams on the Nu instead of the original thirteen. These sensitivities were strongly reinforced by the November 2005 Songhua disaster, which provoked the consternation and anger of Russia, whose

good will and intentions are critical to China's political and strategic position in the north and west. It is now a high priority for China to try to ensure there is no further disaster of this kind. A joint body has been set up with Russia to monitor not only the Songhua but all other rivers that cross the Sino-Russian border. This may in time lead to a new national policy on transnational rivers.

In any event, both the foreign and domestic contexts now favour giving attention to China's relations with the MRC. But what happens next is not necessarily settled. The picture of national interests and how decisions are made is as variegated in China as it is in the other four countries. It is a great big unwieldy administrative system, with all the disparate and contested issues and development and environmental concerns of these countries but on a very large scale. On foreign policy, however, it is distinctive. Debates may rage between different interests domestically, and do, but in the end foreign policy decisions are highly analytical and methodical, and when a decision is finally made on the MRC it will be with a clear view of objectives, and China will speak with one voice, mandated from the top.

Discussions held with officials in September 2005 revealed there was interest but no real evidence of a definitive or unified position on the MRC, and much evidence of different opinions. By December 2005, while different opinions obviously persisted, it appeared that China had arrived at a point where most people in the official policy loop thought it would be preferable if China were a member, that the fundamental principle of China joining was acceptable, that the relationship with the downstream riparian states was from certain perspectives crucial, and that China needed to have a better understanding of the issues as seen from downstream – “we don't want to look like someone who doesn't care”.

But even if the right conditions for joining exist, obstacles remain. The first is that the appropriate signals would have to come from current member states. Thailand has already been “flying a kite”. It is not known whether this reflects discussions already held

Even if the right conditions for joining the MRC exist, obstacles remain

There is a generally shared opinion in China that the Agreement represents the interests of the existing members and is unfavourable to the interests of China

with China, but it would not be surprising. Second is that Chinese officials have made it clear China intends to move gradually not hastily, allowing time for it to develop an understanding of the views of downstream countries. Caution in approaching change is characteristic of China's foreign policy. But it can also be inferred that some Chinese interests still have reservations about the substantive issues. As noted elsewhere in this study, in water management alone there are nine ministries with different responsibilities and views. There are also other key players – each of which has a different take on the matter – including SEPA, the powerful National Development Reform Commission and the Ministry of Commerce.

Third and most constraining is the Mekong Agreement. There is a generally shared opinion in China that the Agreement, while claiming to reflect international water law, represents the interests of the existing members and is unfavourable to the interests of China. Chinese are given to saying that as China was not party to the negotiation of the Agreement (it was not party either to the ECAFE-sponsored Mekong Committee), there are naturally a number of matters it would have to open up; and as put to us in one nicely diplomatic statement, “so maybe China would like to have some negotiation”.

What does China want to negotiate? In Kunming we were given an academic paper authored by Professor He Daming (and two others), Head of the Asian International Rivers Centre at Yunnan University which is understood to work closely with government. This paper canvasses a number of objections to the Agreement on legal grounds and proposes that these can be addressed either by revisions to the Agreement, supplements or resolutions, and that “framework” issues can be made more specific through bilateral or multilateral discussions. It identifies the issues needing discussion as:

- i) The introduction of new systems and principles, for example principles of environmental monitoring, EIA and compensation.
- ii) The revision of provisions of the Agreement over which there is significant dispute – for example the principle

- of reasonable and equitable utilisation in Article 5, the principle of not causing substantial damage in Article 7, and the procedures for prior consultation in Article 26 – as well as the addition of articles on protecting reasonable and equitable utilisation by upstream countries, and restricting excessive interference by downstream countries in the utilisation of water resources by upstream countries.
- iii) Making certain in-principle stipulations more specific, for example scope, adjustment targets and planned water utilisation under “significant impact” in Chapter 2 of the Agreement, “harmful effects” in Article 7, “substantial damage” and “state responsibility” in Article 8, as well as procedural issues relating to dispute avoidance and implementation supervision.

There is more detail in the body of the paper. It concludes by recommending that the title of the Agreement be changed to *Agreement on Cooperation for Sustainable Development in the Lancang-Mekong River Basin*, “so as to give expression to the geographical and realistic circumstances of this international river basin”.

This may or may not be the position of the Chinese Government, but as the issues clearly have been much discussed it is probably an indication. The Thai kite-flying referred to above has already suggested that the Agreement has to be renegotiated to accommodate Chinese accession. But the issues signalled in this paper indicate that while the question of membership is on the Chinese agenda, and perhaps that of some existing member states, the Agreement will be a major constraint and the process protracted.

What will it mean for the MRC if China does become a member? Some people argue that China will dominate the organisation and over time shift its decisions and policies in ways that favour Chinese views and interests. This would depend in part on how Chinese entry was negotiated and how the Agreement was rewritten or supplemented. But it depends also on how the riparian governments see the merits of multilateralism, and on the judgments they make about their respective bilateral relations

with China. Projection of China's interests in relation to water is happening now anyway, for example in the November 2005 agreement on water cooperation between China and Cambodia. Riparian governments may judge that there is value in bringing China into the multilateral framework and hope to deal with issues if they arise.

A counter view on this question is that China could perhaps be more engaged and active than some of the present members in contributing to the good management of the river. After all, China has completed clearing the channel for navigation⁴ and is nearing completion of all the dams its own environmental interests will allow.⁵

And for this reason too, the focus of MRC attention logically must shift from negotiation over dam building by China, which is where the attention was in 1995, to management of the dams now built, regardless of whether these dams are unwelcome to the countries downstream of China. This shift may make it seem advantageous to the existing members to have China in. From the point of view of the total river, the principles of good water governance are generally better served if the organisation is inclusive rather than exclusive, even if inclusiveness alters the balance.

A different kind of concern about Chinese membership is that if one member has dams on the mainstream in its territory, this opens the door to others doing the same in theirs. This could occur in Thailand, for example, and is perhaps a reason why Thailand is keen to get China into the MRC.

There is also a question for donors, about funding. China has committed significant funding (USD 20 million at least) to environmental cooperation under the GMS, and donors would presumably want to ask whether they should continue their current levels of MRC funding if China became a member or

4 This was advised to Study team members by a Chinese official responsible for river affairs, in December 2005.

5 There were originally to be 8 dams on the Lancang mainstream. 4 have been completed, 1 was shelved, and the remaining 3 are under construction.

whether they should expect a substantial contribution from China. It is conceivable that Chinese membership could inaugurate a new funding mix in which member states would bear a higher proportion of the total budget, leading over the longer term to total funding by riparians and to the withdrawal of donors.

One issue that would arise after Chinese accession, if not before it, is the extent to which the Secretariat would be able to engage with the public on the Chinese side of the border. While the space for civil society and the expression of the public interest in China is growing, it is still limited and subject to periodic and targeted contraction. The man whose name is most prominently associated with the campaign on the Nu River dams for example, Yu Xiaogang, in late 2005 was granted provisional approval to renew the registration of his organisation, Green Watershed.

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We have tentatively raised this issue in China, and an informal official view is that it would be difficult. However, we understand this view to refer more to the opposition politics of development critics than to what might be expected from a disinterested Secretariat. Community surveys and baseline analyses are commonplace in China, and NGOs and consultants funded by foreign development assistance have been widely involved in social and environmental impact assessments. But this informal official view does underscore the need to be explicit about the purposes and limits of the Secretariat's role in public consultations. Presumably donors would also want to ensure that the Secretariat could build relationships with communities along the river in China; so donors might wish to have separate direct discussions with the Chinese Government on desirable principles of integrated water resource management.

In general, we take the view that Chinese membership would strengthen the capacity of the MRC to be an effective water governance institution. It would provide for closer involvement and more satisfactory consultation than happens under the current arrangements with China, and would help replace suspicion of China's development intentions and undertakings with fact. It would increase transparency surrounding water-

related decision-making, and establish at least the potential for discussion and resolution of disputes between member states. China also has a long history and considerable contemporary knowledge and experience of water management. If it were to contribute this knowledge and experience to the MRC, it would greatly enhance the MRC's capacity to act as a knowledge centre for the whole river basin, and beyond.

It seems unlikely that China will be interested in the MRC as an investment development organisation. The indications are that its interest is in technical and river management cooperation and knowledge sharing. For investment and development in a Mekong Basin context it clearly favours the GMS (see Chapter 6), and indeed some Chinese involved in discussions about policy options canvass the idea of the MRC becoming a subordinate unit of the GMS. Given the likely long-term contribution of China to the GMS, the potential gains for downstream countries are such that this outcome may not be as remote as it now might seem.

Finally, given that China is adopting an increasingly "hard" law approach to environmental problems and legislation, it may even be that negotiations over Chinese accession could be the catalyst for opening up the whole issue of "soft" versus "hard" law and moving it in the direction of the latter.

Chapter 6

The MRC and Regional Integration

The MRC is surrounded by a multitude of transnational arrangements and institutions: the busy infrastructure of Asian regionalism. Some of this is purposeful and strategic, pushing “big picture” regional integration. Some is functional, the joining of like interests that becomes the composite substance of transnational economic and political union. The pace is gathering, driven by China’s growth and multilateral activism and by renewed enthusiasm among ASEAN members for the long-term vision they had before the Asian financial crisis of an Asian version of Europe. The United States’ distraction with other regions and issues that are not seen from within Asia as relevant to the region also contributes to a growing Asian regionalism.

This context is most important for the MRC’s member governments and consumes a significant part of their energies and policy attention, from prime ministers down to the most junior officials. The standing ministerial, official, working group and other meetings that rotate around the ASEAN capitals throughout the year function as a form of regional governance and cover every policy domain and issue, including an ASEAN Working Group on Water Resource Management (AWGWRM, which had its Sixth Meeting in the Philippines in February). This dimension to the interests of member states is not readily apparent in MRC thinking, which often seems self-focussed and has a very limited view of the landscape - like a frog in a well. It also puts the MRC in perspective and explains at least in part why the leaders and policy heavyweights in the member governments are so little engaged in its affairs. In their preoccupation with regional affairs and institutionalised ASEAN conclaves, the MRC is neither high on the policy agenda nor a stage for discussing regional relations. The MRC is a functional organisation and, if it is functioning as intended, why should they be engaged? One conclusion to be drawn from this is that it is unrealistic for the Secretariat to hope for greater engagement in the Council by ministerial and higher

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levels of government. While this is true in present circumstances, it does not need to be - if the culture of the MRC and particularly the Secretariat were to change in ways suggested elsewhere in this study.

The MRC is challenged to examine its place and its comparative advantage in relation to other regional bodies

The MRC is also challenged by this context to examine its place and its comparative advantage, particularly in relation to ASEAN itself, the Greater Mekong Subregion, GWP Southeast Asia, and to some extent the ASEAN-Mekong Basin Development Cooperation. The clear advantage of the MRC is that it is the only transnational agency of its kind in the region. Its experience in transboundary riverine water governance and accumulated resource data and technical information is not only an asset for the region, it is also an opportunity for the MRC. Although not an ASEAN body, the MRC is part of the transnational infrastructure in Southeast Asia and, belonging as it does to four ASEAN governments, a subset of regional integration. It would be to the advantage of both the MRC and ASEAN if the MRC, while maintaining this unique position, were to seek more actively a closer high-level alignment with ASEAN.

Through a Memorandum of Understanding, ASEAN has observer status – as an “MRC Partner” – at MRC Council and Joint Committee meetings. But this reflects an MRC-centred view of the world. It brings ASEAN in; it does not take the MRC out of its well. Nor does it plug it in directly to the forums that really count for its government principals.

So to be part of the extraordinary momentum towards regionalism that swirls around it, the MRC has to actively seek out a different kind of relationship with ASEAN. This has to be explored of course with ASEAN. But the kind of arrangement that might be canvassed, for example, would be for the MRC to seek advisory input to the annual round of ASEAN and ASEAN+3 Environment Ministers’ meetings, from which ASEAN’s water initiatives emanate, giving the MRC status at this level of regional government. If it were a principal source of direct advice to this forum, the MRC could add considerable value to ASEAN water policy and governance, placing its unique

advantage at the disposal of ASEAN for the benefit of the whole region including the Mekong. It would also help broaden the MRC's own horizons and its understanding of these wider regional interests that so clearly impact on its work. It might also seek to cooperate more with ASEAN's Working Group on Water Resources, acting as a knowledge base for this Group and for the officials' groups that support the ministerial meetings. In both cases, the MRC's appropriate role is to be a professional governmental or civil service organisation of the region. The MRC should not imagine that this is as an opportunity for it to assume the role of paid consultant; nor should it be drawn into the trap of becoming a party to any of these groups, committees or meetings, a distraction it could ill afford particularly in its present circumstances.

The Greater Mekong Subregion (GMS) presents a different kind of challenge to the MRC. Strictly speaking, the GMS is not involved in Mekong River governance. However, various MRC Secretariat representatives perceive that the GMS is encroaching into this area, and at least one senior member of staff has indicated that the two organisations are in competition. Given that the GMS is an ADB-driven program, it may be that the MRC confuses or conflates ADB-funded water initiatives with GMS initiatives, which in some contexts might not be surprising. But the GMS Biodiversity Corridors Initiative does take the GMS further into the areas of environment and conservation than it has hitherto been, and this includes a corridor for the Mekong Headwaters and one for the Tonle Sap Inundation Zone. Indeed, across the whole initiative there are bound to be areas that seem to encroach on what the MRC might regard as its role, hence the need for functional demarcation and clarification.

But this is perhaps not the main issue. The GMS rivals MRC not so much in its role vis-à-vis water as in political clout in the Mekong Basin. Although the two organisations cover almost exactly the same geographical area, the GMS has a membership that includes all six riparian states; it is rapidly developing a much higher profile; and in power, influence, ownership and funding, it is stronger than the MRC. Apart from sustained and substantial

Across the whole GMS initiative there are bound to be areas that seem to encroach on what the MRC might regard as its role, hence the need for functional demarcation and clarification

funding by the ADB, there are several factors that explain the GMS's success. First, it has grown into an institution which all its member governments take seriously and which is "owned" by prime ministers and key policy ministers. Second, it is favoured by China as the institution for Mekong Basin economic cooperation and as a vehicle for China in the Mekong subregion. China turned the Second GMS Summit in Kunming in July 2005 into a major regional event, it has brought the province of Guangxi into the GMS, and it has pledged significant funds to support the Biodiversity Corridor Initiative. To our Study Team, Chinese officials variously described the GMS – in explicit contrast to the MRC – as dynamic, successful, an association of equal partners "including civil society and NGOs", having a common vision and common developmental agenda, pragmatic, and action-oriented. One summed it up by saying, "We have high expectations of the GMS." The GMS captures the mood of the moment. It is future-oriented in thinking, forward-looking in initiatives, and strongly aligned with the prevailing regional sentiment that is driving ASEAN-China relations and regional integration.

There is a sense that the MRC has "missed the boat". The question is, what should it do?

It may be from a desire to compete with the GMS that the MRC Secretariat has been pushing so strongly to assume an investment development role for itself. But it is impossible for it compete in any meaningful sense, even if the role were appropriate and supported by the MRC's backers: the GMS's institutional and funding base is too strong, its ownership by regional governments too powerful, its sector activities too well-developed, and its role in the regional framework too well-established for the MRC to be anything more than a bit player in a sideshow.

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But the MRC has "missed the boat" only if it casts a covetous eye on that role, rather than in terms of its own mandate. Rather than compete, it should develop a relationship with the GMS, delivering good water governance for the river basin and good integrated water management practices as a contribution to GMS-balanced economic development goals. To achieve this, the MRC

would have to do two things. One is to stick to and strengthen its comparative advantage. The other is to engage the support of its principals at ministerial level, and for them to press the MRC's key areas of work at the relevant GMS ministerial meetings.

If we turn now to the GWP Southeast Asia, there would seem to be every reason for the MRC and the GWPSEA to make common cause. Curiously, the MRC was unable to provide us with any information on relations or contacts with GWPSEA, and vice versa. The GWPSEA did give us a number of documents about its recent activities in the region, but none of these mentions the MRC. Unlike the MRC, however, the GWP was actively engaged in the creation of the ASEAN Working Group on Water Resource Management and took part in the meeting in January 2003 that finalised and approved the Long Term Plan for Water Resources Management in ASEAN Countries, surely of considerable potential significance for the Mekong. The GWPSEA has also established Country Water Partnerships (CWP) in Southeast Asia, including with the four member countries of the MRC, to assist in the sustainable management of water resources. Significantly, in terms of recommendations we make about the proper role of the MRC, the GWP and its country programs facilitate "the exchange of knowledge, experiences and best practices in IWRM."

It is illogical for the MRC and the GWPSEA not to be in a close collaborative relationship

It is illogical for the MRC and the GWPSEA not to be in a close collaborative relationship. Building such a relationship should be part of an MRC platform for wider regional engagement. We suggest that the MRC should as soon as possible enter into a dialogue with the GWPSEA to establish an active partnership with the aim of institutionalising principles of IWRM in MRC member countries and throughout Southeast Asia.

This leaves the ASEAN-Mekong Basin Development Cooperation (AMRBC). The AMRBC has a characteristic ASEAN framework, with regular ministerial meetings (the Seventh and latest in Kuala Lumpur on 28 December 2005) and a Steering Committee; and its role is to encourage dialogue, identify common projects, and to forge interconnections and economic linkages between ASEAN member countries and Mekong riparian countries.

AMRBC is not to be dismissed, if only because it was taken up rather enthusiastically by China

Its Basic Framework states that it should complement the MRC.¹ Since its establishment in June 1996 it has been a rather unfocussed and not very successful vehicle for generating funds for development, including the Singapore-Kunming Rail Link. At the Seventh Ministerial Meeting, Malaysian Trade and Industry Minister Rafidah Aziz noted its limited success and said one of its weaknesses was that its projects had no regional content.² However, it is not to be dismissed, if only because it was taken up rather enthusiastically by China.³ China is its only non-ASEAN founding member and to date has been its single largest contributor of funds. And as China's interest in the AMRBC relates to infrastructure and transport through the Mekong Basin, it is therefore relevant to issues under the MRC's water management responsibilities. The AMRBC also conducts training on water resource management – in which the MRC, as the region's strongest repository of expertise in this area, ought to be closely engaged, if it is not already.

More surprising, and more immediately relevant to the MRC, is the case of some project proposals being worked up under AMRBC. The AMRBC has on its books two major, but as yet unfunded, water-related projects in the Lower Mekong for the Lao PDR. One project, operating on the premise that data collection has been fragmentary and not standardised, is for the Lao PDR to establish a Water Resources Database Centre for the whole of the Lower Mekong that will “systematically store data and also provide standardised data services for line agencies not only in Lao PDR but also in other countries in the region.” The other is for the Lao PDR to conduct a complete survey of water resources in the Mekong River Basin.⁴ While the MRC should not seek to monopolise all water-related activities in the Mekong Basin, these projects – particularly the first – fall within the ambit of the MRC's unique skills and knowledge. Whether the Lao PDR would

1 *Basic Framework of ASEAN-Mekong Basin Development Cooperation, Kuala Lumpur, 17 June 1996.* <http://www.aseansec.org/6353.htm>

2 ‘Opening Remarks by H.E. Dato’ Seri Rafidah Aziz, Minister of Trade and Industry of Malaysia, Seventh AMRBC Ministerial Meeting, 28 December 2005’. ASEAN Secretariat, Initiative for ASEAN Integration Unit, January 2006.

3 In Opening Remarks at the Fifth Ministerial Meeting by Chinese Vice Premier Zeng Peihong “spoke highly of the achievements of the AMRBC etc”. *People's Daily*, 20 August 2003.

4 Review of AMRBC Projects, 14 November 2005. ASEAN Secretariat, Initiative for ASEAN Integration Unit.

be the candidate of choice to carry out these projects – again, particularly the first – is another matter; but it is far from apparent that there is value-added or effectiveness in having project proposals so clearly within the MRC’s ambit work their costly way through the Lao PDR and AMRBC bureaucracies and then via the AMRBC go trawling for money among member countries and donors.

This brings us back to the question of interests. This case illustrates the need for the MRC to be attuned to what is going on in the institutional environment around it as well as to the interests of the region as a whole. It does of course also reflect a reciprocal need on the part of others to understand the interests and capabilities of the MRC. In any event, it underlines the point that the MRC must engage itself more firmly within the regional infrastructure and be more aware of those regional interests that have close bearing on its work. The message is that the MRC should neither neglect nor try to compete with other regional initiatives, but should work at excelling in the areas of its comparative advantage. That is its guarantee of remaining relevant and effective in the region.

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Chapter 7

The MRC and Southeast Asian Political Culture

7.1 The MRC and the political culture of ASEAN

The MRC has institutional roots in both good and bad experiences of river basin cooperation, and the current model is based on internationally accepted principles of good practice. It sits, however, in a Southeast Asian context, where there are societies with different institutional roots and experiences, ideas about cooperation and traditions of good practice. Since one size invariably does not fit all, it is not surprising that there is tension between the MRC and its member societies. These tensions have significant implications for the MRC's future, and the MRC will have to address them.

One of these tensions concerns what is sometimes called the “ASEAN Way”. Although generally regarded by international water interests and donors as inimical to the objective of rules-based regulation – or a “hard law” MRC – the culture may itself suggest some means by which progress could be made towards that objective. The trick is in knowing how to work with it.

What is at issue is a political culture. It is a political culture common to all four member countries (as well as to other ASEAN states and in some important respects to China). Although in the context of the MRC, member governments may invoke the “ASEAN Way” out of expediency in order to resist rules-based regulation, the approach is nevertheless derived from a political culture. It is hardly surprising, therefore, that member states are not keen to change this culture to suit the architects and donors of the MRC.

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The “ASEAN way” culture as it applies to the MRC is often articulated by members as “the Mekong Spirit”. The term was in

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fact coined by a group of donors, dubbed the “Mekong Club”, who in 1957 bankrolled the MRC’s predecessor, the Mekong Committee, as a way of expressing their optimism about the prospects for collaboration in the Mekong basin.¹ Today the term is used by MRC members to justify their preference for national sovereignty and voluntary engagement over transnational regulation and enforcement.

The ASEAN Way, however, is a set of policy and institutional ideas that grew out of the social characteristics of Southeast Asian cultures, notably conflict avoidance and harmony, consensual group behaviour, personal relationships taking precedence over other relationships in politics or business, and indirectness and circumlocution in communication.

Both the “Mekong Spirit” and the “ASEAN Way” are subject to being caricatured in ways that deprecate the value systems that underlie them, and it may be preferable in this discussion to refer instead simply to “political culture”.

In the ASEAN Treaty this political culture finds expression in the principles of non-interference in sovereign affairs, and dispute resolution by “flexible procedures” (whereby hard and fast rules that may be confronting are “softened”, and enforcement is difficult). A third principle, consensus decision-making, is not enshrined in the Treaty except in relation to dispute resolution, but it has been affirmed repeatedly in the course of many decisions and has subsequently become as much entrenched as the first two. These three principles should not lead us to imagine that ASEAN governments are “above” engaging in conflict – just as they are not “above” having legally enforceable agreements – but the principles are indeed hallmarks of ASEAN political culture, even to the point where non-interference extends to avoiding “negative attitudes” towards one’s neighbours, a position long abandoned by most western governments.

¹ *Mekong Committee*. Transboundary Dispute Freshwater Database, Oregon State University. www.transboundarywaters.orst.edu/projects/casestudies/mekong.html

From the 1990s the principle of non-interference, including the aversion to criticism, began to create tensions within ASEAN. But initiatives to water it down, for example in relation to members' financial mismanagement during the Asian financial crisis, or to ignore it on certain issues, for example in relation to the generals in Burma, were often defeated by the principle of consensus. The Burma case did ultimately push the other ASEAN states to adopt a critical position – but not so critical as to force Burma out of ASEAN.² What this example does illustrate, however, is that among ASEAN's key power brokers there is the potential for the political culture to change.

The three principles also have a deeper function, which is to hold the ASEAN nations together politically when by all expectations they should fall apart. These nations had no modern-day habit of cooperation; in the colonial era, their external relations were almost exclusively with European powers. These nations also had deep historical differences. There was the Vietnam War and the Cold War and other international events that pulled these countries in different directions. Later, there was the challenge of how to make ASEAN comprehensively Southeast Asian when the political and social systems and economic development of prospective members were so completely different. Forty years on, ASEAN is not only politically integrated, it is integrated to an extent that is irreversible, and it is the foundation upon which East Asia as a whole is now building an Asian union.

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This political culture has been of singular importance in encouraging regional peace, growth and stability, and the means by which ASEAN has harmonised different interests and regulatory systems and introduced a degree of regional governance. It has a significance for MRC member states that may not always be understood outside the region. And while the founding, and more developed, countries of ASEAN have been together long enough to contemplate moving away from this culture in some respects, the history of conflicts between the MRC four is recent enough

² Burma put more strain on the political culture than any other issue in recent times, and pressure from inside and outside ASEAN did not always succeed in changing it. When external pressure seemed set to threaten other interests, and Burma itself obdurately refused to play the ASEAN game, opposition to criticism of this member crumbled.

for them to find the principles of this political culture necessary to the way they conduct these relations generally and in the MRC.

Of most relevance to the MRC in this culture are the following factors: the overriding importance of hierarchy and top-down ownership and decision-making; the preference for “soft law” over “hard law”; the implications of both of these for institution building; and the critical role consensus-building plays in effecting change, and the brake this puts on the pace of change. The ASEAN example illustrates these characteristics of the political culture. It was initiated, created, owned and propelled from the beginning at a very high political level. Relations at this level came first, before any form of institutionalisation occurred. It was 10 years from ASEAN’s founding in 1967 to the signing of the Treaty in 1976, another 16 years before a nominal Secretariat was established, four more years before the leadership summit was institutionalised as an annual event, and only after that, in the late 90s, that the Secretariat became a fully operational organisation with a range of policy and functional responsibilities. The Greater Mekong Subregion had quite different origins, but it too illustrates the dynamics of the political culture. Beginning as an ADB initiative, it is only since high-level political leaders became engaged and initiated a regular summit that the initiatives and activities of the GMS have begun to develop something of an incipient institutional form.

In ASEAN, “soft law” made possible the maze of agreements that now link the member states more integrally and formally at government, business and other levels and it remains a common characteristic of the domestic legal/political systems in all of these countries

While Southeast and Northeast Asia are moving towards integration – and some tough negotiations lie ahead that will involve binding commitments – the countries of this region have shown no inclination to abandon the benefits of “soft law”. In ASEAN, “soft law” made possible the maze of agreements that now link the member states more integrally and formally at government, business and other levels and it remains a common characteristic of the domestic legal/political systems in all of these countries. However, the experience in many countries, developed as well as developing, is that there often comes a point when “soft” rules are translated into legislation and when “soft” implementation becomes enforcement and compliance. This has been happening within, and in certain contexts between,

ASEAN states, sometimes pushed by governments, sometimes by protectionist commercial interests, and to some extent also by public intellectuals in think-tanks closely networked with government. Agitation by civil society has occasionally also had some influence.

Between MRC states, however, there is little movement on this issue, nor is there any *domestic* legislation in these countries to which transnational enforcement could be linked. Three of the four states are close to the very “soft” end of the spectrum, and the fourth, Thailand, sits in the middle of this spectrum. Consequently there is a discrepancy between the rules-based regulation necessary for a transnational water authority to be effective, and the dominant political culture of the MRC and its member states. The question is: *does* the MRC have the will to move towards the “harder” end of the spectrum, and if it does, *how* would it make that happen?

The question is: does the MRC have the will to move towards the “harder” end of the spectrum, and if it does, how would it make that happen?

The answer to this can only be found in the countries which have “ownership” of the river, that is, the sovereign Mekong Basin states. That means it has to be found in the political culture itself. It means acknowledging the role of hierarchy, and targeting not the MRC or the Secretariat but the political leadership of the four countries themselves, with these goals in mind: to enlist their commitment to the principles of IWRM; to refresh their “ownership” of the MRC; and to begin the process of building consensus at this level for establishing a legally enforceable rules-based regime for the Mekong River. This should not be predicated on the form of the MRC as it currently stands: the institution may have to undergo some restructuring or metamorphosis. Instead, it should recognise that if the principle of consensus is followed, then the pace of change will be restricted to that of the “slowest” member country. This process cannot and should not be attempted by the Secretariat, nor is it a matter of a one-off meeting here or there. It requires a careful long-term strategy implemented principally by donor governments acting in harmony and by the GWP leadership. Above all, it must target heads of state or government as well as the appropriate ministers – or it is unlikely to succeed.

A first milestone to aim for is a summit meeting of the four countries' heads of state or government, carefully prepared so as to ensure a substantive outcome

A first milestone to aim for, therefore, is a summit meeting of the four countries' heads of state or government, carefully prepared so as to ensure a substantive outcome. Every East Asian country has its metaphors about going "with the current" rather than "against" it. The purpose of this summit would be to move the MRC into and with the regional currents.

7.2 The MRC model

It is in the context of this political culture also that the inability of the MRC to be more effective, as an institution, should be understood. The political culture is not the *sole* cause of the institution's failure to mature into a strong water authority, but it is one of the most critical.

Prior to the 1950s, neither in Southeast Asia nor China was there any history of state cooperation on the management or sharing of the waters of the Mekong. The demand for cooperation came from international water experts, ECAFE, and the US Bureau of Reclamation. When the Mekong Committee was established in 1957, it simply adopted a five-year plan developed by a US engineer, former US Lieutenant General Raymond Wheeler.

The political culture is not the sole cause of the institution's failure to mature into a strong water authority, but it is one of the most critical

The politics of Southeast Asia at the time were strained. Not surprisingly, there was no prospect of the Chinese joining the Committee. And when Indo-China began to fall apart, what little there was of the Mekong Committee was kept alive by external donors. This external proprietorship carried over into the founding of the MRC in 1995. Its international sponsors devised an Agreement and institutional structure that may have been exemplary for international water specialists. But the management and sharing of water is quintessentially about politics. And in April 1995 the politics in and between these states was still raw with the ravages of the recent past. Fighting was still going on in Cambodia, and in Thailand there had been a series of coups and attempted coups. None of the three Indo-China states had yet become members of ASEAN, and all three regarded Thailand with suspicion and hostility. Perhaps some of the external progenitors of the MRC even hoped that establishing the

organisation would drive sub-ASEAN regional cooperation and integration. But it is far from achieving that.

A fundamental weakness from the start was that the MRC's genesis was not driven by a "binding of roots" either at high political level or through grounding in the local political culture. It seems to have been assumed that the institution could be planted in Southeast Asia and left simply to grow. But the institutional culture on which it was based was largely western. And it seems that no account was taken of the culture in which it was planted: of hierarchy and patronage; of the way in which, particularly in more formal or official contexts, communication happens and consent is obtained and disagreement expressed and decisions made; of the more intimate connection between political leaders and the institutions they control and the influence this has on institutional growth and change; of group behaviour and relationships and conflict avoidance; and of the influence all this has on rules and regulations and the law.

Deriving institutional models from other cultures is not in itself a problem, and there are countless examples of this in Asian countries. The problem is one of ownership, or lack of it, and the question of whether imported institutions can be adapted and made sensitive to their context while still retaining their essential features. This is what the structures and Secretariat of ASEAN have done for example; and working with ASEAN, or walking into its Secretariat, one cannot mistake its strong Southeast Asian identity. But the MRC as an institution has been neither adopted nor adapted in this way; and lacking ownership from the top, it is actually a part of the problem that now inhibits the development of an effective water governance regime for the Mekong Basin.

It has not helped that the institution's development has continued to be so strongly influenced by external donors and by expatriate leadership in the Secretariat. That it is donor-driven is hardly new or in dispute: its dependence on donors for funding, and the continuing reluctance of member governments to increase their disproportionately small financial contribution, are testimony to this. Its growth and strategic directions have been steered by

The management and sharing of water is quintessentially about politics

The institutional culture on which the MRC was based was largely western

The paradox is that those who would most like to see the institution become an effective water authority are, due to their dominance in MRC affairs, perhaps inadvertently making it less effective

donors, its agendas and programs have predominantly been set up by donors, and its initiatives are reviewed by donors – all in the name of good water governance.

The resulting paradox is that those who would *most* like to see the institution become an effective water authority are, due to their dominance in MRC affairs, perhaps inadvertently making it *less* effective.

A way out, through refreshing the interest and commitment of high level leadership, has been suggested at the conclusion of the preceding section of this chapter. However, reform also requires fundamental change in the institutional culture itself, principally the Secretariat.

7.3 The MRC Secretariat – “A Chameleon on a Batik”

Between the interests of donors and the many national interests of the riparian states sits the MRC Secretariat, its responsibility to accommodate all these interests simultaneously. Like a chameleon on a batik, it’s hardly surprising that it is confused.

The Secretariat has the task of implementing policies and programs which, for the sake of harmonising Mekong River interests and ensuring fair and equitable outcomes for everyone, must try to accommodate the national interests of all four member countries. The Secretariat therefore needs to be equipped to analyse these countries and their interests. The Secretariat’s leadership has asserted that it knows “what countries want”, but that is rather different from understanding national interests, and in any event it is a rather bold assertion.

Is the Secretariat currently able to manage disparate interests, establish priorities, serve the greater goal of transnational water governance and the good of the riparian communities and governments? This is the challenge, and to meet it the Secretariat needs to understand and interpret not just national interests of these countries but also their societies and political systems and the broader regional context. Yet, as it is presently constituted

and staffed, the Secretariat does not have this capacity. There are several reasons for this.

Most striking is that there is a preponderance of international experts, mostly western, in key senior staff positions. This is the result of a policy – agreed between government officials responsible for the MRC, the Secretariat and donors – to staff the Secretariat with international sector experts (water, environment, fisheries, navigation, watershed management, etc.) in the pursuit of global excellence. The success of this policy is another question (which could be investigated in the donor-initiated review of the Secretariat). Senior staff may have expertise in their speciality, but they have limited expertise and ability to interpret the complex political, cultural, social and institutional environment of member states. The institutional culture of the Secretariat inhibits effective use of (mostly more junior) riparian staff to leaven this sense of being driven by non-riparian personnel. It is striking also, given the MRC is in its tenth year and there has always been substantial donor funding, that there are still so few staff from riparian states who have been trained and nurtured under MRC auspices to a level competitive with international experts. This has not only limited the Secretariat’s capacity to interact effectively with its constituents throughout the basin. It has been a major impediment to its adaptation to the Southeast Asian environment. As noted above, the institutional culture of the MRC is in sharp contrast to that of the ASEAN Secretariat.

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Partly for these reasons, the Secretariat has a very narrow understanding of its member countries; and among some staff there is an assumption of knowledge about these countries which is well founded. The Secretariat’s methodology for interpreting national interests of constituents, for example, is to take this as being represented simply in the national development plans of the four governments. This one-dimensional and top-down methodology excludes many interests and perspectives in and out of government, which even the current governments might regard as legitimate.

The Secretariat’s limited ability to understand its “masters’ (four

governments and many donors) and the societies and people it serves, as well as how to balance these interests and remain focussed on its mission, contributes to confusion about what it ought to be doing. This is reflected for example in its recent advocacy of an investment development role for itself. Such a role, if the MRC were to take it on, would elevate the agency to the position of principal, rather than the instrument of the principals, would conflict with its role as guardian of the river and the ecosystem, and would add to the general confusion about what its proper role should be.

In the longer term, the problems of the Secretariat can only be solved by refocussing on the central mission of water governance. This will require the engagement and ownership of high level political leaders, as recommended above; organisational change, which may be the outcome of the prospective donor-sponsored independent review of its structure, management and accountability; and skills and professionalism. Critical to the success of organisational initiatives will be that the Secretariat's culture must change in the following ways.

A major challenge is to match the IWRM approach to stakeholder and community involvement with the centralised and top-down political culture that prevails in some MRC member countries

First, there should be substantial cultural diversification, particularly at senior levels in the Secretariat, to begin the process of transforming the agency's expatriate identity into one that is more comfortably integrated with and representative of the political culture of the region. This is no easy task, because the Secretariat also needs a high degree of independence so that it can develop objective scientific knowledge and translate it into policy recommendations for the MRC's bureaucratic and political levels. A major challenge here is to match the IWRM approach to stakeholder and community involvement with the centralised and top-down political culture that prevails in some MRC member countries.

Second, the Secretariat needs to enhance its skills and capacity to analyse and interpret the societies it serves, as well as the wider region, and including the diverse interests of each of the national governments. It can do so by recruiting people who are sectoral professionals as well as experts in the riparian countries and their

languages.

Third – and this is not much discussed in the Secretariat, or for that matter outside it – the Secretariat needs to engage with and bring into the work of the MRC the public, the interest that is at present most notably absent or at best muted.

The first two requirements above are challenging but achievable if there is a strong strategy for institutional change. The third may in some circumstances be difficult, but it is nevertheless fundamental. Public engagement by the MRC leads to a fourth critical aspect of change: the Secretariat's role in orienting the National Mekong Committees towards more proactive engagement with the public, that is Basin stakeholders and communities, and civil society and NGOs.

Although the political space for articulation of the public interest in MRC member states varies hugely from one state to another, the IWRM principles that guide the MRC and to which the member governments in general subscribe, indicate that for good water governance to occur, the involvement of the public is essential. The public may of course be said to be represented by governments and government departments, and for certain purposes – technical and diplomatic for example – the government role in the MRC is central. But the public interest is more layered and varied than this, and the interests of the people who live along the river are more diverse. The Secretariat therefore has to be more differentiated in its relations with them. As a step in this direction, the Strategic Plan 2006-10 highlights the need for more dialogue between the MRC and civil society. But this good intention needs above all political will and action. And here both the MRC Secretariat and the National Mekong Committees have key roles to play.

To what extent does the MRC Secretariat have the liberty to engage with the public in these four countries? The Secretariat argues that it is primarily an instrument of these governments. But at the same time it works in a policy domain where decisions always have some impact on the community somewhere. How it engages with the public on these matters is potentially sensitive

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for the governments in all four countries. There is room for such engagement, but the Secretariat has to understand the sensitivities and know how to work with them. If it is not clear and focussed about its river management role – for example if it pursues a role as an investment development player and in doing so expose it to a conflict of interests in its role as custodian of the river – then direct engagement with the public is likely to be restricted and dogged by controversy. It is as a professional and knowledge-based secretariat that it can be most effective, providing a service to the public as an honest broker, trusted by all parties to mediate different interests and facilitate reasonable outcomes. It is in this capacity that the Secretariat should give professional guidance to and develop capacity in the National Mekong Committees so that they can have a proactive relationship with the public based on IWRM principles.

However, knowing the public and its issues, and taking these up in ways that are acceptable to government and effective for the public, requires more than arm's length consultation in formal or workshop settings. To be effective in its wider social context, the Secretariat has to give higher priority to understanding better the Basin communities it is meant to serve and their livelihoods. Such knowledge has then to be translated into a much closer and more direct *relationship* with the public, attuned to it culturally and “mentally” and engaged operationally. This is also where the National Mekong Committees will have a key role to play.

Finally, the Secretariat must be more “outgoing” and improve its outreach in the Basin, both in its efforts to build capacity in the National Mekong Committees and in a more direct dialogue and engagement with the Basin’s many different stakeholder groups, local government, civil society and NGOs. This outreach needs to be embedded as part of regular MRC programs, particularly the Basin Development Plan and the Environment and Fisheries Programmes.³

³ The Fisheries Programme has already shown many good practises in engaging with the public and the basin fishing communities as well as being well integrated in national and local government fisheries authorities in the four MRC countries.

Chapter 8

Donors and the MRC

Foreign interests, donors, and foreign experts have always played an important and at times dominant role vis-à-vis the MRC. Since the creation of the Mekong Committee in 1957, facilitated by the UN's Economic Commission for Asia and the Far East (ECAFE), cooperation between the four lower Mekong countries has been largely steered and engineered by externals such as the UN, United States, and donors (including the many donor-financed international experts and academics). As has been argued elsewhere in this report, collaboration between the four countries was never based on a home-grown model for cooperation that responded politically to the specific needs or development strategies of the countries themselves. Mekong collaboration has, by and large, been externally motivated, reflecting a mixture of geopolitical interests, foreign policy, and development agendas.

8.1 The United States and the Mekong Committee

Up until the end of the wars with the United States in 1975, external interests in the lower Mekong were mostly those of the United States and the UN. There was a considerable Cold War and security aspect to United States geopolitical interests in the Mekong Committee during the 1960s and 1970s. The United States was keen to see a strongly united Lower Mekong region opposed to Communism (in North Vietnam and China); and the water resources of the Mekong were thought to offer potential for economic growth and impetus for cooperation between Thailand, Laos, Cambodia and South Vietnam. United States foreign policy in the region had many interesting and, in hindsight, sometimes peculiar justifications. For instance, President Johnson in 1965 explained in an address at John Hopkins University that, while bombing North Vietnam, the US would also provide USD 1 billion in aid for the Mekong program. He added: "The vast Mekong River can provide food and water and power on a scale to

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dwarf even our own Tennessee Valley Authority.”⁴

US experience of river basin development from the Tennessee Valley Authority was influential in shaping the early contours of the Mekong Committee

US experience of river basin development from the Tennessee Valley Authority was influential in shaping the early contours of the Mekong Committee. During the 1960s the Committee was engaged in a large scale program of water resources investigation and planning. The US was champion of the process, and sections of the international community showed interest in investing in the Mekong Reservoir Cascade. The UN provided international legitimacy for the United States-led engagement in Mekong developments. In 1966, U Thant, the then UN Secretary General, praised the Mekong project as one of the most important UN actions in the world. It was then that plans to build a cascade of dams on the mainstream first emerged, based on the Tennessee Valley model and the advice of experts from the US Bureau of Reclamation. In 1970, the Mekong Committee presented the “Indicative Basin Plan”. The plan moved the project further towards implementation as a result of the Bureau’s feasibility study of the Pa Mong multi-purpose reservoir project (hydropower and irrigation) just upstream of Vientiane in 1973. This study suggested a USD 2 billion investment that would have resulted in one of the world’s largest dam and reservoir projects.⁵ As the final political sanction – and in what was the first expression of major water governance actions – the Mekong Committee agreed on and issued the 1975 Joint Declaration that paved the way for the project. But the grand vision for large-scale development on the Mekong River never materialised; a few months later the region’s geopolitical map fundamentally shifted and the Mekong Committee ceased to exist.

It was not until the early 1990s, when more peaceful conditions were finally established in Cambodia, that all four countries were again reunited under an Interim Mekong Committee. Many bilateral donors then became interested, even more so after the

⁴ Lyndon B Johnson in Nguyen Thi Dieu, “The Mekong River and the Struggle for Indochina: Water, War and Peace”, Westport, Connecticut: Praeger, 1999:106.

⁵ The Pa Mong project had impressive economic benefits in terms of hydropower production, dry season irrigation and flood protection. But it would have required the resettlement of 25,000 people and would have had a series of negative impacts on the productive ecology of the river basin. See Browder and Ortolano “The Evolution of an International Water Resources Management Regime in the Mekong River Basin” , 2000:507

signing of the 1995 Mekong Agreement. Being largely a product of the UN and water experts, the Agreement offered a broad sustainable development framework that matched the policies and development language of most donors.

In the late 1990s most bilateral donors developed their own water policy papers that more or less copied each other

8.2 The globalisation of water resources and river basin expertise

The United States export of models for good river basin management was the beginning of several decades of external expert influence on Mekong collaboration – part of the overall internationalisation of river basin development.⁶ This approach was, and still is, to transpose good or best practice (in part or in full) from one river basin to another, most often from the “North” to the “South”. After the 1992 Rio Declaration and its Agenda 21, the globalisation of policies, strategies and designs for good water resource management became further entrenched. The World Bank’s first Water Resources Management Policy Paper of 1993 became a key policy document, together with those later developed by the Global Water Partnership. There was widespread agreement with the concept of IWRM both among donor countries and developing countries. In the late 1990s most bilateral donors developed their own water policy papers that more or less copied each other. Furthermore, all the “correct thinking” on water and IWRM was repeatedly asserted in the numerous international water conferences in the Haag, Bonn, Kyoto, and most recently in Mexico City in March 2006. The benefit of all this is that there is considerable global consensus. In fact, there appears to be so much agreement on the objectives, principles and implementation strategies of IWRM⁷ that suggesting something different from these internationally agreed “dogmas” would signal considerable political incorrectness.

In fact, there appears to be so much agreement on the objectives, principles and implementation strategies of IWRM that suggesting something different from these internationally agreed “dogmas” would signal considerable political incorrectness

It would therefore appear that donor collaboration with the MRC on IWRM and river basin management, as well as coordination amongst donors, should be a “piece of cake”. But the reality suggests otherwise, as we shall see below.

⁶ See Miller & Hirsch “Civil Society and Internationalised River Basin Management”, AMRC, 2003:12.

⁷ See Chapter 3.

8.3 Donors and the MRC after the 1995 Agreement

Starting in 1992, after Cambodia's re-entry to the Mekong Committee, the UNDP helped to negotiate the 1995 Agreement. The UN was brought in when cooperation almost collapsed in 1992 due to disagreements between Thailand and Vietnam over the structure of the new Mekong regime. When the 1995 Agreement was signed, bilateral donors, the UN and development banks stood ready to increase their assistance.

There has been unanimous donor support for the 1995 Agreement. Some donors have chosen to direct their assistance more towards the core priority areas: the Basin Development Plan (BDP), Water Utilisation Programme (WUP) and Environment Programme (EP). Others have continued to assist specific projects under the MRC's many "sector" programs, some of which are heavily funded (like the Fisheries Programme), others of which are not (the Hydropower Programme, for example). The MRC's five-year *Strategic Plan 2000-2005* prioritised MRC programs according to the 1995 Agreement and the subsequent reorganisation of the MRC Secretariat.

The MRC's budget depends almost entirely on donor funding. During the period 2000-2005, donors funded MRC activities to a total of USD 92 million

The MRC's budget depends almost entirely on donor funding. During the period 2000-2005, donors funded MRC activities to a total of USD 92 million. The annual donor contribution in 2004 was close to USD 13 million. The single largest donor has been Denmark, which provided more than USD 20 million in the 2000-2005 period. Besides Denmark, the following donors contributed more than USD 3 million in 2000-2005: Netherlands, World Bank, Germany, Sweden, Japan, Finland, Switzerland and Australia.⁸ In comparison, the total contribution of MRC member countries will be USD 1.15 million in 2006 and this will increase by 10% annually.

Sweden has been a long time supporter of the EP and the BDP. One of its major concerns has been that the MRC should take a proactive role in conflict prevention and mitigation – which implies that the MRC should adopt a water governance function.

⁸ Other smaller donors have been UNDP, UNITED STATES, ADB, EU, UK, Norway and New Zealand.

Denmark initially supported river transportation⁹ and fisheries but went on also to support the EP and become the lead donor to the BDP. Denmark still actively supports the Fisheries Programme, the Flood Management and Mitigation Programme,¹⁰ and the Environment Programme. Some of Denmark's key policy interests are in developing MRC capacity in transboundary water resources management and in encouraging it to operate as a river basin organisation.

Australia has supported a “twinning” program between the MRC and the Murray-Darling Basin Commission (MDBC). The program has included a steady stream of Australian assistance and expertise to the MRC, primarily technical and managerial expertise from the MBDC or from other Australian water and environmental organisations. With relatively small assistance budgets, Australia has managed to have a large impact on MRC development, principally through technical assistance and “good practice” provided by the MDBC.

Some donors support stand-alone sector-based projects. Germany, for example, supports catchment area and forestry management, Belgium supports navigation, France supports the Mekong-HYCOS project, and so on.

In discussions about the MRC's strategic direction – what the MRC should or should not be – the most prominent contributors amongst donor countries have probably been Sweden, Denmark, Germany and Australia. Lately, the World Bank has entered the stage and is now actively engaged in the debate.

Over the past decade the MRC Secretariat has been engaged in managing a number of relatively separate programs, each funded by one or a few donors. Coordination between programs and donors has been weak. The substance of the projects and programs has not and is not being driven by the Secretariat's senior management, nor by its oversight body, the Joint Committee (JC), or by the National Mekong Committees (NMCs).

⁹ Denmark assisted ferry transportation in Cambodia during the 1990s and before the MRC was established. This assistance ceased in 1999.

¹⁰ The Netherlands is the FMMP major donor.

Over the years, the political levels of the MRC (the JC and Council) have approved an endless stream of donor projects and have never said “no” to a single project

Although donors, or the technical experts engaged by donors, sometimes enter into detailed dialogue on matters of substance with the international experts employed on these projects, the “bottom line” is that most programs are essentially donor-driven. Over the years, the political levels of the MRC (the JC and Council) have approved an endless stream of donor projects and have never said “no” to a single project.

In spite of these weaknesses, donor funds to the MRC have largely been well spent on the development of state-of-the-art scientific knowledge and technical capacity. What is missing, however, is the political will to apply this knowledge more proactively to decision-making on appropriate river basin management.

This brings us back to the question of national interest, which runs through all the different chapters of this study. Interaction between member countries and the MRC might be improved if member countries made a stronger commitment at the higher political level, and if the Secretariat, particularly its senior management, had greater professional capacity and more institutional memory to carry out more independent analytical and strategic work. In the absence of commitment from the members and of know-how at the Secretariat, donors have filled the vacuum and have largely been in “the driver’s seat”. The MRC’s political level and its Secretariat have been much more *reactive*, responding to donor “push and pulls”, than *proactive*.

The MRC’s political level and its Secretariat have been much more reactive, responding to donor “push and pulls”, than proactive

The MRC’s dependence on donor projects is a well-known weakness and a cause of constant complaint by many experts, and by some donors, over the last few years. For one thing, it has given the MRC Secretariat a large administrative burden and created difficulties due to the array of different donor agreements, funding modalities and accounting procedures. Another concern has been the extent to which projects are “donor driven” – a concern that is part of the *raison d’être* of this study.

While it is true that donors have been interested in individual projects under the MRC, it is fair to say that they have not

been overly interested in the MRC as a politically-active water governance organisation. It has most often been seen as just a technical-managerial arrangement for IWRM, environmental protection, or specific sector developments (water shed management, navigation, fisheries etc.) that one way or the other add value to the development and well-being of the river basin. As for the Secretariat, donors have largely considered it a convenient vehicle for their grants and projects. Indeed most donors have, until recently, thought the MRC *is* the Secretariat.

The political nature of transboundary water management between sovereign states has not been well understood or acknowledged by donors. This is perhaps because some donor organisations are still separate technical development entities that are preoccupied with delivering and managing projects and that operate largely outside the political realm of foreign relations. Only recently have donors woken up and linked their own interest in the MRC's development agendas (the technical-managerial) with the longer-term strategic and political objectives of the MRC. This presents new challenges to donor coordination and donor-MRC relations.

Controversy over the Strategic Plan and BDP2 highlights the fact that the more holistic and “politically correct” water resource and environment agendas are donor agendas

8.4 Donor-MRC controversy

Throughout 2005, during the period of this study, a disagreement arose between donors and the MRC over the content and direction of its new Strategic Plan and its proposal for a second phase of the BDP (the BDP2). This controversy highlights the fact that the more holistic and “politically correct” water resource and environment agendas are donor agendas. Donors reacted against the MRC's new strategic turn towards being more directly involved in the facilitation of investments and towards harnessing donor money for projects that, according to donors, lie outside the MRC's mandate as a river basin organisation. This new direction was spelled out in the MRC's Strategic Plan and BDP2 proposal. Both documents were approved by the MRC Council in late 2005, but after donors objected, the documents are now being revised.

In the Donor Consultative Group (DCG) meeting held

immediately after the above-mentioned MRC Council meeting, donors submitted a joint statement¹¹ criticising the lack of consultation prior to the preparation of the Strategic Plan, and the over-emphasis on investment facilitation in both the Plan and the proposed BDP. Donors also called for an independent review of the MRC Secretariat and the NMCs, which was a clear signal that they felt not all was well with the MRC.

The MRC wants to see things happening on the ground. As one member of the Laotian NMC commented: “Every year our Ministry of Finance asks what we get out of the USD 200,000 they send to MRC. We want to see physical results.”¹² Donors, on the other hand, implicitly invoke global water resource and environment agendas in their concerns over the MRC’s preference for investment facilitation. They argue in favour of maintaining a more holistic approach to sustainable development and of the MRC strengthening its role as a knowledge provider leading to more engagement in water governance and regulation.¹³

During the period of this study, the donor-MRC debate has directly or indirectly touched upon the question of how much the MRC should, or should not, become a regulatory agency. Some members of the NMCs and the JC, as well as senior staff at the MRC Secretariat, initially reacted strongly against any suggestions that the MRC should play more of a regulatory role through, for example, transboundary *Environmental Impact Assessments (EIAs)* or the *Procedures for Maintenance of Dry Season Flows on the Mainstream*. However, following discussions with various MRC representatives the tension has dissipated considerably, and it seems there is now less apprehension about the term “regulation”. Indeed, in one meeting with the MRC Secretariat, the CEO felt

11 A heated exchange followed the donors’ presentation of this statement. For some MRC and country representatives used to a culture of political and diplomatic politeness, as well as for some donors used to administrative cultures that do not like to create noise or rock the boat, the statement was considered harsh. Other donors come from more straightforward and critical bureaucratic cultures where the norm is to ‘call a spade a spade’. These differences amongst donors complicate donor coordination, and they show that the political cultural issues are not simply along “East vs. West” lines.

12 The Laotian NMC in a discussion with the Study Team on 10 January 2006 in Vientiane.

13 This was expressed in clear terms by Peter Lysholt Hansen, Denmark’s ambassador to Vietnam, in the DCG meeting on 1 December 2005. Most donors present in the meeting supported this.

comfortable enough with the word to remark that eventually the agreement on, and implementation of, the WUP rules and procedures would amount to “some degree of regulation”.¹⁴ But politically the issue of regulation still causes a lot of uneasiness in some MRC member countries. The fear is that regulation will seriously challenge national sovereignty. In a discussion about how much investment facilitation versus regulation the BDP should bring about, Vietnam’s JC member said:

The 1995 Agreement mentions that there has to be development. We must have dams to regulate the river. The BDP is a development project and not a regulation project.¹⁵

Some donors look at it a bit differently. In their overall assessment they don’t seem to be too concerned with particular Articles of the 1995 Agreement. One donor representative put it like this:

The 1995 Agreement was an important political accomplishment in 1995 when the region had just come out of war and misery. Politically a fairly broad and “soft” agreement was the best one could expect at that time. Much credit goes to the countries and the architects and brokers behind the agreement. But the situation is different in 2006. The development pressures and challenges in the Mekong are rapidly changing. Also, many global lessons on water and environmental governance have been learned since 1995 including from relevant river basin organisations. This presents a new and different context for MRC both in terms of accumulated global knowledge and commitments as well as actual developments on the ground. It may not be possible to amend the 1995 Agreement at this stage.... unless China is invited in ... but at least a stronger commitment to regulation will be necessary. This would probably also mean countries compromising sovereignty for the betterment of the river basin as a whole. The challenge here is the political sensitivity towards parastatal agreements on trade-offs that restrict national authority. But such difficult agreements will have to be made, if not now then in the near future, as pressures on resources are increasing dramatically, not least because of the rapid economic growth in the region.¹⁶

Politically the issue of regulation still causes a lot of uneasiness in some MRC member countries

14 Study workshop at the MRC Secretariat in Vientiane on 13 December 2005

15 Nguyen Hong Toan, Secretary-General of Vietnam’s NMC and JC Member for Vietnam, in the DCG meeting in Chiang Rai on 1 December, 2005

16 Christer Holtsberg, Director SENSEA, Bangkok, 11 March, 2006

Donor influence over the MRC has been seen by some member country representatives, and the current executive of the MRC Secretariat, as having pushed the MRC to “the green side” to become “more of an EPA style organisation”. The Secretariat argues that this is one reason China has been reluctant to join the MRC.¹⁷

Disagreements between some donors and the MRC Secretariat have been simmering for some time. But recently there have been some positive signs. The discussions in the last DCG meeting on 1 December 2005 were open and frank, if not on detailed substance then on important elements of the MRC’s new strategic direction. Some donors were very direct in their comments and criticism. Some of the MRC’s JC members, notably from Vietnam, were equally forceful in supporting the MRC’s becoming more directly engaged in investment facilitation. This openness in the donor-MRC dialogue may signal a positive development, according to those MRC observers who have urged that the dialogue be more critical, more forceful and less diplomatic. The process is, after all, meant to be constructive, and criticisms should be taken in this light, especially now that the MRC is maturing as an organisation.¹⁸

The rather abnormal situation we have here, in which donors are dominant, may have arisen because donors are “filling the vacuum” left by member countries’ lack of engagement with or ownership of the MRC

There are many different views about the role donors should play with respect to the MRC. It is our contention that it is inappropriate for donors to drive the MRC agenda. It is inappropriate because it is not the way foreign relations and development diplomacy work in the year 2006. The rather abnormal situation we have here, in which donors are dominant, may have arisen because donors are “filling the vacuum” left by member countries’ lack of engagement with or ownership of the MRC. Having said that, there is a growing view in civil society that donors should exercise *more* responsibility and exert *stronger* pressure on the MRC. This view is presented in the following example, which refers to the Sesan tributary and

¹⁷ In an interview on 9 December 2005 with the MRC CEO Dr Olivier Cogels, Dr Cogels asserted that the MRC has a reputation for being a ‘green’ organisation and that MRC member countries believe donor pressure to be responsible for this apparent shift towards environmental protection.

¹⁸ This is argued by Eric Biltonen in a ‘non-paper’ commissioned by the World Bank: “Retrospective Desk Review of the Mekong River Commission: Progress and Recommendations from 10 years of Dialogue”, undated.

draws its rationale from a rights-based approach and a general environmental concern:

Cambodians have appealed to the MRC and donor agencies to stop funding hydro planning on the Srepok until damages and problems arising from hydro dams on the Sesan, another river shared by Vietnam and Cambodia, are duly investigated and resolved. But unless MRC donors reinforce this message and insist upon higher standards for hydro planning and water management, pulling funding if necessary, the MRC executive have little incentive to do more than talk endlessly about the need for change. Unless MRC donors demand reform or cut off funding, the MRC will remain politically and financially adrift, unaccountable to Mekong water users, and oblivious to market realities and technological advances.¹⁹

The dominant role of donors is also reflected in the growing number of donor-sponsored studies of the MRC and the Mekong – academic or otherwise. And the number of studies continues to grow. Sweden has recently commissioned a study on “Transboundary Water Cooperation as a Tool for Conflict Prevention and for Broader Benefit Sharing” in which the Mekong and the MRC figure prominently.²⁰ The report you are now reading adds to the list. Unfortunately, much of this knowledge, including strategic recommendations for the MRC’s mandate and future role, remains in the hands and minds of external experts. Very little reaches government circles, let alone politicians, in the Mekong countries themselves. The debate as to what the MRC should and should not be remains largely in the domain of donors, external experts, academics, international NGOs, and other non-riparian groups.

8.5 Donor coordination

Donors are notoriously bad at coordinating their activities; coordination is often complicated and usually has very high transaction costs. There has, however, been some attempt at

19 Grainne Ryder, Policy Director, Probe International, Energy Probe Research Foundation, Toronto, Canada. In “Mekong Update”, Volume 8, Number 3, July-September 2005, AMRC, Sydney University.

20 Draft 2006

coordination in the context of the MRC's environmental and BDP programs. As mentioned above, the first phase of the BDP was basket-funded by Sweden, Switzerland and Denmark, with Australia and Japan offering technical assistance. Joint donor reviews were conducted annually. The coordination was largely smooth and uncomplicated.

An example of less successful coordination is that between the above-mentioned donors and the World Bank/GEF, where the former are supporting the BDP, and the latter the WUP. The substance of the two programs is closely interlinked, yet there has been very little coordination between the donors. Fortunately, to the credit of MRC Secretariat staff, it would appear that the two projects were technically integrated without donor involvement.

The MRC has not made any significant request for better donor coordination; it seems satisfied as long as there is a steady stream of donor grants for its projects

Ideally, donor coordination would be the Secretariat's responsibility, at least on technical matters and particularly during the project preparation phase. But the MRC has not made any significant request for better donor coordination; it seems satisfied as long as there is a steady stream of donor grants for its projects. This stance is understandable given how much time and how many resources the MRC allocates to individual donor dialogue however, at the same time, the Secretariat complains about the many uncoordinated donor grants that create a heavy financial burden.

Poor donor coordination and changing donor emphasis could also be a reflection of the fact that, for most bilateral donors, the MRC is not the highest item on the agenda; country assistance programs are more important. Their policies may not be based on careful analysis of the complexities of the MRC and its regional situation. They may therefore be less prepared to engage firmly in a policy dialogue with the MRC. Consequently their involvement may be erratic, and only called upon because there is a DCG meeting or because issues have arisen to do with the project cycles of their own grant assistance programs.

One major weakness of donor assistance to individual country programs is the lack of coordination between these programs

and *regional* donor support to the MRC. Also, there is little coordination among donors to **align all their country assistance programs** in water and environment at a region level. The following observation, by a Mekong analyst, provides food for thought:

One major weakness of donor assistance to individual country programs is the lack of coordination between these programs and regional donor support to the MRC

Denmark is providing Vietnam with a USD 4.6 million grant for “Integrated water resources management in Ca and Srepok River Basins” which is supposed to assist local authorities, local communities, and other water stakeholders with “sustainable water resources management” over a four-year period. Nowhere in the project announcement is it mentioned that Srepok is a transboundary river shared by Vietnam and Cambodia, or that Cambodians will or should be recognised as stakeholders in decisions and plans affecting their river. Nor does it mention that Sweden and Norway have funded hydro planning along the Vietnamese stretch of the Srepok since 1999, without consulting Cambodians, without assessing the costs to Cambodian livelihoods, and without promoting any type of benefit-sharing mechanisms common in Nordic countries.²¹

Danida reports that in its original formulation the Srepok project was supposed to **consider transboundary issues** but that the **Vietnamese government (Ministry of Agriculture and Rural Development and Vietnam’s NMC)** cancelled an international workshop planned by the project management to facilitate discussions with the Cambodians and other donors. But for Danida (and other donors) it remains unsatisfactory to support only partial water resources management and river basin development in only one country (Vietnam) while leaving out the downstream country (Cambodia), particularly given the “hotspot” nature of the “3S” basin area. This issue presents a (manageable) challenge for collaboration in the Mekong: the MRC should be able to facilitate the transboundary coordination of such development efforts; and donors should, as a matter of policy, raise this issue in discussions with the MRC, and in this particular case also with the Vietnamese government – and indeed internally with their regional and bilateral desks.

²¹ Grainne Ryder, Policy Director, Probe International, Energy Probe Research Foundation, Toronto, Canada in “Mekong Update” Volume 8, Number 3, July-September 2005, AMRC, Sydney University

Given the diversity of donor policies and programs, it is significant that in the last DCG meeting 14 donors jointly presented a rather critical statement on the MRC's overall policy direction. Furthermore, their request for an independent organisational review of the MRC Secretariat and the NMCs sent a clear signal of dissatisfaction. Later, in early March 2006, an informal meeting of donors was held in Bangkok, at which they issued another statement reaffirming their joint commitment to a revised Strategic Plan, a revised document for the next phase of the BDP, an independent organisational review of the MRC Secretariat and the NMCs,²² and more direct dialogue with the political echelon of the MRC.

One major difference is between those donors who want to engage in dialogue with the MRC based on "positive", but often vague, UN-style diplomatic language, and other donors who favour a more direct, incisive approach

Joint donor positions do not come easily. There are cultural differences that need to be aligned, and transaction costs are high. One major difference is between those donors who want to engage in dialogue with the MRC based on "positive", but often vague, UN-style diplomatic language, and other donors who favour a more direct, incisive approach. This difference in styles of communication and diplomacy highlights other differences too: some donors want to see concrete results now; others seem prepared to carry on the kind of diplomatic dialogue with the MRC Secretariat that has so far changed nothing. Furthermore, the remarkable divergence in donors' views and policies vis-à-vis the MRC reflects the different degrees of understanding and insight into the MRC's strategic role, as well as the different degrees of experience and interaction with the MRC itself. Some donors are more engaged than others. And donors "look after their own turf" when it comes to the MRC, and they sometimes take pride in defending it.

8.6 The World Bank

World Bank/GEF assistance to the WUP has been of key importance in the MRC's implementation of Article 26 of the 1995 Mekong Agreement. The WUP was funded by the GEF

²² After the 9th March meeting donor coordination on the preparations for the donor sponsored independent review of the MRC Secretariat continued at a very detailed level. While this is no doubt necessary it also once more shows that donor coordination requires commitment, resources and time and is only possible at high transaction costs.

and executed by the World Bank to develop at least six sets of rules for water utilisation. Some of the outcomes have already been agreed by the MRC, including the more controversial procedures for maintaining dry season flows on the mainstream. The negotiations between the four countries have taken place as direct dialogues between relevant government officials in the four countries supported by the MRC Secretariat. The World Bank has not been directly engaged in these negotiations.

Recently, the World Bank has initiated the process of formulating a second phase of the WUP. The possibility of merging a WUP2 with the BDP2 and other core MRC activities has been discussed with the MRC Secretariat and with some donors (Sweden, Denmark, and Australia).

The World Bank has other ambitions in the region too. Its Mekong Water Resources Assistance Strategy (MWRAS) is the latest addition to the increasing amount of externally driven analytical and strategic work aimed at supporting regional or transboundary development in the Mekong Basin. The World Bank's engagement through the MWRAS has been in preparation for more than a year. There is no formally agreed strategy nor any agreement with the MRC or individual member countries. But the MWRAS work goes ahead with the World Bank's approval²³.

The MWRAS strategy suggests possible areas for investment as well as related arrangements for governance. The benefits of the MWRAS are that the Bank's vision for development in the region is based on substantial analysis of the Mekong development context as well as on considerable consultation with government officials in the four riparian countries.²⁴ Consultation with civil society and donors has, however, been limited. Consequently NGOs and some donors have raised concerns that the MWRAS process has not been fully inclusive of all MRC/Mekong

²³ Recently the World Bank has upgraded the MWRAS to a program i.e. the MWRAP.

²⁴ A number of "country strategizing" workshops were held with primarily government officials to brainstorm on development potentials and needs in the LMB. This methodology is often applied by the World Bank in its methodology for identifying new interest and credit portfolio areas. What is different here is that it is a transboundary context. Normally the Bank credit portfolio turf is country specific and supported by national economic and sector analyses.

Although the Bank has repeatedly stated that the MWRAS is a joint initiative with the Asian Development Bank (ADB), the latter keeps a very low profile

stakeholders. Amongst civil society it is perceived that there is a considerable lack of transparency in the MWRAS process. The most problematic part of the MWRAS story is that it is still without MRC and country ownership. It remains a Bank proposition.

Although the Bank has repeatedly stated that the MWRAS is a joint initiative with the Asian Development Bank (ADB), the latter keeps a very low profile. This is perhaps not surprising, as the ADB already has its hands fairly full with its Greater Mekong Sub-region (GMS) engagement.

Like much bilateral donor assistance, the Bank's MWRAS strategy is very much a supply-driven affair. The involvement of Lower Mekong Basin (LMB) countries (government and NGOs) and the MRC has primarily been in response to the ideas and suggestions put forward by the MWRAS team of international experts.

The architects behind the strategy include influential international experts, some of whom have a background in the MDBC and long-standing consultancies with the MRC. This has enabled the MWRAS team to engage in thorough dialogue with the MRC Secretariat and the NMCs.

Like much bilateral donor assistance, the Bank's MWRAS strategy is very much a supply-driven affair

The MWRAS strategy indicates what the Bank has in mind in terms of identifying areas for transboundary investments primarily aimed at hydropower and irrigation development.²⁵

These priority sub-areas include:

- Vietnam, Cambodia and Laos: multi-country investments in the so-called "3S"²⁶ region – Sesan, Srepok and Sekong tributary basins.
- Vietnam: the Mekong-Bassac delta (with the impact on Cambodia, e.g. irrigated agriculture).
- Thailand and Laos: joint development and management of Mekong water resources, in particular its tributaries.

²⁵ It is envisaged that the larger hydropower and irrigation infrastructure investments will be within the framework of a "balanced, water centred program" with also support to sustainable livelihoods, biodiversity and other aspects of rural development. World Bank Discussion Note on the "Future Directions for WRM in the Mekong Basin", November 2005.

²⁶ The "3 S" metaphor was first presented by the "NGO Forum for Cambodia".

To support the World Bank's involvement in these transboundary sub-areas the intention is also to support "soft" development, such as institutional arrangements and capacity development in the form of sub-basin organisations that will facilitate, administer and sustain infrastructure investments. As the investments are transboundary in nature, institutional and governance arrangements have to be different from those with which the Bank is familiar under its national credit portfolio programs. It is for these reasons that the Bank is seeking assistance cooperation with and grant money from other donors. One of the donors that has been approached is AusAID.

The Bank's MWRAS initiative is sympathetic to sustainable development in a number of ways, such as daring to engage in some of the Mekong's "hotspots" like the 3S's. But one may ask *why* the Bank is choosing to engage in such complex and controversial areas considering all the noise and criticism that came out of the Nam Theun 2 project.²⁷ Although Nam Theun 2 is now going ahead after 10 years of planning, in which there were considerable regional and international disagreements over its benefits and impacts, it is difficult to understand how the Bank could use lessons learned from this project without running into trouble. The envisaged mixing of investments and water governance under specially designed sub-basin organisations could lead to problems similar to those that may result from the MRC's intention to house investment facilitation and water governance under the same roof.

The Bank's areas of interest are not so much within the MRC's current sphere of influence and involvement as within a territory that is conceived to be outside the MRC's "jurisdiction", namely the above-mentioned "strategic sub-areas". But at the same time the MWRAS strategy identifies the MRC as an organisation that is supportive of these sub-area developments. Although the Bank expresses interest in providing some sort of capacity-building to the MRC and NMCs, it is implied that the strategic sub-areas would have their own institutional and transboundary governance arrangements. This would involve cooperation frameworks

The Bank's MWRAS initiative is sympathetic to sustainable development in a number of ways, such as daring to engage in some of the Mekong's "hotspots" like the 3S's. But one may ask why the Bank is choosing to engage in such complex and controversial areas considering all the noise and criticism that came out of the Nam Theun 2 project

²⁷ See Attachment 1.

between the countries concerned, such as bilateral arrangements between Vietnam and Cambodia or between Laos and Thailand. It appears that the MRC is not expected to have a water governance role here.

It is unclear what the governance arrangements are for the three development clusters constituting the Bank's investment territories in the region. What seems clear, however, is that the proposed institutional and governance arrangements are mostly bilateral and meant to facilitate the implementation of the envisaged investments presumably based on World Bank credits and/or private investments. The strategy appears to envisage the MRC as having only a relatively small role, certainly not as a transboundary water governance organisation but more as a knowledge provider to help the Bank meet its mandatory requirements for economic, social and environment feasibility and impact studies.

It seems, although this is not quite clear, that the Bank's main interest in the MRC is its capacity to support the investment preparations that the Bank will embark upon in the basin

In crude terms, self-interest would appear to be the Bank's motive for carving out its own investment territory in the Mekong region. Arguably, this is legitimate; we are after all talking about a development bank whose goal is to seek out new areas for investment, even if its mandate is also to take care of economic growth and poverty alleviation. Strictly-speaking there is nothing wrong with this. But the Bank's objectives are different from those of the bilateral donors, who have focused on building core capacity in the MRC so that it can take charge of the river as a professional river basin organisation. It seems, although this is not quite clear, that the Bank's main interest in the MRC is its capacity to support the investment preparations that the Bank will embark upon in the basin. For the bilateral donors, it is the other way around: a stronger and more capable MRC with more ownership and engagement from riparian countries is an objective in itself and a prerequisite for good IWRM and water governance in the basin. Bilateral donors are therefore urging the MRC to become more engaged and to exercise greater influence – in terms of technical, managerial, and water governance matters – over the big infrastructure developments in the basin.

The problem with the Bank's MWRAS strategy is that it could

become too detached from the MRC, if the MRC does not strengthen its governance of water-related investments and developments as well as over the management of existing infrastructure projects on the Mekong tributaries. Increased MRC involvement in these large-scale projects would automatically “take care of” large transboundary investments facilitated and promoted by the Bank in the future.²⁸ So although there is uncertainty about as to what is in the Bank’s MWRAS strategy, particularly its water governance arrangements, there would surely be less cause for concern if the MRC were to evolve into a knowledge institution empowered by the political will of its member countries to support decision-making processes on large and sometimes controversial investments on the Mekong’s tributaries.

Finally, there is a concern that the Mekong basin may become oversaturated with initiatives and that the Bank’s MWRAS strategy may be just one too many. Particularly disconcerting are the additional institutional and governance arrangements proposed under the MWRAS strategy, for these lie outside the existing arrangements (i.e. the MRC).

8.7 The ADB and the GMS

There is no direct collaboration between the GMS and the MRC, but the ADB and the MRC have signed a Memorandum of Understanding. As a development bank, the ADB is not a big donor to the MRC, but it funds the MRC’s Flood Management and Mitigation Programme with grant money (USD 1 million) and, recently, the preparation of the MRC’s new communications strategy. Although the ADB funds individual water projects in the MRC countries, its role in relation to the Mekong region and the MRC is largely defined through the GMS program, as discussed in Chapter 6.

The GMS program has investment portfolios in sectors such as transport infrastructure and telecommunications, and it

²⁸ With the right capacity, the MRC would apply its knowledge and procedures in assessing and screening Bank project proposals on the basis of economic, social and environmental assessment and the use of mathematical models and basin wide scenarios.

The GMS is becoming increasingly Asian and less “ADB-driven”, evident in summits involving prime ministers and in numerous meetings at sector ministerial level

is building expertise in the environment sector and possibly in regional environmental governance through its “Core Environment Programme” and “Biodiversity Conservation Corridors Initiative”.²⁹ It is understood that the possibility of the GMS having a special water program has been discussed, but no decision has been made yet.

The GMS used to be referred to as an ADB-driven program managed by an ADB Secretariat, but this has changed. There is increasing country interest in the GMS, and a stronger sense of ownership over it – including from China, which is reportedly very committed. The GMS is becoming increasingly Asian and less “ADB-driven”, evident in summits involving prime ministers and in numerous meetings at sector ministerial level. Not being based upon a formal agreement, the GMS program has evolved into political, administrative and technical cooperation at many levels. It has succeeded in doing what the MRC has not been able to.³⁰

Given the strong country commitment to the GMS, not least from upstream China, it would seem sensible to add to it a water investment program. This might also better coordinate the large-scale hydropower and irrigation infrastructure investments

Given the strong country commitment to the GMS, not least from upstream China, it would seem sensible to add to it a water investment program. This might also better coordinate the large-scale hydropower and irrigation infrastructure investments. Closer coordination between the GMS and the MRC would be of obvious mutual advantage, particularly if China were to become a member (discussed in Chapter 5). In this scenario, the MRC would be engaged as the knowledge-provider and it would give decision-making support to countries and the GMS/ADB on project investments. Upon the countries and the GMS/ADB would fall the responsibility for managing infrastructure investments. The MRC could also play a monitoring role vis-à-vis large scale controversial projects on major Mekong tributaries, primarily hydropower projects.

A closer working relationship between the MRC and the GMS, based on complementarity and comparative advantages, would bring clarity to their respective roles. The GMS would be

²⁹ The programs are co financed by the ADB’s Poverty Reduction Cooperation Fund, Sweden and the Netherlands.

³⁰ This paradox is dealt with in Chapter 6.

responsible for investments to boost economic development. The MRC would be responsible for knowledge support³¹ and water governance.³²

8.8 Perspectives for future donor-MRC relations

Donors see coordination as something good and appropriate, but they don't do it easily or without high transaction costs. And is the MRC really interested in donor harmonisation? Future scenarios could seek to improve donor harmonisation, at least on the broader aspects of the MRC's future strategic direction. But what would be the implications? Would the World Bank become a regional player, or would it simply suffer institutional overload?

Until the late 1990s the UNDP played the leading role as the external umbrella organisation for donor cooperation with the MRC. But after the UNDP's internal policy shift, its role gradually diminished. Other donors like Sweden and Denmark have maintained long-term commitments to the MRC, but there is no lead donor that speaks on behalf of all donors. Some donors have suggested that the MRC should take the initiative in donor coordination. This has not happened.

It would be practical, and it would reduce transaction costs, if donors selected a lead donor to act as coordinator

It would be practical, and it would reduce transaction costs, if donors selected a lead donor to act as coordinator. It would seem appropriate to have the bilateral donors take on this responsibility. Over time, some bilateral donors have shown considerable engagement and have built up a good knowledge of the MRC and the region. The ADB or the World Bank would be less suitable as lead donor; being development banks they may in future have stakes in major transboundary water infrastructure investments in the basin.

In the wake of the controversy over the MRC's future, it is important that the MRC communicate to donors what it is seeking to accomplish. Its current appetite for an investment facilitation role would, by default, result in its giving priority to investment

³¹ On economic, environmental and social consequences, impacts and possible investment/development alternatives.

³² Country negotiations and decision making.

facilitation, while donors would continue to give priority to the environment. Such a dichotomy is unfortunate, and donors would not be comfortable. It would also be of no help to the MRC with regard to taking on more of a regulatory and governance role.

A common platform could be established, for example, if donors agreed on the outcomes they want from the upcoming organisational review of the MRC Secretariat and the NMCs, as well as the strategy and components they want in the BDP2

For their part, donors are not making it easy for the MRC because they continue to have a fragmented approach to the MRC through the funding of many different projects some of which may not be essential to MRC's "core business" as a transboundary river basin organisation. Donors need to send a more coordinated message based on a deeper understanding of the challenges faced by the MRC if they are to gain its confidence both at the technical level of the Secretariat and at the political-bureaucratic level which includes the NMCs, the Joint Committee and the MRC Council. To do this, donors need to be better informed on Mekong developments and show more commitment in their engagement with the MRC and other regional developments. Donors also need to agree on at least the broad goals for the MRC; and based on their recent steps towards harmonising views on basic MRC policies and strategies, this is possible. A common platform could be established, for example, if donors agreed on the outcomes they want from the upcoming organisational review of the MRC Secretariat and the NMCs, as well as the strategy and components they want in the BDP2 - that now emerges as some of the MRC's "core business".

If better mutual understanding and confidence could be established between donors and the MRC, it would be appropriate also to consider a more flexible funding arrangement according to which the MRC could apply funds to mutually agreed priority areas. Of course there is still some way to go before this could be achieved. If mutual understanding and confidence about the MRC's strategic direction is not forthcoming, donors should consider a short-term exit strategy that would entail terminating funding to the MRC after the current grant commitments.

The growth of mutual understanding and confidence will depend on whether donors and the MRC can reach agreement on several issues: the revised Strategic Plan 2006-10, the next phase of

the Basin Development Plan (BDP2), and the outcomes of the upcoming independent organisational review of the MRC Secretariat and the NMCs. As we have argued, if the MRC decides on a strategy that is incompatible with donor assistance policies, it would be inappropriate for it to carry on with a frustrating arrangement that is built upon fundamental disagreements and that suffers from endless pressures from the donors themselves. Developments in donor-MRC relations in the remainder of 2006 may therefore prove critical for the MRC.

Imagining that mutually satisfactory donor-MRC cooperation can be established by the end of 2006, donors still need to consider a long-term exit strategy, say over a 10-year period, in order to encourage riparian countries to develop a greater sense of responsibility for and ownership of the MRC and its political, financial and technical growth.

As to the World Bank's role vis-à-vis the Mekong and the MRC, more clarity will be welcomed. The MWRAS strategy could be constructively replaced if the Bank were to dovetail a possible GMS water investment program. It would seem reasonable for the two development banks to join forces under an established investment framework like the GMS, rather than for the World Bank to set up yet another investment and governance arrangement in the Mekong. Such a joining of forces would of course, as we elaborated earlier, be subject to the MRC being given an appropriate role to play.³³

Imagining that mutually-satisfactory donor-MRC cooperation can be established by the end of 2006, donors still need to consider a long term exit strategy

³³ See also Chapter 9 and Chapter 10.

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Chapter 9

MRC Governance – Roles and Potentials

In Chapter 3, we drew attention to the weak legal basis for governing the Mekong Basin between riparian member states and within each state, given the very soft law underpinning the MRC and the uneven application of law within member countries. In Chapter 4, we showed that national interests and sovereignty concerns continue to dominate MRC governance, that national interest is conceived in quite a narrow way, and that the interests of riparian states are represented in a similarly narrow way in existing MRC governance structures. We suggested in Chapter 5 that the partial governance of the Basin due to China's absence is increasingly dated, that we may be on the cusp of a more central engagement by the upstream riparian, and that this would have significant governance implications for the MRC. We showed in Chapter 6 that the MRC is situated within an increasingly crowded, robust but still somewhat confusing regional governance landscape, and in Chapter 7 that there are issues of political culture that the MRC needs to deal with head-on. In Chapter 8, we also brought to light dilemmas associated with the MRC's continued dependence on donors.

Our primary concern is the MRC's existing and potential governance role; that is, the means by which it can mediate transboundary, national and civil society interests

In this chapter, we look forward and consider what roles the MRC can and should play to best serve the interests of the river basin and the people who depend on the river and its resources. Our primary concern is the MRC's existing and potential governance role; that is, the means by which it can mediate transboundary, national and civil society interests.

Our analysis is based on three fundamental points in which, with the foregoing critique in mind, we believe the MRC has the potential to get back on track as a world-class transboundary river management agency. First, the MRC should be firmly

focused on achieving a *triple bottom line* for the Basin.¹ Second, the MRC should complement, and not try to compete with, regional agencies or private interests whose key role is to promote investment. Third, the MRC should achieve a much higher degree of regional ownership and “embedded-ness” within the political and institutional cultures of its member states.

There is one key direction in which the agency can and must move – and move quickly - this is professionalisation

While there are no “magic bullets” with which to achieve this potential, there is one key direction in which the agency can and must move – and move quickly. This is *professionalisation*. The appointment of riparian staff must be based on professional qualifications and ability rather than national and/or line agency allegiance, and the staffing policy must provide career advancement in an agency whose clear mandate is to work for the river and those who depend most closely on it.

9.1 The MRC: whose authority, to what end, and for whom?

We begin by reviewing the nature of the MRC in terms of its authority, its role and purpose, and its ownership. In discussing these issues, we also suggest ways through the real dilemmas they raise.

Whose authority?

Clearly the MRC is not a level of government. It has no statutory supra-national authority beyond what riparian members sign up to. This raises the question of what governance role such an agency has or should have. Does or should it have the “teeth” to preserve the territorial integrity of each member state, or is it entirely

¹ By “triple bottom line”, we refer to the need to evaluate the balance sheet of any development in terms of its contribution to social, economic and environmental well-being. This is different from a “safeguards” approach, in which narrow economic profitability is the key accounting criterion subject to regulatory provisions to ensure that social and environmental impacts are mitigated. It implies that economic, social and environmental outcomes are all seen as part of the developmental benefit/dis-benefit of a project, not that there is a simple trade-off between economic benefit, on the one side, and socio-environmental costs on the other.

bound by the territorial sovereignty of its riparian members?²

A starting point for this study was to consider the extent to which the MRC is a *governing* or a *governed* organisation. In a strictly legal and formal political sense, it is clearly the latter. That the MRC is governed does not matter to those who see the organisation as a means to build on a “Mekong Spirit” of goodwill in which each country cooperates with the others for better Basin outcomes. However, such a simple conclusion raises its own problems.

First, the MRC’s lack of regulatory authority is still poorly understood by the public and by civil society organisations, particularly in instances of actual conflict and tension.³ With its international funding and supra-national position, the MRC is perceived by NGOs and others to be a powerful agency with responsibilities to intervene – in its own right – in transboundary issues.

Second, this lack of authority has perhaps also been misunderstood by some donors, who expect the MRC to be able to act for the Basin beyond riparian country interests. These donors have poured large amounts of money into knowledge production, on the assumption that the MRC itself can somehow act on that knowledge – or that it has sufficient influence over and acceptance by riparian line agencies with the result that they will act on knowledge produced by the MRC with the interests of the river basin at heart. Ceaseless production of knowledge makes most sense if there is a governance link between data generation and better decisions for the Basin as a whole. In an agency unable to act on that knowledge or unable to influence others to do so, it makes less sense.

Third, governance of the MRC as currently structured through NMCs and the JC is narrow, often arbitrary, and uncommitted at senior political levels. While each riparian state has its own means

The MRC’s lack of regulatory authority is still poorly understood by the public and by civil society organisations

Production of knowledge makes most sense if there is a governance link between data generation and better decisions for the Basin as a whole

² Territorial integrity in an international river basin refers to the right of each riparian state not to have its access to resources or environmental quality diminished by the actions of other riparian states. Territorial sovereignty refers to the right of riparian states to do what they like within their own parts of a river basin.

³ See Attachment 1 Case Studies.

of dealing with diverse interests, this diversity gets lost at the level of MRC governance. Furthermore, there is an inherent bias toward infrastructure-oriented approaches to Basin development and management if priorities are determined by the ability to achieve consensus within this narrow representative structure. This bias goes against principles of stakeholder-oriented IWRM.

By second-guessing the developmental priorities of interests represented on the Council and JC, the Secretariat's governance role as objective knowledge agency is compromised

Fourth, with ambiguous leadership – the CEO of the MRC Secretariat presents himself as, and is often perceived by others to be, the CEO of the MRC itself – it is difficult for the Secretariat to provide independent advice based on river basin science. Authority rests with the Council and JC and is inevitably based on national representations. By second-guessing the developmental priorities of interests represented on the Council and JC, the Secretariat's governance role as objective knowledge agency is compromised. It has strayed from its main role, which is to provide the MRC governance authority, line agencies and the basin community with informed, impartial and bold support for making decisions.

Fifth, without a governance (as distinct from government) role that acknowledges sovereignty but also goes beyond riparian states' separate agendas, there is little logic – according to IWRM principles – in having a transboundary agency. To date, there has been woolly thinking (at best) about what such governance actually means if it is to go beyond national interest – especially in the narrow sense in which “national interest” is constructed and represented at present.

So, what is the way forward for the MRC's legitimate governance role? A more explicit public discussion of this key issue – which might engender common understanding among stakeholders at different levels – will clarify what the MRC can and should achieve, and what it can be held accountable for by riparian governments, civil society and donors alike. With better representation of diverse national interests by NMCs, and high-level political commitment at Council and Joint Committee levels, authority would increase with legitimacy.

To what end?

In the course of discussions during this study about the MRC's current and future role, two terms have proven particularly controversial: regulation and investment facilitation. At one level, the controversy boils down to semantics. At a more substantive level, it reveals fundamentally divergent views about the MRC's past and present roles and where it is heading.

Two terms have proven particularly controversial: regulation, and investment facilitation

The regulatory role of the MRC is debatable. Members of the NMCs, JC and MRC executive are quite adamant that the Agreement is *not* a regulatory instrument and that the MRC is *not* a regulatory authority. On the other hand, the MRC's core programs are intended to build a knowledge base that will support rules governing water sharing, transboundary impact assessment and the prioritising of development plans. Even the loose 1995 Agreement has rules about notification, consultation and agreement for different kinds of water resource development projects. And even the MRC executive has argued that the outcome of the agreement on the WUP based rules and procedures "will amount to some form of regulation once implemented".⁴ These considerations notwithstanding, the MRC should be less concerned about the semantics of what constitutes regulation and more proactive in ensuring that rules work for the common good. This requires that the MRC consider the following questions:

- With whose input are rules about water sharing and transboundary impact assessment to be made in order to ensure that a wide range of stakeholders becomes involved in, understands and has ownership of the rules?
- To what extent do compliance and enforcement mechanisms exist for the purpose of applying operational rules that have been agreed to?
- To what extent is the MRC's rule-based regime compatible with the domestic legislation of each riparian member state?
- To what extent does civil society have access to the rule-based regime directly or through the NMC governance

⁴ Dr Olivier Cogels, CEO of the MRC, at project workshop, MRC Secretariat, Vientiane, 13 December 2005.

framework? In other words, are the rules transparent and available to all stakeholders in the Basin's resources to apply them, or are they available only to governments?

To date, in applying river basin knowledge to rule-making, the MRC has sought very little involvement from wider stakeholders in riparian countries beyond the NMC and JC level. As a result, rules are at best seen as technical procedures for technocratic application rather than as governance mechanisms with relevance to different basin stakeholders.

Recent moves towards making investment facilitation a "core business" of the MRC run a serious risk of destroying trust and confidence

Recent moves towards making investment facilitation a "core business" of the MRC run a serious risk of destroying trust and confidence in itself as an agency that is supposed to be an advocate for sustainable development and that has the interests of the river and those who depend on its resources at heart. While it is not clear what kinds of project investments the MRC would facilitate under the new vision, such core business might divert it from its proper function in two serious ways. First, a role as project champion would divert the MRC from its primary governance function as an agency acting in the interests of the river and its basin by providing objective knowledge, stakeholder facilitation and the bigger picture of how individual projects incrementally impact on the basin's transboundary resources. Second, it would further divert the MRC from controversial, and potentially damaging, transboundary projects (which already have their own forceful advocates), where the MRC's real value lies in providing the science, rule-based regime and perspective necessary to achieve a true triple bottom line. Such investment already has many advocates and facilitators: the GMS (and by implication ADB), the private sector, and riparian governments and utilities. It hardly needs another champion. At the same time, there is no reason why the MRC should be expected to oppose such infrastructure developments. Rather, the key issue ought to be how sustainable development of the Basin (the primary objective of the MRC, according to its charter) can best be facilitated:

- What niche should the MRC occupy to ensure that an understanding of how the basin "works" as an integrated socio-ecological system is put to use to make wise

- investment decisions for sustainable development?
- How can multiple stakeholders be made to feel confident that the MRC's position and advice on water resource investments is based on "public good" considerations rather than narrow infrastructure development interests?
 - To what extent can the MRC confidently and transparently distinguish *its* governance role from that of other regional players rather than trying to duplicate or compete against theirs?
 - To what extent can an understanding of the need for such a clear-cut role be established and supported both at senior political levels and more widely amongst the Mekong public and civil society?

There are many other issues about the sort of governance role the MRC needs to take, and these are canvassed in the rest of this chapter.

Of, by and for whom?

Whose agency is the MRC? To date, this question has largely been raised in the context of donor influence versus riparian ownership. There are real questions here, but they are old questions and only partial questions. They are real both in terms of the influence donors have, through the MRC's continuing financial dependence on them, and in terms of the dominance non-riparian staff have over the Secretariat's leadership. They are partial because, at a more fundamental level, ownership of the MRC "by riparians" means little in itself unless the composition of riparian interests is considered along the lines discussed in Chapter 4. If the MRC is truly to become an IWRM agency, the sense and rights of ownership must be broadened within riparian states, and "riparianisation" of the organisation needs attention from senior political levels to grassroots and civil society levels. A further issue of ownership has to do with whether China joins.

***Ownership of the MRC
"by riparians" means
little in itself unless the
composition of riparian
interests is considered***

But ownership is only part of the story. The issue of who *runs* the MRC is also significant: the identity and image of the MRC as an organisation run by and for Mekong citizens is integral

to its wider acceptance as an embedded governance agency. Currently the Secretariat is staffed by a combination of expatriate appointees – with quite mixed degrees of expertise and cultural, political, linguistic and socio-ecological knowledge of the region in which they are working – and riparian staff seconded from line agencies. Neither of these groups has the confidence or job security to provide independent professional advice – through the CEO’s office or otherwise – particularly in the case of larger and hence more controversial projects that will have most impact on the sustainable development of the river and its tributaries. The Secretariat’s staff also includes riparian professionals, but their career development and commitment to the MRC is constrained by a staffing policy that limits appointments to six years.

In recent years, it is clear that the current expatriate leadership has alienated some of its professionally appointed riparian staff – exactly the people who bring a combination of skills and a sense of regional ownership to the MRC. Consequently staff turnover has been consistently high.⁵ To put it bluntly, there has been a “brain drain”. This alienation has extended to some of the most dedicated expatriate specialists. Combined with the MRC’s heavy reliance on consultants, this means that the knowledge produced at an institutional level is not necessarily internalised by individual staff. Further, the very detailed work carried out within MRC programs is only partly understood by those who govern the MRC at a formal bureaucratic level (the Joint Committee) and at a political level (the Ministerial Council), and as a result there have been moves to diminish – or “dumb down” – some of the MRC’s more sophisticated work. For example, there has been a retrograde move to substitute environmental flows principles with minimum flow criteria. So, the question of who runs the MRC needs close attention: *internal* governance is inseparable from the agency’s wider governance role.

The question of who runs the MRC needs close attention: internal governance is inseparable from the agency’s wider governance role

For whom does the MRC exist? Given the agency’s commitment

⁵ In terms of numbers, staff turnover has not accelerated. In fact, with the peak of staff loss in the Secretariat’s move from Phnom Penh to Vientiane in 2002, there has been a relative stabilization. However, the individuals who have left due to differences with the current leadership have been important in key areas such as outreach in basin planning. See Appendix 4 for staffing figures.

to sustainable development, the straightforward answer is, “the people of the Basin”. In reality the answer is not so simple. Two of the four riparian members – Thailand and Vietnam – exploit the Basin’s resources for places and people outside its boundaries. Large-scale resource mobilisation may or may not trickle down through “poverty alleviation” measures. The kind of development promoted and regulated by the MRC has different implications for different social groups in different places. Past experience with dams, irrigation, flood management, and the development and management of other water resources tells us that special attention is required to ensure that the results of these initiatives are equitable.⁶ A number of programs at the MRC, for example within the Fisheries Programme and the Environment Programme, have taken this on board, and serious attempts are being made to model and anticipate the implications of various development scenarios for the poor and others living along the river. How such knowledge is used and managed is a key governance issue that will influence the actual and potential constituency of the MRC. Paying too narrow attention to investment promotion can easily divert such considerations, even to the point of censorship when difficult choices emerge from the knowledge base. It is fair to say that the MRC can only become an IWRM institution if it acts in the interests of stakeholders. This is particularly challenging in a political landscape where governance is highly unequal, non-transparent and only partially participatory.

The MRC can only become an IWRM institution if it acts in the interests of stakeholders. This is particularly challenging in a political landscape where governance is highly unequal, non-transparent and only partially participatory

So, what measures are needed to make the MRC an agency that is owned, run by and benefits the principal stakeholders? Most fundamental here is that the agency should respond to a perceived need, and occupy an important and recognised governance niche. It cannot do so without a concomitant riparian-based professionalisation of the Secretariat.

9.2 Governance directions for the MRC

Two key areas at the heart of Mekong river basin governance are the equitable management of conflict and the engagement of the riparian public.

⁶ World Commission on Dams, *Dams and Development* (London, Earthscan, 2000)

The MRC's role in conflict management

A river basin organisation has two main roles in conflict management. The first is *direct intervention* – to apply rules, adjudicate, and carry out assessments and other actions with regard to a dispute. The second is *knowledge production* – to have the intellectual resources to serve as an objective point of reference for others to draw on in order to negotiate, resolve or manage conflict in equitable and sustainable ways.

The MRC's direct intervention role in conflict management remains unclear. What is clear is that aggrieved parties sometimes expect the MRC, being a transboundary river management agency, to step in when water-related transboundary conflicts occur. In many cases, these expectations may exceed what the MRC sees as its role. Sesan is a case in point. Here, civil society groups assisted indigenous minority communities in Cambodia who were affected by upstream hydropower development in Vietnam, to request direct intervention from the MRC. The MRC's response was that it could not act directly on a non-governmental request. It did, however, help set up an only marginally-effective intergovernmental committee, but that was the extent of its "intervention". Rather more effective was the case where the MRC commissioned an expert review of the EIA for the proposed Upper Mekong navigation channel. The fact that this review was critical of the project enabled a more informed and open debate to take place. In other cases – for example the Nam Theun 2 Dam, one of the highest profile and most controversial projects in the Lower Mekong Basin – the MRC has steered clear of any active involvement.

The extent to which knowledge production is or can be accessed to help manage conflict in more peaceful, equitable and sustainable ways has yet to be tested

The use of knowledge to make better decisions is at the heart of the MRC's governance role. The extent to which knowledge production is or can be accessed to help manage conflict in more peaceful, equitable and sustainable ways has yet to be tested; nonetheless we can identify three main issues that will need to be addressed if the MRC is to play a greater role in this capacity. First is credibility: MRC data about fisheries, hydrology, environmental flows and other subjects must be trustworthy so that all parties to a conflict will draw upon it. Related to this is the need for a sense

of ownership of the knowledge and clear understandings of how it is derived or generated. Second is a commitment to making its knowledge public, no matter how controversial or problematic for sectional interests the implications of some findings may be. Restricting the dissemination of scenario modelling, for example, has no place in a professional river basin organisation. Where findings do have controversial implications, these should be dealt with at the political level; the MRC itself must not develop a culture of self-censorship. Third is the issue of access, which involves: public awareness of what information is available and how to obtain it, the cost of obtaining information, and assistance in interpreting information. It is notable that to date, few NGOs, universities or even impact assessment professionals have drawn much on MRC science. A crucial challenge for the MRC, therefore, is to become more service-oriented and demand-driven in its work, rather than project-oriented and supply-driven. The professionalisation of the MRC through riparian country staff should include outreach and active engagement with the basin community in its widest sense.

In practice, none of the NMCs has achieved a significant degree of public engagement

The MRC's engagement with the public

The MRC has a public participation strategy that subscribes to principles of public involvement, consultation with stakeholders, and other commonly accepted ways of engaging the public. In practice, however, the MRC remains distant from the Basin public. Why is this so, and what is the MRC's role in and potential for engaging a wider public?

The size of the Basin and the location of the MRC headquarters immediately put distance between the MRC and the bulk of the riparian population. In principle, the National Mekong Committees are the points of contact at country level. In practice, none of the NMCs has achieved a significant degree of public engagement.

The most direct "portal" for the wider public is a vastly improved website, which for those conversant in English and with access to IT resources provides quite a user-friendly interface. The website

does have some riparian language sections, but these provide only quite basic and static information on the MRC's structure and functions.

Other excellent electronic material produced by the MRC includes the River Awareness Kit, a marvellous resource for teaching about the interconnected system that is the Mekong Basin. Yet this resource also epitomises one of the MRC's failures: because the kit is a project-based output, it seems mainly to sit on shelves and be little used by managers, universities or schools in the region – currently it is used in two university-based freshwater ecology courses. In part this is because it is available only in English, but in part it reflects the MRC's extremely limited engagement with other knowledge production and dissemination centres such as educational and research institutions within the region. Furthermore, much of the knowledge production is carried out by consultants; yet for the MRC to be more publicly engaged, more of this work must be embedded within, and understood by, local and national schools, universities, relevant government departments, non-governmental organisations and so on. There is scope to create a professional unit within the MRC that takes on this role.

The MRC needs to be far more pro-active in engaging the Basin public, and it needs to do this as “core business” rather than as a consultancy project carried out by fly-in public participation experts. To engage NGOs, universities, riparian line agencies (beyond the few that are central to NMC activity) and others requires an outreach culture that has been lacking in most programs. A notable (albeit expensive) exception has been the Fisheries Programme, and perhaps this can serve as a model.

The MRC needs to be far more pro-active in engaging the Basin public, and it needs to do this as “core business” rather than as a consultancy project carried out by fly-in public participation experts

Strategies also need to be developed so that the NMCs can engage with civil society and the Basin public within each country. A good example is in the area of notification. To date, when there has been notification under Article 5 of the Mekong Agreement, it tends to go no further than the notified NMC. There is no process for or practice of informing, consulting, or seeking feedback from affected parties in a wider sense. Another issue

raised by civil society groups on several occasions is the practice of charging for data. For many NGOs, the cost is prohibitive. It also creates a sense that the MRC is reluctant to share information. This needs to be understood in the context of a culture in which governments typically guard knowledge jealously; such a practice therefore reinforces the perception that the MRC is an inaccessible bureaucracy.

There is another level of public engagement that is crucial. Based on the vast resources that have been poured into its knowledge production programs, the MRC should now have a world-class repository of data, river-specific science, and modelling capacity. Yet to date, the organisation has been reticent at best in using that science to advocate for the river. A telling example came up during interviews for this study: at a meeting on an ADB proposal to commercialise and industrialise fisheries-processing around Tonle Sap, an NGO participant raised the question of what this would mean for the sustainability of artisanal fisheries. The participant from the MRC Fisheries Programme kept quiet. It was only when the other challenged him directly that he acknowledged the implications for the fisheries were serious. This reluctance to use knowledge to advocate fairly and impartially for the river and those who depend on it, is at the heart of MRC governance shortcomings. To improve the situation would require, again, an institutional culture based around committed, professional riparian staff charged with a clear mandate to promote the “triple bottom line” well-being of the river basin and its community.

Reluctance to use knowledge to advocate fairly and impartially for the river and those who depend on it is at the heart of MRC governance shortcomings

9.3 The MRC’s development: opportunities and obstacles

The MRC, in its development as a river basin organisation that has governance responsibilities and pursues the path of sustainable development, is at a critical juncture: there are opportunities to be seized and hard choices to be made. The direction the organisation chooses to take will affect the extent and type of donor support it receives, so it is vital that this direction is understood clearly, not just by the MRC executive and donors (who may agree or disagree) but also by the MRC’s riparian

owners and “constituency”.

There are several roles the MRC can take on. These roles are still poorly thought out by donors, the Secretariat, the Joint Committee and the Council; and the emphasis appears to shift according to the preferences of the incumbent CEO. Broadly, the roles are:

- a *regulatory body* – with clear “governing” functions as defined under the Mekong Agreement (see Chapter 3) and through operational procedures and rules that are developed over time
- an *investment facilitator* – whose primary role is to mobilise financial resources for the development of water and other Basin resources
- a *planning agency* – whose role is to prioritise projects in an integrated manner so that national plans for separate riparian countries’ sections of the Basin can be coordinated rationally and with regard to transboundary impacts
- a *scientific organisation and repository of knowledge* – well respected, staffed by professionals with career paths in the agency, trusted and able to support better decisions in pursuit of the public good and environmental well-being
- a *multi-stakeholder platform* – an arena in which the Basin’s diverse stakeholders are able to come together and negotiate equitable and sustainable outcomes around projects that have trade-offs between different interest groups, between economic growth and the ecological integrity of the Basin, and so on. Associated with this might be a *mediation* role, built upon a trusted and accessible knowledge base over which diverse riparian stakeholders have a sense of ownership.

Such primary roles are not intended to be mutually exclusive. Rather, in the synergies and tensions between them, it is possible to perceive opportunities for and obstacles to any future role the MRC may have.

One of the dilemmas for choosing a role or combination of roles is that the 1995 Agreement is so loose that it could be

interpreted to encompass every possibility. The challenge for the MRC is therefore not only to choose a role(s) to match the Agreement, but to match a role(s) to the current and future needs and challenges of the Basin. These needs and challenges have of course changed since the Agreement was made.

9.5 Alternative or supplementary governance

If donors wish to support better governance of the Mekong River Basin, to what extent should they “put all their eggs in the MRC basket”? What alternative or supplementary forms of governance need support, and how should these link to the MRC?

An argument made early in this report was that for transboundary basin governance to work well, the legal and other underpinnings of good water governance must have a robust presence at a national level. Yet governance within riparian states at sub-basin level leaves a lot to be desired and needs assistance from bilateral programs. Support for Mekong water governance thus requires attention at national and sub-national levels. While donors do support various programs of this kind, they are not well integrated into basin-wide governance even when the same donor is involved. A prime example is Danida’s support for the development of a river basin organisation in the Srepok Basin in Vietnam: to date this initiative has not achieved a transboundary role or perspective, nor has it been linked to Danida’s MRC programs. It is not necessary of course for all sub-basin initiatives to go through the MRC; however, there is a lot of scope for the MRC to coordinate with and draw on this finer grained work at national level, and for sub-basin initiatives – such as Thailand’s and Vietnam’s RBO developments – to access the MRC’s resources to a much greater extent.

There are now multiple regional Mekong initiatives among universities, NGOs, international organisations, publishing and media organisations and so on – regionalism has grown organically, which in many ways is a good thing – but these initiatives are poorly linked with each other and with the MRC. There is consequently a tendency to “reinvent the wheel” by

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creating new knowledge-producing and governance institutions, or by pouring resources into institutions that are poorly linked in with others. However, there are multiple synergies to be exploited by building on, and simultaneously strengthening, existing knowledge-producing and governance institutions.

Organisations whose Mekong-wide initiatives have been poorly linked with the MRC to date include the following:

- Regional NGOs such as Focus on the Global South, TERRA, SEARIN, and Oxfam Mekong Initiative (now a looser collaboration between the Oxfams working in the Mekong Region). In part this is due to the sometimes adversarial relationship between these NGOs and mainstream intergovernmental agencies such as the MRC, but this is not always necessary - there are also points of common interest that could be nurtured if the MRC is to be truly inclusive. International environmental organisations such as IUCN and WWF are somewhat more involved with the MRC's work, but there is scope here too for better support, outreach and coordination.
- Universities, many of which have established Mekong centres. Yunnan, Can Tho, Khon Kaen, Ubonratchathani, Chulalongkorn, Mae Fah Luang and Chiangmai Universities each have one or more centres related to Mekong development, natural resource management and the environment, but these are very poorly linked with the MRC. **The MRC could play a greater support role in knowledge production within established research and teaching institutions.**
- Networks, such as the Mekong Programme on Water, Environment and Resilience (M-POWER), the now defunct Regional Policy Support Initiative (REPSI), and the Mekong Learning Initiative. Others include SEI's Sumernet, Global Water Partnership's GWPSEA, and a UNDP-sponsored Mekong community network.
- The idea of a Mekong People's Forum was floated at the November 2004 meeting at the UN offices in Bangkok. While this idea remains vague, there is a clear sense that the official channels for cooperation are elite-based,

inaccessible, and too closely linked to the promotion of infrastructure development as the main priority. There are also few channels through which the voices of civil society can be heard.

It is incumbent on both MRC and other groups with Mekong water governance interests and roles to establish better linkages, coordination and integration. There is also room for diversity and differences of roles, which donors can support through different organisations at country and basin wide levels. The following chapter offers specific recommendations: for the MRC itself, for riparian governments, for donors, and for civil society organisations.

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Chapter 10

Recommendations

A retrospective of 10 years of recommendations about what the Mekong River Commission should be or do presents a very crowded landscape. We are conscious of this and of the risks we run in adding to it. But we have striven for weight of ideas over volume of advice, and we believe that on a number of major issues and points of contention, the report will serve constructively to open up genuinely new and realistically achievable pathways for the MRC.

We began with a sense that in recent years many of the policy ideas and intentions expressed on behalf of the MRC under the banner of sustainable development have been very general. We have learned from this study, and from working with the MRC and the region over many years, that although high-level conceptual strategic directions are imperative both for the MRC and for Mekong governance, the important prescriptions for change lie in the details. So, while some of our recommendations are, inevitably, conceptual or generic, we have endeavoured to underpin these with others that are detailed and specific.

10.1 How can the MRC's role be enhanced?

The MRC's primary role should be to ensure a "triple bottom line" for the Basin.¹

1. As a river basin manager, the MRC should focus its activities on the central task of achieving "triple bottom line" results for the well-being of the river and its ecosystem, the communities whose livelihoods depend most immediately on it, and the public good.
2. The MRC must apply its knowledge to and be involved in decision-making on every significant infrastructure and development project, to ensure a "triple bottom line" audit with

¹ See Chapter 9.

a Basin-wide scale of reference – in other words, MRC should signal and present objectively the social, environmental and economic implications of projects for the river basin, within and across country borders. Where necessary, it must also advise on alternative sustainable development solutions. In so doing, the MRC should pay particular attention to ensuring that economically driven investments are compatible with the environmental and social well-being of the Basin. This means achieving development outcomes that are livelihood-oriented, sustainable, and focused not solely on the narrow criteria of project viability and economic growth.

3. To be effective in this task, the MRC must concentrate its energies on producing scientific knowledge. This is both its unique strength and an essential foundation for providing disinterested scientific advice to governments, international institutions, project developers and development interests and other river basin stakeholders to assist them in “triple bottom line” decision-making.

4. The MRC must also focus and expand its knowledge base in order to support more robust regulation of the river based on agreed rules and procedures (see below on how the MRC should move from “softer” to “harder” law).

5. The MRC’s development planning function should be to engage proactively in Basin-wide developments throughout the next phase of the Basin Development Plan. If it applies its scientific planning methodologies, the MRC will have a comparative advantage and a development role in ongoing and future large-scale developments on the river, including controversial “mega projects” on its tributaries.

The MRC should move from “softer” to “harder” law to support better water governance in the Basin.

This would require amendments to the 1995 Agreement, or the enactment of a Protocol to the Agreement, as outlined in the recommendations below. But first, here are some important

preconditions upon which our recommendations depend:

- countries must be willing to accept limitations on their national sovereignty to ensure that the river is managed as a common good, so that the resource is protected as well as developed sustainably.
- the MRC must take the initiative in fulfilling its mandate for transboundary water governance and in defining its organisational role in the region.
- the MRC must work towards political and legal change in a manner attuned to and consistent with the ASEAN political culture.

The recommendations are as follows:

6. To set out more clearly the extent of the political and geographical authority of the MRC and its various components, in terms of its external dealings with member countries, other Basin countries (China and Burma), and the donor community.

7. To legally require transboundary environmental impact assessments to be carried out on any proposed inter-basin and intra-basin diversions.

8. To make it mandatory to provide opportunities for input from interested communities, groups and individuals through a program of public participation in all levels of decision-making, including environmental impact assessment, in order to promote the inclusion of the views of all current and potential stakeholders. This public participation process could be extended if member governments were to make the relevant courts at the national level accessible to all stakeholders, so that they could litigate on matters of environmental protection and natural resource exploitation.

9. To incorporate legally enforceable *Rules for Water Utilization and Inter-Basin Diversions*, as envisaged in Article 26 of the 1995 Mekong Agreement, so that “equitable and reasonable utilization” is secured; and to incorporate provisions to protect the riverine and associated terrestrial environments.

10. To include specific obligations to enact national water resources management legislation to implement the Agreement's provisions, including planning, environmental impact assessment, and public participation.

National governments should move from “softer” to “harder” law to support domestic and transboundary water governance.

This would require the following procedures to be implemented, the outcome of which has precedence in other transboundary river basins.² Our recommendations rely on two important preconditions:

- there must be a much stronger national political commitment to the MRC as an independent water governance authority than is currently the case
- countries must be willing to accept some limitations to their national sovereignty.

11. The role and mandate of the National Mekong Committees should be reviewed by the MRC to ascertain more precisely what functions these committees are performing and to clarify their role in linking national and transboundary water governance.

12. The National Mekong Committees should develop policies to align *national* legislation and policies on water and environment with the Mekong Agreement and its related policies, rules and procedures. As a next step, the government ministries responsible for the National Mekong Committees should produce draft legislation for public consultation. This legislation should then be introduced into the national legislatures, and in the “objects” clause it should refer to the need to implement the policies developed by the MRC.

13. All agencies that manage water in the participating jurisdictions should have a dedicated capacity-building program which (a) informs them of their statutory responsibilities to legislate, and (b) gives them the skills actually to implement the legislation. This program could be developed by the donor

² Such as the Murray-Darling River Basin

community.

14. Ideally, government agencies in each country should be coordinated under an “apex” body responsible for management and decision-making matters concerning transboundary water issues and developments including environmental and social concerns.

15. Prosecutors and judicial officers in the participating jurisdictions should participate in capacity-building programs to enable them to implement and enforce water resources management legislation. This will assist in civil and criminal compliance and enforcement processes where water legislation has been breached. Again, we recommend that such a program could be developed by the donor community.

The MRC should use its knowledge to be an advocate for the river and those who depend on it. Better pathways should be developed to translate the MRC’s programs and other knowledge production processes into water governance of the Basin³

16. Each MRC program should have a clear communications strategy for conveying its modelling, planning and river science outputs to bureaucratic and political decision-makers at governmental levels and to other stakeholders and civil society in the Basin. This strategy should have a public information (“push”) dimension that engages far more proactively with relevant stakeholders and decision makers, and a (“pull”) dimension that encourages accessibility and ease of use on a “demand” basis. The strategy should be geared toward “hotspot” areas where interest in these outputs is greatest.

17. The MRC should build up a professional riparian staff base whose primary role is to develop and supply *independent* and *objective* knowledge and advice about the river, its users, the environment, and sustainable development.

18. MRC staff with specialist knowledge in their program areas should participate in decision-making on key development

projects, their principal responsibility being to advocate for the river and those who depend on it.

19. To achieve a greater constituency and governmental and civil society commitment to the MRC within each riparian country, governments, donors and the MRC Secretariat should promote a broader and deeper level of engagement in transboundary natural resource management through national resource management agencies. This would require capacity building of NMCs to work with a broad range of national stakeholders and through the NMCs. A separate strategy should be formulated for each riparian country, based on an analysis of the potential for broadening NMC engagement within the respective governmental systems with governmental natural resource management agencies and relevant civil society groups.

MRC should not avoid making decisions about mega projects and Basin “hot spots” with high potential for conflict.

20. In applying its knowledge and delivering strategic advice, the MRC should become directly involved in making decisions about “mega projects” on the Mekong tributaries, primarily hydropower and irrigation projects such as Nam Theun 2 and 3, the proposed Thai Water Grid project, and the 3S projects in Vietnam which affect downstream Cambodia (and to some extent Laos). These and similar future projects on larger tributaries are “hotspots” with considerable potential for conflict. The MRC’s engagement should be comprehensive. For existing projects, it should consider including more appropriate mitigation strategies for improving livelihoods, as well as environmental conservation strategies and schemes – which take into account the various environmental, socio-cultural and economic viewpoints – to optimise the management of existing dams. In the case of new projects, the MRC should ensure that the triple bottom line is retained as a basic criteria for designing and recommending a project. If the “triple bottom line” cannot be guaranteed, the MRC’s role should be to suggest alternatives.

In order to become more service-oriented and demand-driven, the MRC should develop and implement a public engagement strategy that follows basic IWRM

principles of stakeholder (government and nongovernmental) and community involvement in water resources management.

21. To realise a more responsive and informed MRC, the MRC's Secretariat should place greater emphasis on stakeholder and community issues in its knowledge production activities. It should transfer knowledge to and develop capacity in the NMCs so that they can engage more proactively with the public - with Basin stakeholders, local community groups, civil society and NGOs. Such a strategy of engagement must be diverse and flexible, since "one size does *not* fit all". With more appropriate knowledge and greater capacity, the NMC's would be in a better position to understand and engage with their society context and to respond to the particular stage of development and the problems in their respective countries. At the same time, the Secretariat should be a more effective, independent knowledge centre (in a region where information technology is still unevenly distributed) and a reference point and resource for the NMCs in the provision of knowledge, training and capacity-building.

22. One essential element of efforts by the MRC Secretariat to build capacity in the NMCs should be a collaborative initiative to broaden the constituencies of NMCs in government line agencies and to actively include civil society.

23. A closer engagement with the public by the Secretariat and the NMCs would result in a much stronger knowledge base that supported the MRC's "triple bottom line" approach (as argued in our first recommendation), and enable the MRC to provide an enhanced knowledge service to the public.

The MRC should proactively position itself within existing water development and governance arrangements in the Basin e.g. ASEAN, GMS, GWP and engage with civil society and universities/research centres in the region.

24. To proactively position itself within existing water development and governance arrangements, the MRC should do the following:

- Foster an active partnership with GWP Southeast Asia with a view to institutionalising IWRM principles in MRC member countries and throughout Southeast Asia.

- Place its unique advantage in water resource management and environmental protection at the disposal of ASEAN – for the benefit of the whole region including the Mekong. The MRC should also seek a formal place in, status with and provide regular advisory input to, the annual round of ASEAN and ASEAN+3 Environment Ministers’ meetings.
- Engage with and support ASEAN’s Working Group on Water Resource Management.
- Seek a formal position with regard to status with the GMS as part of its framework, and play a functional role in delivering outstanding water governance for the river basin and as a model for integrated water management, as a contribution to GMS development goals.
- Draw the ASEAN-Mekong Basin Development Cooperation (AMRBC) into an information-sharing collaboration – as part of its role as a knowledge centre.

25. In addition, the MRC should establish a presence in, and a sense of ownership among, regional research and educational bodies, notably universities.

26. The MRC should proactively engage with NGOs and other civil society organisations in riparian countries, not just with international NGOs working at a regional level in the Mekong.

The MRC should be more responsive to the political culture of ASEAN and the four member states and nurture its own Southeast Asian character and identity.

27. The MRC should aim for cultural diversification, particularly at senior levels in the Secretariat, in order to transform itself from an institution that still retains much of the character and identity of an expatriate agency into one that is comfortably integrated with and representative of the region.

28. The MRC should improve its ability to analyse and interpret the societies it serves by recruiting more sectoral professionals who are experts in the riparian countries as well as skilled in the region’s languages.

29. The MRC should give higher priority to stakeholder and community issues in its knowledge generation. As a first step, the Secretariat should develop and implement a public engagement strategy that follows basic IWRM principles. Based on the strategy, the Secretariat should transfer knowledge and develop capacity in the NMCs so they can engage more proactively with the public.

10.2 How should China be involved?

China should be welcomed and encouraged by the MRC into the Mekong governance framework.

30. Chinese membership would strengthen the MRC's capacity to be an effective water governance and IWRM institution because it would encourage closer involvement and more effective consultation between all Mekong countries. It would build mutual trust and confidence on issues relating to the Lancang/Mekong and increase mutual understanding of how decisions are reached on water-related issues. Chinese membership would also provide a basis for discussing and resolving disputes within the framework of a single river basin agency rather than on an ad hoc basis as at present. With the addition of China's knowledge and experience of water management issues, the MRC would have a better capacity to function as a knowledge centre for the river.

31. MRC member governments should discuss Chinese membership collectively and individually with the Chinese government at an early date and seek to establish a timetable for organising China's membership. The MRC should then instruct the Secretariat to prepare two information papers for their riparian countries' separate and collective consideration: the first to cover water governance and management, as well as other policy and operational issues; the second to deal with issues that may arise in relation to the Mekong Agreement in negotiations over China's membership

32. MRC member governments should consider a cooperative framework that focuses on managing the flow regimes of existing dams for the purpose of achieving the desired social, economic

and environmental outcomes.

33. The MRC should also use these membership discussions with the Chinese as an opportunity to explore options for aligning itself with ASEAN and the GMS.

34. Finally, MRC member governments should discuss with China and with donors what the funding arrangements for the MRC would be if China became a member.

10.3 How should donors engage with the MRC and the Mekong region?

Donors need to be better informed about the MRC and the Mekong, they need to improve their coordination, and they must engage in a more consistent policy dialogue with the political arm of the MRC.

35. Donors should be better informed and intellectually better equipped to cooperate with and engage in a closer policy dialogue with the MRC and its member countries (that is, they need to engage in a dialogue that goes beyond technical and managerial issues at the project level). Donors need to better understand the complexities of the region, the individual countries and the multitude of issues pertaining to the Mekong River.

36. Donors should synchronise their bilateral programs with their assistance in transboundary water resources management under the MRC, particularly in relation to conflict-prone tributaries such as the Sesan, Srepok and Sekong Vietnam-Cambodia tributaries.

37. Donors have recently taken constructive steps to coordinate their views and policies on what the MRC should focus on in the near future. Undoubtedly, this process presents a considerable challenge to donors from diverse organisational cultures, and with differing policies and levels of commitment to the MRC. Donors should remain committed to improving coordination among themselves in order to send more consistent messages and suggestions for change to the MRC, and particularly to its Secretariat.

38. Donors should select a lead donor who would assume the role of umbrella coordinator and spokesperson in their dealings with the MRC. The lead donor should be chosen from among the bilateral donors, who have the advantage of a long-term engagement with and a good knowledge of the MRC and the Mekong region.

39. Donors should also persevere in their quest to move beyond the Secretariat in their dialogue with the MRC and engage in a more direct dialogue with the higher bureaucratic and political levels of the member country governments. In so doing, donors would move beyond established communication mechanisms – such as their annual consultations with MRC, their annual bilateral consultations, and their regular Donor Consultative Group meetings – **and engage in policy dialogue at higher political and bureaucratic levels.**

40. As we have suggested in this report, once the MRC had a more defined role with a set of approved core duties and activities, donor coordination would be less problematic because donors would ideally fund this or that activity without a lot of policy discussion. Or donors would provide basket funding provided that MRC's financial management is sufficiently robust. The trick is therefore for the MRC not to have unclear and controversial objectives and strategies that will invariably invite different donor interpretations, disagreements, etc. - and a lot of wasted transaction time among donors and between donors and the MRC.

41. Donors should be proactive in their support of other Mekong stakeholders and water governance arrangements such as civil society groups and networks, regional NGOs and academia. Donors should support and promote a more structured MRC-civil society engagement program (as flagged in the MRC's draft Strategic Plan 2006-10) in order to meet the IWRM requirements of broad stakeholder involvement in Mekong water governance.

42. Donors should begin to consider their options for withdrawing assistance to the MRC. Assuming that a donor-MRC

agreement on outstanding policy and strategy issues could be reached in 2006, a long term (possibly ten years) and phased exit strategy needs to be considered. Provisions also need to be made for a shorter term exit strategy if the MRC decides to move in strategic directions that are incompatible with donor policy. It is inappropriate for donors to pressure an organisation to pursue policies that are unacceptable to its executive governance bodies. If a donor-MRC agreement on the MRC's strategic direction cannot be reached during 2006, donors should call for the termination of assistance after a winding-up of current financial commitments over a nominated period of time (roughly three years).

What should the role of the ADB and the World Bank be in relation to the MRC?

43. The establishment of a water investment program under the GMS would be welcomed as a way of bringing Mekong infrastructure investments under a single umbrella that has considerable country ownership and includes China (see the recommendations on China and the GMS above). It would make a lot of sense if the ADB and the World Bank pooled their Mekong investments into a GMS water program. This would reduce the number of international players, improve the transparency of agency agendas, and render superfluous the World Bank's MWRAS.³ As we have argued, there is an obvious water governance role for the MRC within a more comprehensive GMS water program.

10.4 How should NGOs engage with the MRC over the issue of regional water governance?

44. NGOs need to be more capable and informed in their analytical, strategic and advocacy work. They should be better equipped to arrive at their own clear positions on what civil society or the public interest wants or needs from a river basin organisation. To date, civil society groups have been mainly reactive rather than proactive in their advocacy of a particular

³ The MWRAS has recently been 'upgraded' to a program (MWRAP). See Chapter 8.

institutional role or model.

45. It is particularly important that NGOs develop their own capacities in their work with river science. For its part, the MRC needs to find ways to make river science more accessible to non-specialists.

46. NGOs should promote the interests of civil society in wider arenas by engaging more proactively, either through collaborative dialogue or advocacy work, with the MRC, the NMCs and donors. NGOs should remain accountable to those communities whose interests they serve in such engagements.

47. In representing the plight of local communities whose livelihoods and entitlements are threatened by developments on the river, NGOs should draw attention to the fact that the plight of the river and its people is a global responsibility. In so doing, NGOs would exploit the socio-environmental “consciousnesses” of an international audience.

48. Some international and regional NGOs use the media and lobby governments to engage in “spectacular” advocacy work, acting as visible political pressure groups. Others are better equipped and more inclined towards a complementary role, disseminating knowledge and engaging in dialogue with both the MRC and riparian governments. The NGO community should recognise that there is a strategic advantage to working both from within and without, and it should also be recognised by those on the “receiving end” that both positions are legitimate and important in river basin governance.

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Attachment 1: Mekong Case Studies

Preamble

The following case studies have been included as “hotspots” or relevant cases where the events offer insight into the ways in which diverse national interests shape transboundary water governance initiatives. The focus is on the interplay between national interests and transboundary governance, in particular looking at the role the MRC has/has not played in mediating national interests and settling disputes.

Four case studies from various country/transboundary contexts have been chosen and are presented in brief on the following pages with reference to: the features of the case; national interests as presented through the case; and implications for transboundary water governance in the Mekong. All cases chosen are national in origin but have significant transboundary impacts. As such, all have been controversial and have had an implied or real role for the MRC as the principal transboundary water governance organisation. None of these cases has seen MRC play a prominent mediating role to achieve better governance.

It is important to note that the selected case studies are not thought to reflect all interests in play in the Mekong or to offer definitive evidence concerning the activities of the MRC. Rather, these cases have been selected because the events provide insight into the nuances of national interests and transboundary water governance initiatives. Significantly for this study, all projects described have been justified, legitimated or explained by their proponents with reference to “national interests”.

The cases are:

1. Development on transboundary tributaries and the Sesan dispute between Vietnam and Cambodia
2. The Thai irrigation water grid
3. The Nam Theun 2 hydropower development in Laos
4. Navigation and hydropower development in China on the Lancang-Jiang

Transboundary Tributaries in the Lower Basin: The Sesan Dispute

The Case

The Sesan River, along with the Srepok and Sekong Rivers (hereafter referred to collectively as 3S), form one of the most significant sub-basins of the Mekong. From the Central Highlands of Vietnam, the Sesan journeys southwest into Cambodia through Ratanakiri and Stung Treng

Provinces. The 3S system is one of the Mekong's most significant tributary watercourses, contributing approximately 20% of water in the Mekong mainstream as measured at Kratie.¹

Controversy surrounding the "3S"² rivers centres on planned hydropower developments and associated downstream impacts. The Vietnamese government has completed one dam, the Yali Falls dam, and has plans to construct four more. Of these four, construction began on the Sesan 3 dam located 30km downstream of Yali Falls in 2003. The Sesan 3 project was made possible with funding from the Vietnamese and Russian governments following the withdrawal of the ADB. This withdrawal arose as a result of the ADB's requirements to carry out additional environmental impact studies, which in turn was a response to civil society concerns and pressure regarding negative environmental, social and economic impacts. In addition to Vietnamese plans, the Cambodian government also has plans to build at least two dams on the Sesan and Srepok.

Of the hydropower projects, the Yali Falls dam is the largest in the Lower Mekong Basin and has been the most controversial. The dam is located on a tributary of the Sesan in the central highlands of Vietnam. Construction of the dam began in 1993 and was completed in 2001. With a generating potential of 720 MW, the dam cost an estimated US\$ 1 billion.³ The dam built by Vietnam's state-owned electricity utility Electricity of Vietnam (EVN) working with the Swiss consultancy Electrowatt Engineering Services Ltd. It was financed with loans from the Russian and Ukraine governments and financial assistance from the Swedish aid agency SIDA. Yali Falls had long been part of the Mekong Secretariat's indicative planning under the old Mekong Committee.

In 1996, three years after the start of dam construction, people living in Ratanakiri Province in Cambodia (70km downstream of Yali Falls dam) began to experience unusual and/or extreme flooding events as a result of dam-related water releases.⁴ The impact of this flooding was severe in both social and environmental terms: many aquatic and riverine species were threatened by habitat disturbance due to abnormally high water levels and the loss of livestock, crops and personal possessions threatened the livelihoods and food security of many Ratanakiri households. A study carried out by economist Bruce McKenney, with longstanding experience of working in Cambodia, estimated that between 1996 and 1999, tangible losses (for example loss of livestock or fishing gear) came to approximately US\$800,000 or US\$237 per household. These figures are disputed by the Vietnam National Mekong Committee.⁵

1 Sekong, Srepok and Sesan figures added together from data of Toda et al. (2004) c. 21% in rainy season and 20% in dry.

2 Note that the term 3S has found its way into the World Bank Mekong Water Resources Assistance Strategy document, but with no reference back to the original formulation that came from civil society organisations concerned about transboundary impacts from developments in Vietnam's Central Highlands and southern Laos.

3 CRES 2001 cited in Hirsch, P and Wyatt, A (2004) "Negotiating local livelihoods: Scales of conflict in the Sesan River Basin" *Asia Pacific Viewpoint* 45(1): 51-68.

4 Although less severe, impacts were also experienced in Stung Treng Province, some 250-300km downstream of the dam.

5 Sesan protection network see http://www.mekong.es.usyd.edu.au/case_studies/sesan/index.htm.

Since 1999, flooding has continued to impact on areas downstream of the dam. In 2000, large scale flooding and loss of property was reported to be the result of large uncontrolled releases of water associated with commissioning tests of the dam's spillway.⁶ In the period since unusual flooding events were first experienced, 39 deaths have been attributed to the unpredictable changes in river flow and height.⁷

It took some time before problems in Ratanakiri Province became known to public officials. Although an environmental impact assessment was undertaken in 1993 by the dam builders, downstream areas in Cambodia were not included in the study area.⁸ Adding to this, neither the Cambodian government nor the MRC Secretariat took an active role in determining effects of the dam for communities over the Cambodian border.⁹

Then in 2000 a coalition of NGOs established the Sesan Working Group. This group later became the Sesan Protection Network consisting of a core of Cambodian and international NGOs including the Non-Timber Forest Products Project (NTFP), Cambodian Environmental Protection Association (CEPA), NGO Forum Cambodia, Partners for Development in Cambodia (PFD), Fisheries Action Coalition Team (FACT), and Centre d'Etude et de Développement Agricole Cambodgien (CEDAC). The group is resourced and supported by Oxfam America (operating from the regional Phnom Penh office). The Sesan Protection Network gained the support of government officials at the provincial and district levels.

The group (first as the Sesan Working Group then as the Sesan Protection Network) commissioned two studies to investigate impacts: one in Ratanakiri Province in 2000 and one in Stung Treng Province in 2002. The studies found that flooding had worsened and become unpredictable, dry season flows had increased, water quality had declined¹⁰ and fish catches had declined.

This research culminated in a workshop in 2002 at which various Cambodian government officials were in attendance. At the workshop the Sesan Protection Network requested *inter alia* that construction on planned additional dams be halted, that the natural flow of the river be restored and that the Cambodian Government negotiate with the government of Vietnam to find a solution.¹¹ The Cambodian NMC and the MRC Secretariat were invited to participate but both declined, with the Secretariat citing its reason as not wanting to appear partisan.¹²

6 Asian Development Bank 2001 cited in Hirsch, P and Wyatt, A (2004) "Negotiating local livelihoods: Scales of conflict in the Sesan River Basin" *Asia Pacific Viewpoint* 45(1): 51-68.

7 See Hirsch and Wyatt (2004), above and Lerner, M (2002) Draft Sesan Legal and Policy Study, Oxfam America, Phnom Penh

8 An EIA conducted in 1993 by EVN and Electrowatt only assessed impacts on the area 8km downstream of the dam.

9 See Hirsch and Wyatt (2004), above.

10 Increased turbidity probably due to erosion. See Hirsch and Wyatt (2004), above.

11 Cited in Hirsch and Wyatt (2004), above.

12 As the VNMC was not invited, see Hirsch and Wyatt (2004), above.

Responding to concerns raised by civil society groups, the MRC has, however, been involved in undertaking “fact-finding” research in the affected areas and in coordinating dialogue between the Vietnamese and Cambodian governments. In 2000, the MRC participated in a four day research mission to Ratanakiri Province and facilitated a meeting between the Cambodian and Vietnamese Governments. In the same year, the MRC also facilitated the establishment of the Cambodia-Vietnam Joint Committee for the Management of the Sesan River. As per the 1995 Mekong Agreement,¹³ since MRC-led dialogue failed to resolve the matter, continued negotiation is now taking place between the Cambodian and Vietnamese Governments through this Joint Committee.¹⁴ The Committee met three times before it was wound up in early 2004. The main achievement was to establish a system for advance warning of unusual water releases, but communication difficulties within Ratanakiri Province mean that the more isolated communities still fail to receive advance notice of such releases. The Committee did not deal with compensation issues or respond to community demands for a moratorium on further dam construction on the river before issues arising from Yali had been dealt with.¹⁵

National Interests

The national interests at play in this case are primarily the interests of economic development. In the Vietnamese context, with a rapidly growing economy and intense agricultural and industrial development, dam building is considered a fundamental component of national plans to boost energy production and increase wealth. Along these lines, local sacrifices (in this case the relocation of communities in inundated areas and the alteration of the natural ecology of the rivers in questions) are presented by the government as an acceptable trade-off for the greater public good assumed to result from development.

Transboundary impacts in this case are also dwarfed by the greater good assumed to result from dam construction. Dam construction is viewed by Vietnam as a unilateral issue, an attitude enshrined in the Mekong Agreement with its emphasis on national sovereignty. Despite the transboundary nature of the Sesan system, as dam construction is wholly within Vietnamese borders the issue is widely interpreted to be a Vietnamese concern alone. The fact that this is a tributary and not a mainstream transboundary impact further reinforces this interpretation. There is a historical irony here, in that Vietnam as a downstream country had earlier been a riparian member keen to see territorial integrity concerns reflected in the Mekong cooperation framework.

On the Cambodian side, the national interests at play are confounded by the politics of scale,

13 Article 35.

14 The Chief Executive Officer of the MRC Secretariat stated in 2002 that the Yali Falls matter was the responsibility of the Cambodian Government and outside the jurisdictional mandate of the MRC. Cited in Hirsch and Wyatt (2004), above.

15 Hirsch and Wyatt (2004), above.

where the concerns of the local are not seen to constitute interests of national importance.¹⁶ This is further compounded by the indigenous (non-Khmer) ethnic make-up of the affected areas in Ratanakiri. It was only after civil society groups (with the financial resources and support of international NGOs) undertook research and put pressure on governments to take notice that the Cambodian authorities responded. Even then, the Cambodian Government has been unable to effectively negotiate successfully for the mitigation of negative effects, prevention of further dam construction and compensation for affected communities. This may be in part due to the closeness of the current Cambodian regime to Vietnam and hence the reluctance of the government to offend its stronger neighbour. In addition, Cambodian negotiators have been ill equipped with the technical knowledge and skills to argue their case, while Vietnamese negotiators bring piles of technical studies and documents to the meetings. This would appear to be a clear case where technical mediation is called for.

Implications for Transboundary Governance and the MRC

The MRC has played a role in coordinating government-to-government negotiations aimed at resolving the dispute over transboundary impacts. As such, the organisation has demonstrated its relevance as a mediator.

However the case also highlights the inadequacy of the institution – the MRC “had to” wait until the Cambodian Government requested its involvement and even then engaged only at the national level rather than dealing directly with, or responding directly to, affected people. It seems that member states created the MRC but have given it no autonomy to engage directly in matters of regional dispute or respond to stakeholders at any scale below the national governmental level. In a pattern which continually legitimates national interests as represented by senior political figures but gives no weight to the needs or plight of local level actors, the MRC is “hamstrung by its own mandate”¹⁷ and unable to respond to concerns without direct orders from national governments.

Furthermore, in this case, MRC member countries have indicated that they prefer to act unilaterally or bilaterally rather than through the MRC. This is particularly true where the rivers in questions are tributary watercourses. Decision making regarding tributary watercourses is conducted according to the principle of national sovereignty (the Harmon Doctrine). Although referred to in the Mekong Agreement, tributaries are only subject to rules of notification for dry season diversions. In effect, they are not managed as part of the wider Mekong Basin by MRC member states.

The unequal political and economic power of neighbouring nations makes effective intergovernmental negotiation difficult, as does unequal technical capacity. The Cambodian Government, with a less established political system and weaker economy, is not in a position to negotiate with Vietnam on an

¹⁶ Lebel et al. state that “[l]ocal-level knowledge and institutions are seen as local in scope, relevance, and power, whereas the rules and knowledge of the state have much bigger scope and significance”. See Lebel, L, Garden, P, et al. (2005) “The Politics of Scale, Position, and Place in the Governance of Water Resources in the Mekong Region.” *Ecology and Society* 10(2): 18.

¹⁷ Hirsch and Wyatt (2004), above.

equal footing and to make demands for affected communities.

The successes in making the experience of affected communities known when compared with the incapacity of the MRC to take action indicate that in the Mekong, formal channels are not always the most appropriate or effective means by which to seek to effect change. Civil society can assist in coordinating and resourcing local actors, enabling local actors to collectively seek to be heard at the official level.

Access to and control of information is crucial to effecting change and influencing decision making. The first studies of affected areas were undertaken by civil society actors and the information collected proved crucial to their campaign. Yet there is a flip side – information collected by civil society has not been recognised by many at the political level as legitimate. Because it was put together based on surveys of affected communities, the information was seen as “anecdotal” and “unscientific”, particularly by the VNMC.¹⁸

And “legitimate” research conducted through MRC channels has been tightly controlled. Although the Cambodian Government requested that the MRC undertake fact-finding in affected areas, the terms of the assessment were defined by the Cambodian and Vietnamese governments together on a consensus basis. Information was not allowed to be freely obtained and distributed.

Thai Water Grid

*The Case*¹⁹

The Thai water grid project (officially named the “sustainably holistic water management project”) is a 400 billion baht scheme to construct a network of pipes across the country. The overall aim of the project is to transfer water from “wet” areas to parts of Thailand more prone to dry season drought. Relying on a system of natural waterways, dams, constructed canals and pipes, the scheme intends to increase the area of irrigated land by more than four times and to ensure that all in Thailand have access to potable water.

Although many of the transfers planned will occur wholly within Thailand, the scheme also includes significant transboundary components. The project pre-feasibility document identified 18 potential sites from which water could be transferred, including the Stung Nam River in Cambodia and the Xe Bang Fai, Xe Bang Hiang and Nam Ngum rivers in Laos.

The document gives a list of priorities and favours those which require only bilateral discussions. Although other options would make more sense both economically and from an engineering perspective, such as diversion of water from the Mekong River itself, this option is considered

¹⁸ In an interview with the VNMC on 5 December 2005 Mr Nguyen Hong Toan asserted, with respect to civil society researchers, that “they were misinformed, but then we told them”.

¹⁹ Research on the water grid case study was undertaken by a team at Ubon Ratchathani University for this study.

too complicated as it would require that Thailand negotiate with all the Lower Mekong Basin countries. The project pre-feasibility document states:

“The feasibility of the diversions from neighbouring countries gives more weight to considerations relating to agreements with the relevant countries than other considerations such as the investment costs. This is because a number of the rivers that are the sources of water for these diversions are international rivers” [that is the Salween (and its tributary the Muoi) and Mekong River].

In 2004 the planned transfers from Laos were given preliminary approval when a memorandum of understanding was signed between the Thai and Lao governments authorising the diversion of Lao waters into neighbouring Thailand. This part of the water grid scheme has been dubbed the “Thai-Lao Water Friendship”. The plan is a kind of water trade, whereby Thailand purchases water from Laos and pipes it under the Mekong mainstream into reservoirs in Northeast Thailand.

Although the water grid scheme involves the whole of Thailand, it is sold as a project which will provide water to dry areas, most significantly Isan (the Northeast). The focus on Isan positions the water grid scheme as the latest of several grandiose projects aimed at enabling dry season irrigation in the poorer, dryer northeastern parts of the country – in other words, “watering Isan”. Previous plans include the “Isan Khiew [Green northeast]” scheme in the 1980s which involved the participation of the military in development projects, and the Khong-Chi-Mun water diversion scheme which aimed to irrigate nearly 5 million rai of farmland by diverting Mekong water into the headwaters of the Chi and Mun rivers and constructing 16 main beadrworks and an extensive network of irrigation channels.

Due to its large scale, expense and complexity, the project has met significant opposition. Many of the experimental pay-for-piped-water projects have failed, with farmers refusing to pay for the cost of electricity and associated operation and maintenance fees required to pump water onto their land. Irrigation officials have recommended that farmers shift from rice-cultivation to more profitable cash crops and pay fees for water use to cover the costs of maintaining pipelines. This has been an unpopular proposal in a context where water fees and pay-per-use models do not mesh well with the past expectation that government financed irrigation schemes provide water for free. Moreover, in the absence of metering the proposed payment is not based on volumetric consumption, so the charge is seen as more of a tax than a user-pays facility or incentive to economise on water use. The expense associated with the project has also been criticised by government officials, who admit the scheme needs to be reduced in size and extent to make it economically and technically achievable.

Yet project planning continues, and the government has given no indication that the grid scheme will be abandoned in favour of smaller scale, less ecologically intrusive irrigation systems. A

Master Plan (following on from the pre-feasibility study) was completed in late 2005. Although this document is not yet publicly available it is said to describe 13 grids, four of which connect Thailand with neighbouring countries including Laos, Cambodia and Burma. Of these, priority has been given to the Nam Ngum water diversion project involving the tunnelling of water from the Nam Ngum River, a tributary of the Mekong located within Laos, to Northeast Thailand.

National Interests

Thai national interests have been at the forefront of discussions surrounding the water grid. The grid has been promoted by its architects as a scheme with significant national benefits, in particular poverty alleviation in Thailand's poorest areas in that the scheme will enable dry season cropping. It was promoted particularly strongly around the time of the 2005 election as a populist measure of devolving public investment to the countryside.

The conservation card has also been played by proponents, in that the piping technology to be used is in principle more efficient than open channels. There is also a sense that making Isan green in the dry season is a kind of ecological "improvement" in Thailand's northeast. This is an interesting construction of ecological interests where the opposite can in fact be argued: disturbance to the natural flood-pulse through large scale wet season storage and dry season release is a threat to the ecological balance of the Mekong Basin. Yet this is largely ignored and "drought relief" arguments have been put forward without reference to the natural wet and dry cycles associated with the Mekong's natural hydrology.

There is also a sense in Thailand that this scheme will enable Thailand to take its "fair share" of the river and resources. The Mun and Chi river system contributes only 6 per cent of the flow of the Mekong from 15 percent of the Basin area. For some time in the political arena, and within the Department of Water Resources and National Mekong Committee, there has been a sense that Thailand has a right and an interest in capturing benefits which reflect the large land area in the Basin and compensate for the relative lack of water.

The transboundary component of the project brings Lao national interests into the debate with economic benefits from the sale of supposedly excess water seen as a positive for the national economy. However, to date there has been very little public discussion or awareness of this proposal from within Laos. Sale of tributary waters is bound to have impacts in terms of lost opportunities for irrigation and other water uses within the country.

In Thailand there are sharply conflicting interests in such infrastructure-driven water resource development. They are regularly challenged locally and on the national stage. In Laos, a clear distinction between local and national interests in water has not been articulated in the same way. National interests and full complexity of national interests are not represented in the official

discourse – indeed, such schemes often do not reach the level of a national discourse at all, in contrast to Thailand.

Implications for Transboundary Governance and the MRC

Although major construction on the water grid has not yet begun, the machinations leading up to development of the Master Plan illustrate some key issues relating to transboundary water governance in the Mekong. For example, Thailand has indicated its preference for unilateral or bilateral river management over multilateral negotiations. This is very clearly spelt out in the pre-feasibility document.

Furthermore, the MRC has displayed an unwillingness to be proactive with regards to national development plans which affect the Basin. Although elements of the water grid were included in the BDP as priority projects,²⁰ the MRC has not taken an active interest in the scheme as a whole (or on the level of political negotiation) and there is a sense that they will only do so if a request from a member government is forthcoming.²¹

Similarly, the member countries have displayed a lack of interest in and engagement with the MRC. In this case the MRC is seen as a forum to avoid for fear of regulation rather than an agency with which to engage with a view to achieving better outcomes. As noted above, this is clearly stated in the pre-feasibility document.

Lao PDR and Nam Theun 2

The Case

The construction of a large hydropower dam on one of the major tributaries to the Mekong – the Theun River in the Nakai District in central Lao PDR – has been envisaged since the early 1970s and has been the subject of regional and international debate for 15 years. The debate has engaged national governments, donors and international NGOs. Nam Theun 2 was revived in earnest in the mid 1980s when the project was conceived as part of Lao plans for economic development through public investment assisted by a World Bank loan. The scheme was predicted to boost the Lao economy by enabling electricity exports to Thailand and as such ultimately facilitate poverty alleviation. In 1989/90, the World Bank and UNDP funded a feasibility study for the project.

Until recently, the project was subject to extensive reviews and delays due to concerns over predicted environmental and social impacts arising from construction of the dam. When the project financing model shifted from public to private BOOT arrangements, the question of

²⁰ Later discussions with the Thai NMC suggested that the water grid project was taken out of the BDP database. The present status of the water grid with respect to the BDP remains unclear.

²¹ See Chapters 4 and 8 for a discussion of MRC/country engagement of this type and the extent to which the MRC acts only at the behest of countries.

project backers became the lynchpin. Financiers were unwilling to commit to the project without a World Bank sovereign risk guarantee, and in turn the World Bank was not able to commit to such a controversial project without extensive studies. The Lao Government was unable to construct the dam without external assistance. Despite continuing opposition to the dam by many international NGOs, the studies produced plans designed to offset the local environmental and social impacts (“externalities”) and the dam achieved the support it needed to get the project go-ahead in 2005.

The World Bank has been particularly significant in renegotiating and supporting the project. In March 2005 the World Bank Board officially approved the scheme, committing \$270 million and \$120 million in loans and risk guarantees respectively.²² A few days after World Bank approval, the Asian Development Bank (ADB) also endorsed the project and committed funds to its implementation. The project is led by Electricité de France and also includes a 25% shareholding by the Lao government and smaller shares held by Thai companies.

The revised project, as with the original, centres on the construction of a 48 metre high dam on the Theun River with a predicted reservoir of 450km².²³ In an intra-basin transfer, it diverts the main flow of the Theun River off the plateau down a 350 metre escarpment and into the Xe Bang Fai river system. The dam is intended to generate 1070 MW of power, with 995 MW of this for export to Thailand.²⁴ These revenues are expected to account for 3-5% of total revenues for Laos from 2010 to 2020.²⁵

The World Bank is presenting the scheme as the “new model” of environmentally sensitive and socially equitable hydropower development which accounts and adjusts for environmental and social externalities. Social impact mitigation plans have been developed with a focus on detailed resettlement schemes for communities in areas to be inundated. For the environment, the World Bank has pledged funds for conservation programs including wildlife management in the area south of the Nam Theun 2 watershed and in the catchment area to the north and east of the reservoir.²⁶ Citing these plans, the Bank is presenting the project as win-win for the national economy, local communities and the environment.

A number of international civil society groups continue to oppose the dam, citing inadequacies in environmental and social impact assessments and claiming that the project violates the World Bank’s own environmental standards. The project is expected to displace 6,200 indigenous people and impact more than 100,000 villagers who depend on the Xe Bang Fai River for fish, agriculture and other aspects of their livelihood. These anticipated impacts have been widely documented within

22 Bank Information Centre news release <http://www.bicusa.org/bicusa/issues/asia/2067.php>.

23 World Bank figures from the Project Appraisal Document http://www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000012009_20050408085158.

24 World Bank figures from the Project Appraisal Document, above.

25 Bank Information Centre news release <http://www.bicusa.org/bicusa/issues/asia/2067.php>

26 Brief information on some of these plans in the June 2005 World Bank project update document.

the project's own studies and in critical work including that of IRN and of Tyson Roberts.²⁷

National Interests

Lao national interests have been cited by the government, the corporate leaders investing in the project, the World Bank and many other project proponents during the long and furious debate. Proponents in the early years presented the impacts on local communities and the environment as acceptable trade-offs for the economic boost the dam would give to the national economy through sales of electricity to Thailand. More recently, the project has been presented as a win-win for the national economy and for local communities: according to the World Bank, so long as the appropriate plans are in place, what is good for one is good for both. It has been promoted as a critical lynchpin for further development of the Lao economy.

In contrast to the main public discourse on dams in Thailand, the interests of communities in the Nam Theun watershed have been assumed in the heavily government controlled national media to be in line with those of the Lao Government. There has been little attempt by the World Bank, the MRC or other international players to question these assumptions.

Furthermore, the interests of downstream nations and of the wider Basin have not featured in the dialogue leading up to approval of Nam Theun 2. Although the impacts of such a major storage dam will be felt downstream on the Nam Theun and further into the Mekong mainstream, the project was largely managed unilaterally with reference only to international funding bodies necessary to turn the plans into reality.

Implications for Transboundary Governance and the MRC

As with the other cases, the Lao Government acted unilaterally in the planning of the dam. As with the Sesan, although the case concerns a significant tributary of the Mekong and as such has implications for the health of the river and basin, the project has been conceived as a Lao project only as the construction is wholly within Lao borders. Unlike the Sesan case, however, the tributary itself is not a transboundary river. However, as the fourth largest tributary of the Mekong system, any change in seasonal hydrological regime will have some mainstream impacts.

The absence of the MRC from top-level debate and discussion illustrates that countries are unwilling to request MRC involvement and/or that the MRC is unwilling or unable to take initiative as a regional governance institution in high profile and sensitive projects. Although the MRC could have played a role in undertaking environmental and social impact studies, in mediating the different positions and in considering the effects of the development on the wider Basin, the organisation was largely absent from the planning and negotiation process.

²⁷ For example see <http://www.irn.org/programs/mekong/namtheun.html>.

In contrast to the wealthier neighbouring nations of China and Vietnam, the Lao Government was dependent on external funding to go ahead with dam construction. The necessary involvement of international donors would seem to create space for the MRC to involve itself in negotiations and impact studies (indeed they would seem best placed to do the latter). This did not happen, implying that within the landscape of big international players in this case, the MRC profile is not big enough to gain attention (either as a conduit for engagement with political levels or as a significant source of information).

International civil society actors have mounted significant opposition to the dam. For many years, and in an international climate becoming attuned to the seriousness of sustainability and environmental protection, civil society was instrumental in preventing the project from going ahead. More recently it is in part due to civil society concerns that extensive social and environmental mitigation planning has occurred. If the dam had been approved based on the very rough EIA carried out in 1989/90, most of the safeguards and resettlement planning would simply not have occurred and the project revenues now committed to mitigation would not have been set aside. As with the Sesan case, this illustrates that civil society can play a serious role in transboundary governance, particularly where the political regime does not allow for local voices of opposition.

The case also illustrates the role of the private sector in Mekong water governance. With a move from public investment to BOOT and other public-private partnership arrangements, the question of regulatory regimes becomes vital. In this case, a surrogate regulatory regime was in place because of the spotlight put on World Bank investment in dams, but there is a real danger of a regulatory vacuum in other projects. The MRC has hardly touched this crucial issue to date.

Chinese Navigation and Hydropower Development on the Lancang

The Case

This case relates to Chinese developments on the Lancang-Jiang (upper Mekong) in the form of navigation and hydropower projects: the Upper Mekong Navigation Improvement Project (UMNP) and the planned cascade of eight dams in Yunnan.

Navigation work on the river was conceived in the early 1990s and gained legal status in 2000 with the signing of an *Agreement on Commercial Navigation on Lancang-Mekong River* by China, Burma, Thailand and Lao PDR. The Agreement set out plans to improve the navigability of a 360km stretch of the river from Simao in Southern China to Luang Prabang in northern Laos.

The navigation project aimed to improve the ability of commercial vessels to navigate the Mekong and Lancang Rivers from Yunnan Province into downstream countries. Chinese interests in the

navigation project are in part driven by its desire to develop Yunnan and other western provinces that have lagged behind the boom of eastern coastal provinces, a neglect that has been seen as a cause of unrest inland. For the other three signatory states, a key motivating factor was the improvement of trade relations with the large neighbouring economic power.

Plans for the navigation project detailed three stages of project implementation involving the blasting of rapids,²⁸ reefs and shoals, dredging of the river channel and the establishment of canals. The first stage aimed to enable passage of vessels up to 150 tonnes while the second and third phases aimed to allow navigation by boats of 300 and 500 tonnes respectively. Interestingly, the project was declared finished after implementation of only the first two stages, following protests in Thailand by communities opposed to further rapids blasting – particularly of Kaeng Phii Long.

Although development in China is legally outside the jurisdiction of the MRC, controversy over the quality of the EIA for the navigation project resulted in a request from member nations for MRC assistance. The MRC commissioned an independent assessment of the report in 2001 which found that the EIA was “substantively inadequate and in many places fundamentally flawed”. Thai civil society groups centred on Chiang Khong District in Chiangrai Province have been vocal in their opposition to the rapids blasting, and they have received high profile support within Thailand, for example from the Senate Foreign Relations Committee.

Chinese hydropower projects involve the construction of up to eight large dams. This “Mekong Cascade” aims to take advantage of the steep topography of the riverine environment in Yunnan and is to be constructed on a 750 km stretch of river with an 800km drop in altitude.²⁹ Two of the planned dams have been completed so far: the Manwan dam and Dachoashan dam. Two more, the Xiaowan and Jinghong are under construction. The dams are being constructed for electricity generation to service growing populations in Yunnan Province and to support industrial and urban growth in Guangdong Province. There is also a plan to sell power from Jinghong dam to Thailand.

Proponents of the dam cascade assert that the dams will enable control of the river and an increase in dry season flows for downstream areas.³⁰ Opponents, including Chinese, Thai and international civil society groups point to the negative social and environmental impacts associated with dam construction. These include problems associated with an altered flow regime including threats to biodiversity and fisheries.

28 More than 100 rapids were blasted, primarily along the Burmese-Lao and Thai-Lao border.

29 See Dore, J and Yu Xiaogang (2004) “The Politics of Water in the Mekong Region: the Case of Yunnan Hydropower Expansion”, paper presented at the World Water Council *Workshop on Water and Politics: Understanding the Role of Politics in Water Management*, Marseille.

30 Asserted benefits include flood control, more assured dry season flows, increased navigation options, reduced saline intrusion and the creation of irrigation opportunities in Thailand. See Dore, J and Yu Xiaogang, above.

It is important to note that information about negative/positive impacts of the dams is contradictory and contentious. For example, measurements of the impact of Manwan dam range from “negligible” to a decline in mean-minimum discharge of 25%. Various figures are used by different actors to emphasise what is “good” and “bad” for downstream countries according to different values and agendas. An increase in dry season flows may be “good” for irrigation in northeastern Thailand, for example, but may seriously disrupt the annual flood-pulse cycle on which lower Basin ecosystems depend.

National Interests

This case illustrates the dynamics of China-lower Mekong relations and the asymmetrical power of the basin whereby the upstream nations are much stronger economically than the downstream nations of Lao PDR and Cambodia.

Chinese interests in navigation and dam construction are dominated by economic concerns. Opportunities for trade with lower basin nations and the generation of electricity to serve growing and industrialising populations within China have been at the centre of plans to utilise the resources of the Lancang-Jiang. China has steadfastly insisted on calling its section of the river Lancang-Jiang, the clear implication being that this is a Chinese river and decisions on its use are subject to Chinese sovereign interests alone.

Similarly, opportunities for increased trade served as an incentive for Thailand, Laos and Burma to sign the agreement to improve the navigation potential of the Mekong. However there are conflicting views on the benefits derived: some in Thailand believe that the trade relationship is primarily a one-way exchange with Chinese vessels bringing goods into Thailand but refusing to facilitate the export of Thai products to China.³¹

With respect to dam construction, China has behaved unilaterally without reference to the concerns of lower Mekong nations. Not being a member of the MRC, China has had no obligation to notify or consult with downstream countries or to share data on its plans or on its operation of existing dams. Furthermore, where China does negotiate with lower Mekong governments, the reliance of those nations on economic assistance from China colours the extent to which the interests of the public and the environment are expressed. Cambodia, for example, is China’s largest aid recipient. Cambodian national interests in maintaining Chinese economic support appear to outweigh competing interests which seek to protect Cambodia from the impacts of upstream development.

The interests of the downstream nations have been central to critiques of Chinese developments. These interests have been expressed by governments and civil society groups and by the MRC.

31 Interview with Senator Kraisaak Choonhavan on 30 November 2005.

Civil society groups have attempted to represent the interests of the environment and of those relying on the natural hydrological patterns of the Mekong for subsistence. The MRC has engaged with the debate where requested by member governments, representing lower country interests through the pursuit of correct scientific knowledge about the environmental impacts of Chinese development.

The emergence of an environmental lobby in China adds an important element to the ways in which China's interests in a transboundary river are expressed. The recent impacts of pollution on the Songhua River in northeastern China have had repercussions for its other international river systems where it is the upstream country. Environmental NGOs have been quite outspoken and have found an ally in the increasingly influential State Environmental Protection Authority. To date, Chinese NGOs have found a greater voice advocating on the Nu Jiang/Salween than on the Lancang Jiang/Mekong, but there has been a growing interest and awareness here too.

Implications for Transboundary Governance and the MRC

These cases illustrate the dynamics of how downstream countries deal with a powerful upstream neighbour largely without mediation of the MRC. China has acted unilaterally and largely without reference to the concerns of downstream nations.

Even though China is not a member of the MRC, the Secretariat's involvement in the navigation project EIA process illustrates the positive contribution the organisation can make as a knowledge institution. The critical nature of the expert review allowed for a more informed and open debate on this project.

Civil society opposition to the navigation project further contributed to open debate and dialogue. Thai civil society influenced the position of the Thai government. The events illustrate that there are pathways for civil society to influence national level politics which can in turn influence the international policy landscape. It is fair to say that truncation of the project at less than the originally planned size was at least in part due to concerns resulting from the advocacy of civil society in Thailand.

The existence of Chinese dams implies an altered landscape for both riparian states and civil society and there is a sense that the attitudes of China and of MRC member countries are changing with respect to Chinese involvement in the MRC. There has been talk from Thai representatives that the dams render some articles of the Mekong Agreement irrelevant due to the altered hydrological regime resulting from Chinese dams. Within China, there is an emerging sense of readiness to join the MRC, pending a revision of the Agreement.

Similarly, opportunities for civil society action in the region are shifting, with the area for negotiation

now moving towards operation and management of dams rather than protesting against dam construction in reaches such as the Lancang-Jiang in Yunnan where the dams are already in place or under construction.

Within China, there is an emerging environmental lobby. This also gives the lie to a governance landscape based around riparian “national interests” and indicates that even within the more politically controlled Mekong societies there are divergent views on river management with which a river basin management authority needs to engage.

Attachment 2: Discussion of Key Concepts

National interest

“National interest” is commonly used in two main ways, both relevant to this study. The first way is to identify assumed benefits, or avoided costs, to a particular country that are distinguishable from the well-being of other countries. International negotiations are based on the main premise that compromises or accommodations can be sought between the interests of different country players. In an international river basin, national interests in water and other basin resources are thought of in terms of riparian position (upstream, downstream) and resource use (hydropower, irrigation, fisheries). The second way is to assert a greater common good at the nation-state level, often where sacrifices are required of a smaller group within that same country. Development is often promoted in the national interest, in part to mobilize support for projects that require resettlement or some other enforced change or loss of resources by affected people. Put together, the simplifications and assertions involved in “national interest” discourse raise questions of how national interest is represented, which interests are assumed to be dominant (those of majorities, mainstream cultures, economically and politically powerful elites, bureaucratically dominant sections of the government, parliament-determined national goals) and of what compensation, negotiation and representation mechanisms there are to increase the inclusiveness of “national interest” claims. Paring apart the “national interest” is an essential analytical exercise in understanding [water] governance.

[Water] Governance

Good governance is often understood to comprise the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the participation of all citizens in the decisions that affect their lives. Governance implies management and regulation of the public good beyond the centralized, monolithic nation-state.

Increasingly we see universalistic governance concepts applied to water. The Global Water Partnership, for example, defines water governance as:

the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society (Global Water Partnership 2002: 2)

While at one level there is an apparent consensus over the need for good and better governance of water, the multiple criteria involved and the different interpretations of efficiency, equity and sustainability ensure that water governance reform remains a highly contested arena.

The ADB flags governance as “promoting sound development management” (ADB 2005) and defines it as “the manner in which power is exercised in the management of a country’s social and economic resources for development”. It identifies accountability, participation, predictability and transparency as key elements in good governance.

Amongst other principles, good governance is assumed to involve:

- Decentralization to local government and principles of subsidiarity (countering top-down control);
- Enhanced roles for civil society (countering bureaucratic control);
- A place for the market (rolling back of the state’s micromanagement and allocative inefficiency to a more enabling/regulatory role through law, policy, administration);
- Participation, accountability, transparency (countering closed and corrupt decision making);
- Transboundary management (countering geographical fragmentation);
- Holistic/whole-of-government approaches (countering the silo effect).

Beyond its superficial meanings, governance has highly-charged subtexts. It is often a byword for dealing with corruption, for making the market work for the public good, for rolling back the state, but in a way that employs “antipolitics” through the depoliticising notion of good governance.¹

An outstanding question in relation to the governance emphasis in dealing with the inequities, inefficiencies and unsustainability of aid programs is whether this is due to the context in which, and institutions through which, aid is delivered, or to the nature of aid itself. In other words, are developing-country socio-political systems the only legitimate target of good governance, or should more attention be paid to the aid delivery process and the institutions that do it? Where does the MRC sit in this picture?

Water governance has arisen as a particularly significant area of change. The Global Water Partnership (2002) states that “the water crisis is mainly a crisis of governance”, while the United Nations Development Programme defines water governance broadly as “the range of political, social, economic and administrative systems that are in place to regulate the development and management of water resources and provision of water services at different levels of society” (UNDP n.d.).

As part of this emphasis on governance, a number of institutional changes have become apparent in the water sector in recent years,² reflecting something of a new development

¹ See Jayasuriya and Hewison (2004).

² See Saleth, R M and Dinar, A (2000) “Institutional changes in the global water sector: trends, patterns and implications” *Water Policy* (2) 175.

orthodoxy that implicitly universalizes through the notion of “best practice”. The emphasis includes commodification, privatization, decentralization, bioregional administration (managing water in its catchment context), holistic approaches under the rubric of whole of government approaches, Integrated Water Resource Management, Integrated River Basin Management, a move from supply-driven orientation to demand-side management, and hence from construction to allocation.

The relationship between law and governance raises key questions. To what extent can good governance be achieved or even sought in the absence of hard law? These questions are particularly relevant in transboundary basins where weak international law applies (or does not), and in societies where law is subsidiary to politics in rule making and enforcement. Governance in the absence of good law is bound to be sub-optimum, but failure to consider ways to improve governance when law and its application are still wanting is itself an abrogation of responsibility.

Civil society

Civil society is often and falsely equated with non-governmental organisations (NGOs). More widely, it is seen as a third sector of society beyond the state and the market, akin to the nebulous term “community”. The concept of civil society and its significance in international development has arisen in part as a consequence of the growing disillusion with the bureaucratic state, and yet an awareness that checks are needed on commercial private sector development. From another angle, civil society is seen as part of an opening up of hitherto autocratic political and social systems, and a move toward decentralisation. Yet another reason for civil society emergence is the disappearance of left-based opposition movements since the end of the Cold War and hence a vacuum for representation of subaltern, marginal and special group interests – and, of course of the environment. While there are commonalities between civil society actors in different countries, and indeed there are civil society networks that transcend national borders, there is also a great deal of diversity in civil society even between neighbouring countries such as those in the Mekong Region. A common governance framework for a differentiated civil society landscape raises several questions for our investigation. In the case of the MRC, an immediate question is that of how planning frameworks, participatory processes and other functions integral to IWRM operate in different civil society contexts.

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