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## SUSTAINABLE DEVELOPMENT IN THE MEKONG BASIN: THE ROLE OF THE MEKONG RIVER COMMISSION'S WATER DIPLOMACY

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The observation by British statesman Lord Palmerston that “*nations have no permanent friends or allies - they only have permanent interests*” is a somewhat cynical reflection on diplomacy. Yet, it remains relevant, perhaps even more so in the current global context and particularly among Mekong region countries. Acting in the interests of your citizens and the whole nation is the foundation of good governance. In developing nations, eradication of poverty and inequality and the pursuit of economic growth as well as social and environmental justice are key components of the national public interest and are recognized in the United Nations-mandated Sustainable Development Goals, adopted in 2015 (United Nations, 2015).

The “triple bottom line” approach to sustainable development is also reflected in the Brundtland Report (1987) *which notes that* there are three components to sustainable development: environmental protection, economic growth and social equity. Balancing these components in developing nations can be particularly challenging, where the demands for rapid development are becoming increasingly strident. Not meeting the current generation’s needs can foment social unrest, curb development, and drive migration into neighboring states and further afield. In an increasingly connected world, the expectations of the poor may be driven by the standards of the rich. Migrants are taking enormous risks and suffering considerable hardships to find a better life in wealthy nations. In their 2015 Country Index Technical Report, Chen *et al* show that economic readiness is a key determinant for overall climate vulnerability (Chen, et al., 2015). What increasingly appears to be uncontrollable climate change may spur growing demands for rapid

development. All this may in turn shift focus among policymakers to more sovereign rather than regional policies for development.

Of particular relevance to countries of the Greater Mekong region, SDG10 also calls for addressing income inequalities between nations, while SDG6 calls for cooperation on transboundary waters. Achieving the SDGs in shared watercourses is therefore particularly challenging. There has consequently been an increasing focus on opportunities for benefit-sharing in transboundary basins (Sadoff & Grey, 2002; 2005). However, this can also be challenging in developing basins. The time required to successfully negotiate benefit-sharing arrangements may be too protracted and uncertain to meet immediate growth needs. While the benefits that derive from regional growth, increased trade, reduced migration and more stable neighbors, ["benefits beyond the river," in Sadoff and Grey parlance (2002; 2005)], are too nebulous for national development planning. It is in this milieu that we argue that the 1995 Mekong Agreement provides a framework which, together with the regional approach to water diplomacy, puts the Mekong River Commission (MRC) in a unique position to promote equitable and sustainable development for all its member states.

### **The 1995 Mekong Agreement**

Cambodia, Lao PDR, Thailand and Vietnam share a long history of cooperation in the Mekong River Basin, dating back to the 1950s with the establishment of the *Committee for Coordination of the Investigation of the Lower Mekong Basin* in 1957 (Secretariat of the Interim Committee for Investigations of the Lower Mekong Basin, 1989; Kittikhoun & Staubli, 2018). In January 1975, the four member states of the Commission agreed the *Joint Declaration of Principles for Utilisation of the Waters of the Lower Mekong Basin*. This reflected greater emphasis on a "Duty of Result" underpinned by a more regional view of sustainable development.

In 1991, the four countries started negotiating the future direction for cooperation around development of the Mekong River Basin, and a new agreement, the *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, was drafted. This document, signed by plenipotentiaries of the member states in April 1995 (henceforth

the 1995 Mekong Agreement), shifted the approach to sustainable development of the basin's water resources towards a more nationally -focused approach underpinned by commitments to cooperation. The 1995 Mekong Agreement, while adopting some of the provisions of the 1975 Joint Declaration, pivots towards a more contemporary perspective based on rapid national development, with commitments to reasonable and equitable use and the avoidance of substantial damage.

It was possible to finalize the 1995 Mekong Agreement in a relatively short time (from 1993 to 1995) as the details of the substantive commitments for notification and discussion of planned water uses, and for maintaining flows in the mainstream, were deferred to later negotiations. These substantive commitments were to be included the *"Rules for Water Utilization and Inter-Basin Diversion"*, which the MRC's Joint Committee would develop for approval by the MRC Council. These *"Rules"* are now the MRC's Five Procedures. The objectives and principles of cooperation outlined in Chapter III of the Agreement form the foundation for the Five MRC Procedures and the specific commitments for notification; prior consultation and agreement; maintenance of minimum monthly flows on the mainstream; protection of the ecological balance and water quality; and the sharing of data on the basin and water use. These Procedures also form the foundation of Mekong Water Diplomacy.

The separation of inter-state discussions into notification, prior consultation and agreement processes in Article 5 reflect the separation of proposed water uses based on geographical (mainstream or tributaries), and temporal (wet or dry seasons), and type of use (intra-, or inter-basin). On all tributaries, including the Tonle Sap in Cambodia, water uses that may have a significant impact on the flow regime of the mainstream are subject to notification without need for discussion. On the mainstream, dry season uses are subject to prior consultation, as are wet season inter-basin diversions. A specific agreement is only required when inter-basin diversions are planned in the dry season. These requirements therefore reflect the potential for increasing impacts on water availability in the Lower Mekong Basin, or to reverse flows into the Tonle Sap Great Lake. The greater these risks, the greater the need for engagements through the Commission. Furthermore, prior consultation is defined as

*“neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights”*. The emphasis in the 1995 Agreement consequently shifted more towards sovereign actions and commitments framed by a “Duty of Conduct” to cooperate and discuss where there may be impacts on the availability of water for the other member states.

This signifies an important shift away from the inter-state engagements envisaged in the 1975 Joint Declaration. The Joint Declaration separates major and minor tributaries, which would be agreed by all member states based on their impact “on the regimen of the mainstream.” Developments on major tributaries would be treated in the same way as those on the mainstream. In addition, the Joint Declaration does not separate wet and dry seasons, and requires all water uses on the mainstream and major tributaries to be subject to a “*Project Agreement*.” This was envisaged as an agreement among all the basin states outlining their rights and obligations, as well as the sharing of costs and benefits from any proposed use. The Joint Declaration recognizes inter-basin diversions but does not treat these differently. The 1995 Mekong Agreement therefore reflects a shift away from requiring agreement on large projects, towards one that places greater emphasis on water diplomacy and compromises by all the parties. In his commentaries on negotiation of the Agreement, G.E. Radosevich (1996) notes that the member states deliberately did not want to involve the MRC in all national development decisions.

### **The 5 MRC Procedures**

In Article 5 of the 1995 Mekong Agreement, the member states agree to the reasonable and equitable use of the waters of the Mekong River system pursuant to all relevant factors and circumstances, the “*Rules for Water Utilization and Inter-Basin Diversion*” and the notification, prior consultation and agreement processes. The content for these “*Rules*” is outlined in Article 26. Work on developing these began in 2000 with the establishment of the Water Utilization Program (WUP). However, it was soon agreed that “*Rules*” was too prescriptive and ultimately, the Five MRC Procedures were developed:

- Procedures for Data and Information Exchange and Sharing (PDIES);
- Procedures for Water Use Monitoring (PWUM);
- Procedures for Notification, Prior Consultation and Agreement (PNPCA);
- Procedures for the Maintenance of Flows on the Mainstream (PMFM); and
- Procedures for Water Quality (PWQ).

These Procedures are supported by Technical Guidelines which were approved by the Joint Committee. The development of the PDIES, PWUM and PNPCA (or the “Procedural Rules”) was quite rapid, and by 2003 these Procedures had been signed off by Council, and by 2006 their Technical Guidelines had been finalized. The “Physical Rules”, the PMFM and PWQ, took more time to finalize, and the Technical Guidelines for these were only agreed on a working basis in 2017, 23 years after the signing of the Agreement. These Procedures are currently being implemented primarily as monitoring tools and are considered as still in development.

Despite the long process of development, the member states must still agree on key requirements of the 1995 Mekong Agreement, that is, the timeframes for the wet and dry seasons, criteria for determining surplus water, actions that may be needed to maintain flows above the specified thresholds, actions that may be required to maintain water quality, and mechanisms for monitoring and reporting water use.

As such, while the Procedures and Technical Guidelines are now all being implemented in some form, they do not aim to achieve a Duty of Result, but rather a Duty of Conduct. Nonetheless, the MRC is working on mechanisms to link these in an Integrated Water Resources Management (IWRM) context and on a reporting framework which will directly support discussions in the Joint Committee. This will in turn place the MRC in a better position to influence water resources developments in the basin, by calling on the member states to implement certain measures or take certain actions. This has already happened with the last two prior consultation processes.

## THE CURRENT CHALLENGES

Farnosi F., *et al* (2018) note that research suggests that degrees of conflict and cooperation coexist in most water-related events. This has certainly been the case in the MRC. While the member states “agreed to disagree” in the prior-consultation cases of the Xayaburi and Don Sahong dams in Lao PDR and have not clearly endorsed the country’s Pak Beng and Pak Lay dam projects as a “reasonable and equitable” use of the Mekong River System, it would be unfair to suggest that the MRC has not made significant progress over the last 24 years (Kittikhoun & Staubli, 2018). However, several key challenges to the implementation of the 1995 Agreement and Procedures remain. Perhaps the most critical of these has resulted from growing awareness of the impact that development of the basin will have on the region’s ecology, fisheries and sediment transport processes. The 1995 Mekong Agreement retains a focus on water quantity and quality, and mutually beneficial projects. However, while concerns over water diversions and mainstream flows remain, these are to some extent being offset by the higher dry season flows due to the operations of hydropower projects in China. Now much greater attention is being paid to the disruption of fish migration and the associated loss of fisheries potential, the trapping of sediment behind mainstream and tributary hydropower dams, and the disruption of natural flow regimes and consequent impacts on the ecological functioning of the river.

Unfortunately, while the PMFM provides some shield against reduced mainstream flows, there are no equivalent procedures to maintain transboundary fisheries and sediment transport. As a result, tributary developments that may have significant transboundary impacts escape the rigor applied to mainstream projects. Moreover, despite efforts to reduce the potential for adverse impacts emerging from the prior consultation processes, it is likely that some transboundary harm will still occur. Neither the Council Study (Mekong River Commission, 2017) nor the prior consultation processes ventured opinions as to whether these residual impacts would rise to the level of substantial damage as contemplated in Articles 7 and 8, or whether any proposed use would be “reasonable and equitable.”

Nonetheless, in both the Pak Lay and Pak Beng cases, stakeholders in the notified states requested compensation due to potential loss of fisheries production. In the absence of any clear compensation mechanism, the notified states would be hesitant to suggest that any proposed use would be “reasonable and equitable.” Similarly, project developers would be hesitant to propose cross-border compensation mechanisms for fear they may be made liable for impacts that are not of their making. Indeed, many of the adverse impacts on shared watercourses, such as those from flow-regime changes due to hydropower projects in China, pollution, intensive fishing pressure and sand mining are not subject to prior consultation or even notification.

The 1995 Mekong Agreement and the Five Procedures are therefore not necessarily the ideal tools to guide the “reasonable and equitable” use of the Mekong River System, while measures for fair, cross-border compensation still need to be investigated. However, despite these challenges the political will to maintain and increase efforts to cooperate for the sustainable development of the basin remains. Leaders of the member states have consequently re-confirmed their commitment to the 1995 Mekong Agreement and the “Mekong Spirit” in their previous three summits, held in Hua Hin, Thailand, in 2010; Ho Chi Minh City in Vietnam in 2014; and Siem Reap in Cambodia in 2018.

## CONCLUSIONS

Since the conclusion of the 1975 Joint Declaration, and in the years since the signing of the 1995 Mekong Agreement, the MRC member states have changed their approaches to cooperation from a “Duty of Result” to a “Duty of Conduct.” The specific outcomes implicit in the need to agree all large projects, as well as the shift from “Rules” to “Procedures” reflect the Commission’s role as an enabler rather than a regulator of regional approaches to sustainable development. The implementation of the Procedures now provides the basis for discussion in the Joint Committee, which in turn may be reflected in requests to the member states to make every effort to implement certain measures or take certain actions. This also reflects a greater need for water diplomacy within the MRC.

Many would argue that this has weakened the Commission and made it largely irrelevant (Dore & Lazarus, 2009). The non-government organization Save the Mekong even took the rather drastic step of boycotting the last prior consultation process. However, this perception is more a result of a limited understanding of the practicalities of implementing the 1995 Mekong Agreement, the functions conferred on the Commission by the member states, and the provisions of the Agreement itself. Perhaps more importantly the current approaches to implementing the Agreement are much better aligned with the realpolitik of the member states, and indeed progress towards achieving the SDGs across the region.

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