



# **Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement**

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January 2013**

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## Executive Summary

In November 2012, the Lao government held the official groundbreaking ceremony for the controversial Xayaburi Hydropower Project on the Lower Mekong River. It is the first of nine dams that Laos intends to build on the river's mainstream. For over two years, the proposed Mekong dams have sharply divided the region's governments and become one of the world's highest profile water disputes. Together, the dams would provide electricity and revenue, but would threaten the food security of millions of people and the world's second most biodiverse river. Because the Mekong is a transboundary river, the dams' impacts will cross borders into Thailand, Cambodia, and Vietnam.

In 1995, the four governments of Cambodia, Laos, Thailand, and Vietnam signed the Mekong Agreement, a treaty intended to promote shared use and management of the river basin. The Xayaburi Dam was the first significant test of the Mekong Agreement. Instead of cooperating with neighboring governments, however, Laos began implementing the project while Cambodia and Vietnam voiced concerns about the project's transboundary impacts. Thailand remained silent through much of the dispute, but quietly financed the project and agreed to purchase its electricity. By November 2012, Laos' and Thailand's implementation of the project had advanced so far that Cambodia and Vietnam had little leverage left to raise concerns. Now a dangerous precedent has been set that could undermine future cooperation. In 2013, project implementation might begin for two other Mekong mainstream dams—the Don Sahong and the Pak Beng Dams. Unless reforms are made quickly, disagreements over the Mekong dams could escalate into a conflict with serious economic and political implications.

Laos insists that the Xayaburi Dam has fully complied with the Mekong Agreement. In this report, we challenge Laos' claim. We examine the language of the Mekong Agreement in detail. We also examine: (i) the historical record of the negotiations that describes what the parties intended when they drafted the Agreement; and (ii) international law that describes the meaning of the words that were carefully placed in the Agreement. In doing so, we find that Laos has misinterpreted the Mekong Agreement and failed to comply with several key provisions (see **Table 1** for a summary).

To strengthen future regional cooperation, we recommend that the four governments:

- **Review and clarify the Mekong Agreement's obligations** before any other projects are brought forward for consideration.
- **Delay implementation of further Mekong dams** to allow adequate time for the Mekong River Commission (MRC) to study the proposed dams' cumulative impacts.
- **Delay implementation of the Xayaburi Dam**, so that the transboundary impacts can be studied and baseline data collected before the Mekong River is irreversibly altered.
- **Monitor the Xayaburi Dam's implementation through an independent and transparent process**, so that the four governments do not rely solely on the claims of Laos' engineer, Finnish company Pöyry, whose studies are tainted by a vested interest in the project.

**Table 1: Summary of Laos’ Non-Compliance with Mekong Agreement**

What does the treaty require?	Did the Xayaburi Dam comply?
<p><b>Laos is required to seek agreement with its neighbors before beginning the project.</b> To balance the rights of upstream and downstream countries, the Mekong Agreement requires all four governments to make a “good faith” effort to reach agreement on whether a project goes forward.</p> <p><i>Sources of law: Mekong Agreement art. 5; Vienna Convention on the Law of Treaties; international water law as stated by the UN International Law Commission.</i></p>	<p><i>Did not comply.</i> Instead of trying to reach an agreement, Laos claimed that it only must consider comments of the other governments. Laos made no efforts to compromise on its position or to reach a mutually agreeable solution.</p>
<p><b>Laos must provide other governments with opportunity to evaluate the project’s impacts.</b> The MRC’s “prior consultation” is the process where the four governments try to reach an agreement. The primary purpose of the prior consultation is to provide the governments with an opportunity to evaluate the project’s transboundary impacts.</p> <p><i>Sources of law: Mekong Agreement, chp. II “prior consultation”; PNPCA procedures 5.2.1; international water law as stated by the UN International Law Commission.</i></p>	<p><i>Did not comply.</i> Laos did not provide neighboring governments with an opportunity to evaluate the project’s transboundary impacts. Laos did not assess the transboundary impacts before starting the prior consultation in September 2010.</p>
<p><b>Laos is not permitted to implement the project while consultations are still underway.</b> International law and the Mekong Agreement prohibit the governments from implementing a project while the governments are still discussing the project—this is part of the obligation to negotiate “in good faith.”</p> <p><i>Sources of law: PNPCA procedures 5.4.3; international water law as stated by the UN International Law Commission.</i></p>	<p><i>Did not comply.</i> Laos and developer Ch. Karnchang began implementing the Xayaburi Dam in late 2010 before the MRC governments even met to discuss the project. Later, Laos incorrectly claimed that “preparatory work” was allowed under the Mekong Agreement.</p>
<p><b>Laos is required to study the project’s transboundary impacts before consultation can take place.</b> Under international law, governments are required to take “all appropriate measures” to prevent significant harm to other countries. This includes setting aside enough time to assess the project’s transboundary impacts.</p>	<p><i>Did not comply.</i> After failing to assess the transboundary impacts itself, Laos refused to delay project implementation after Cambodia and Vietnam requested these studies during the prior consultation. Instead, Laos claimed that untested technologies proposed by consulting company Pöyry were sufficient to mitigate any harm.</p>

<p><i>Sources of law: Mekong Agreement art. 3; international law as stated by the International Court of Justice and the UN International Law Commission.</i></p>	
<p><b>Cambodia, Vietnam, and Thailand have a right to extend the prior consultation’s timeframe.</b> The default timeframe for the prior consultation is six months, but under international law the downstream governments have a right to extend it.</p> <p><i>Sources of law: PNPCA procedures 5.5; international water law as stated by the UN International Law Commission.</i></p>	<p><b>Did not comply.</b> Laos claims that the prior consultation ended automatically after six months. During this initial six month period, Laos failed to provide the information that other governments needed to evaluate the project’s impacts. This undermined the primary purpose of the prior consultation. Laos also began project implementation during this initial period.</p>
<p><b>Cambodia, Thailand, and Vietnam have a right to seek compensation for any harm caused.</b> Laos has an obligation under international law to stop the project immediately if it causes harm to neighboring countries. Downstream governments Cambodia, Thailand, and Vietnam can seek compensation for any harm that the dam causes.</p> <p><i>Sources of law: Mekong Agreement art. 7; international law as stated by the UN International Law Commission.</i></p>	<p><b>Did not comply.</b> Cambodia, Thailand, and Vietnam will have difficulty seeking compensation, because there is insufficient baseline data at this time to measure how the Xayaburi Dam will change the Mekong River. All three countries now face the difficult task of closely monitoring the impacts caused by the dam.</p>

## 1.0 Introduction

On November 7, 2012, the Lao government officially began construction on the controversial Xayaburi Hydropower Project, the first mainstream dam proposed for the Lower Mekong River.<sup>2</sup> The process has not gone smoothly. Construction activities began almost two years before the official announcement. The Vietnamese and Cambodian governments called for a delay in construction because concerns over the dam's transboundary impacts remained unresolved. The Lao government never conducted a comprehensive analysis of the transboundary impacts, instead insisting that the dam was engineered to be environmentally sustainable. The Mekong River Commission's Secretariat disagreed with many of Laos' claims, but its advice went unheeded. Although the dam is going forward, its risks remain unknown.

The Xayaburi Dam was the first significant test for the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin ("Mekong Agreement")<sup>3</sup> between Cambodia, Laos, Thailand and Vietnam. The Lao government insists that the Xayaburi project complied with the 1995 Mekong Agreement. Few others have questioned this claim.

In this report, we examine the requirements of the Mekong Agreement in closer detail. On its surface, the text of the Agreement is often ambiguous. Much of the debate over the obligations of the Mekong Agreement revolves around the "Procedures for Notification, Prior Consultation and Agreement" (PNPCA), which outlines some of the rules that the governments are expected to follow when consulting with one another.<sup>4</sup> This language, too, is ambiguous if read in isolation from the rest of the Agreement.

In an effort to seek greater clarity, we examine the requirements of the Mekong Agreement in its entirety. We also examine: (i) the historical record of the negotiations that describes what the parties intended when they drafted the Agreement;<sup>5</sup> and (ii) international law that describes the meaning of the words that were carefully placed in the Agreement.<sup>6</sup> In doing so, a clearer picture of the Mekong Agreement emerges. We find that Laos has misinterpreted the Mekong Agreement and failed to comply with several of its key requirements.

In this report, we focus on four legal questions that emerged during the Xayaburi controversy:

- **Does it matter if Laos violates the 1995 Mekong Agreement?** (Section 2.0)
- **Do all four governments have to agree before a project goes forward?** (Section 3.0)
- **When may the project begin?** (Section 4.0)
- **What happens if the dam is built and causes harm to neighboring countries?** (Section 5.0)

## **2.0 Does it matter if Laos violates the Mekong Agreement?**

The primary purpose of the 1995 Mekong Agreement is to promote cooperation in the development of the Mekong River Basin in a way that is environmentally sustainable.<sup>7</sup> The Agreement does not punish any of the governments for failing to cooperate. So does it even matter whether Laos has followed or violated the Mekong Agreement?

### **2.1 The Mekong Agreement is a legally binding treaty.**

The governments of Cambodia, Laos, Thailand, and Vietnam designed the Mekong Agreement as a legally binding treaty that is consistent with international law.<sup>8</sup> International law sets out the rules for how the governments are expected to treat one another, including the duties to cooperate, negotiate in good faith, and respect the rights of both upstream and downstream governments.<sup>9</sup> By following these rules, the four governments committed to develop the Mekong River Basin in a way that is mutually acceptable.

### **2.2 The treaty has no enforcement mechanism, so disputes are resolved through diplomatic channels.**

The treaty is not enforceable in the traditional sense.<sup>10</sup> The treaty created the Mekong River Commission (MRC) to promote cooperation, but the MRC does not have the authority to police the governments or issue penalties when one government fails to comply. If the governments cannot resolve a dispute under the MRC, they must resort to diplomatic channels or mediation by a third party.<sup>11</sup>

### **2.3 Although the treaty is not enforceable, the governments have strong incentives to comply.**

Although the Mekong Agreement is not enforceable, the four governments have strong incentives to comply with it. Like other treaties, this one is designed to prevent economic losses, environmental damage, and conflict. Without the Agreement, the decision on whether to build the Mekong mainstream dams could become more costly and contentious for governments, companies, and affected communities.

The MRC's 2010 Strategic Environmental Assessment quantified some of the economic losses that could result if the Mekong mainstream dams are built, including the nine proposed dams in Laos and two proposed in Cambodia. The study estimated that losses in fisheries would amount to USD 476 million per year, in addition to impacts on coastal and delta fisheries in Vietnam which have not been measured. Fifty-four percent of all riverbank gardens along the Mekong River would be lost. Losses in agricultural productivity would exceed USD 49.1 million per year. Tens of millions of people would be affected. Mitigation measures would not be able to replace these losses.<sup>12</sup>

Similarly, the risk of conflict exists if one government proceeds unilaterally against the wishes of neighboring governments. In September 2012, for example, the President of Vietnam said: "Tensions over water resources are threatening economic growth in many countries and

presenting a source of conflict especially given the efforts of all countries to step up economic development. Dam construction and stream adjustment by some countries in upstream rivers represents a concern for many countries and an implicit factor affecting relations between relevant countries.”<sup>13</sup> In a region where the countries’ economies are increasingly interlinked, political conflict could harm economic development and deter investment.

#### **2.4 Laos considers the Mekong Agreement to be legally binding.**

Throughout the Xayaburi Dam dispute, Laos has not questioned the binding authority of the Mekong Agreement. Instead, Laos has argued that the project complies fully with the treaty’s requirements.<sup>14</sup> The governments agree that the Mekong Agreement is binding, but do not agree on how to interpret the treaty’s obligations.

If Cambodia, Thailand, or Vietnam disagrees with Laos’ interpretation, it cannot force Laos to change its position. Yet each government still has several options: (1) formerly declare that it does not agree with Laos’ interpretation, and insist that time is set aside to resolve the dispute through diplomacy or third party mediation; (2) claim compensation for any harm caused. Under international law, Laos is expected to cooperate with these demands, in order to prevent an escalation of the dispute.

### **3.0 Do all four governments have to agree before a project goes forward?**

To what extent does the Mekong Agreement require the four governments to cooperate? This section examines the process that is used to balance the rights of all four governments when negotiating a proposed Mekong dam.

#### **3.1 The purpose of the Mekong Agreement is to balance the rights of all four governments, which requires cooperation and compromise.**

A basic principle of international law is that governments are expected to share a transboundary river in a fair and equitable way.<sup>15</sup> On the one hand, it is unfair if upstream governments build dams or use the river in a way that harms countries downstream.<sup>16</sup> On the other hand, it is unfair for downstream governments to prevent upstream governments from using the river that passes through their territory. For this reason, the principle of “equitable and reasonable utilization” lies at the very core of international water law.<sup>17</sup> This principle recognizes the need to balance the governments’ rights and duties through a fair process.

The Mekong Agreement explicitly recognizes that the “equitable and reasonable utilization” principle is the basis for cooperation between the four governments.<sup>18</sup> While a downstream government cannot veto a use of the river, for example, it can demand a fair process to ensure that its rights under international law are respected. Similarly, an upstream government can use the river, but only after taking all necessary steps to respect the rights of downstream governments. No government has absolute rights to use the Mekong River. Instead, they must cooperate to reach a solution.<sup>19</sup>



### **3.2 The Mekong Agreement requires the governments to make a good faith effort to reach agreement.**

The tension between the rights of upstream and downstream governments requires very careful language to resolve. It is unfair to require the parties to reach an agreement before a project goes forward, because this would essentially allow a downstream government to veto an upstream government's project. Yet if there is no requirement to agree, then an upstream government can proceed with a project against the wishes of downstream governments. The Mekong Agreement recognizes this tension: "Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights."<sup>20</sup>

International law resolves this solution by requiring governments to cooperate with one another "in good faith" with the goal of reaching an agreement.<sup>21</sup> For this reason, the Mekong Agreement establishes a prior consultation process that "aims at arriving at an agreement."<sup>22</sup> A government complies with the Mekong Agreement, so long as it has cooperated with the other governments in good faith. Under international law, a government implements a treaty in good faith when it acts reasonably, makes a genuine effort to reach agreement, and expresses willingness to compromise.<sup>23</sup> The underlying assumption is that if a fair process is followed, the outcome will also be fair. A government violates the treaty if it does not act in good faith.<sup>24</sup>

### **3.3 Did the Xayaburi Dam comply?**

In the Xayaburi Dam dispute, Laos never made a good faith effort to reach agreement with neighboring governments.

#### **3.3.1 Laos argued that it was only required to consider other governments' comments, not to try to reach an agreement.**

Laos claims that it met all of its obligations under the Mekong Agreement by accepting comments from neighboring governments.<sup>25</sup> For example, Laos' advisor—Finnish consulting company Pöyry—wrote in an August 2011 report that: "The prior consultation process does not give right to any member countries to suspend the project. As its name suggests, the prior consultation process gives right to member countries to comment on the project. In the case of the Xayaburi HPP, the decision whether or not to proceed with the project rests solely with the Government of Lao...under a condition that the Government of Lao PDR must take comments from other member countries into consideration if it decides to proceed with the project."<sup>26</sup>

Laos also claimed that it has cooperated with neighboring governments and even made compromises by hiring consulting companies Pöyry and Compagnie Nationale du Rhône (CNR) to review the project's design. As evidence of this, Laos claims that it invested an additional \$100 million to improve the design of the project.<sup>27</sup> On 26 November 2012, for example, a Lao official told the *Vientiane Times*: "Laos could have begun construction of the dam immediately after completing the consultation process. But we did not because our neighbors were still concerned about the trans-boundary impacts. We then reviewed all of these concerns to maintain

Mekong spirit and cooperation with our neighboring nations.”<sup>28</sup> As described below, these claims are misleading.

3.3.2 The primary purpose of the MRC’s “prior consultation” is to provide neighboring governments with an opportunity to evaluate the project’s transboundary impacts. Laos never provided this opportunity.

The Mekong Agreement defines “prior consultation” as a process that “would allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement.”<sup>29</sup> At the beginning of the prior consultation, Laos is expected to provide information to neighboring governments about how the project will impact them. This is required under international law,<sup>30</sup> the Mekong Agreement,<sup>31</sup> and the PNPCA procedures.<sup>32</sup>

Laos never provided the basic information that neighboring governments needed to understand how the Xayaburi project would affect them.<sup>33</sup> In September 2010, Laos initiated the MRC’s prior consultation process for the Xayaburi Dam. Although Laos provided neighboring governments with the project’s environmental impact assessment, this study only addressed impacts ten kilometers downstream from the dam site.<sup>34</sup> Laos insisted there would be no negative impacts on neighboring countries, but provided no evidence to justify this claim.

In April 2011, the Cambodian and Vietnamese governments requested more information about the Xayaburi Dam’s transboundary impacts (see **Table 2**).<sup>35</sup> The Lao government refused, instead hiring Pöyry to review the project. Incentivized by the promise of further work as an engineer for the project, Pöyry concluded that further impact studies were not a prerequisite for beginning construction.<sup>36</sup> Numerous scientists in the region disagreed with Pöyry’s “build now, study later” approach, including independent experts at the Mekong River Commission’s Secretariat.<sup>37</sup>

<b>Table 2: Cambodia’s and Vietnam’s concerns with the Xayaburi Dam<sup>38</sup></b>		
<b>Cambodia’s and Vietnam’s Requests (April 2011)</b>	<b>Laos’ Response (as of January 2013)</b>	<b>Thailand’s Response (as of January 2013)</b>
<b>More studies are needed before further implementation of the Xayaburi project.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> Laos proposed to conduct some studies while construction is already underway, but has not addressed the impacts that construction itself will cause nor has it assessed potential transboundary impacts. These studies were not conducted by the time the project was officially approved in November 2012.	<b>Not addressed.</b> Thailand continued to implement the project, signing agreements to finance the project and purchase its electricity. It made no commitment to conduct more studies. A lawsuit was filed in Thai Administrative Court by potentially affected Thai villagers in August 2012, requesting further impact assessments and consultations consistent with the

		requirements of the Thai constitution.
<b>Study the project's transboundary impacts.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> In July 2012, Laos hosted a delegation of foreign governments to the Xayaburi Dam site and informed them that it would not conduct a transboundary impact assessment. Laos stated that all transboundary impacts were already addressed through the reports of Pöyry and CNR, although both of these were desk studies rather than impact assessments. The full extent of the project's transboundary impacts remains unknown.	<b>Not addressed.</b> Thailand has not addressed this issue, although Thai communities are likely to be impacted by the project. This issue is addressed in the pending Thai Administrative Court lawsuit.
<b>Study the cumulative impacts of the eleven proposed Mekong mainstream dams.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> In December 2011, the four governments agreed to conduct a joint impact study on Mekong hydropower development. Laos, however, has expressly stated that it does not plan to stop Xayaburi Dam construction while this study is underway. It is unclear if Laos will delay plans for other Mekong dams while the study is underway.	<b>Not addressed.</b> Thailand is participating with the other MRC governments in designing the joint study. However, the Thai government already approved a Power Purchase Agreement to buy 95% of the project's electricity as well as a loan by state-owned Krung Thai Bank. In November 2012, Thailand explicitly announced its support for the project.
<b>Develop measures to mitigate the transboundary and cumulative impacts, undertaken with participation of downstream countries.</b> (Cambodia)	<b>Not addressed.</b> Laos' consultants Pöyry and CNR proposed changes to the design of the project to mitigate impacts, although they have done so without first studying the actual impacts that will need to be mitigated. The proposed technologies for fish passages have not been proven for the Mekong River or any other large tropical river. As of December 2012, the downstream governments had not seen the final design of the proposed fish passages and other proposed mitigation measures.	<b>Has remained silent.</b>

<b>Implement the recommendations of the MRC's March 2011 technical review of the project.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> Laos' consultant Pöyry concluded that these recommendations could be addressed during the construction phase, although the MRC Secretariat explicitly recommended delaying construction while the studies were carried out.	<b>Has remained silent.</b>
<b>Conduct further study of the dam's impacts on hydrology, fisheries, sediment, water quality, and dam safety.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> Laos' consultants Pöyry and CNR proposed mitigation measures without conducting a baseline study of the dam's impacts. Laos then argued that these studies were not necessary, because the dam would not have impacts.	<b>Has remained silent.</b>
<b>More time is needed under the MRC prior consultation process to gather sufficient evidence to evaluate the project.</b> (Cambodia, Vietnam)	<b>Not addressed.</b> Laos maintains its position that the MRC prior consultation process concluded automatically after six months. This issue was never resolved.	<b>Has remained silent.</b>
<b>Stakeholders need information in a more timely manner in order for effective consultations to take place.</b> (Cambodia)	<b>Not addressed.</b> No further consultations have been carried out.	<b>Not addressed.</b> Thailand has not organized further consultations, despite requests by affected Thai communities.
<b>Develop a benefits sharing mechanism for affected downstream countries.</b> (Cambodia)	<b>Not addressed.</b> No such mechanism has been developed for the Xayaburi project. The MRC Secretariat has conducted preliminary research on this topic.	<b>Has remained silent.</b>
<b>Defer all decisions on Mekong hydropower projects by ten years.</b> (Vietnam)	<b>Not addressed.</b> This remains unclear. In 2013, project implementation is likely to begin on at least two other Mekong mainstream dams in Laos: Don Sahong and Pak Beng.	<b>Has remained silent.</b>

3.3.3 International law forbids governments from implementing a project while consultations are still underway. Laos began implementing the project before the MRC governments even met to discuss it.

The MRC's PNPCA procedures prohibit a government from implementing a project while the prior consultation is underway: "The notifying State(s) shall not implement the proposed use without providing the opportunity of the other member States to discuss and evaluate the proposed use."<sup>39</sup> (As discussed above, the phrase "evaluate the proposed use" refers to the study of the project's impacts on neighboring countries.)

Similarly, international law also prohibits project implementation while the prior consultation is underway. The UN International Law Commission, on whose language the Mekong Agreement is based, says that the notifying State "shall not implement or permit the implementation of the planned measures without the consent of the notified States."<sup>40</sup> The Commission also comments that "it perhaps goes without saying that this...obligation is a necessary element of the procedures..." because it allows the governments to cooperate in an equitable and reasonable manner.<sup>41</sup>

With the Xayaburi Dam, however, developer Ch. Karnchang reported that it began to implement the project in late 2010,<sup>42</sup> less than four months after Laos initiated the MRC's prior consultation process and before the MRC governments met to discuss the project.

From the start of project implementation in late 2010, Laos did not delay the Xayaburi Dam at any point, despite requests from neighboring governments. Cambodia and Vietnam first raised concerns about the project's transboundary impacts at an MRC meeting in April 2011 and requested a delay. The governments agreed to defer the decision on the prior consultation for a Ministerial meeting scheduled for six months later.<sup>43</sup>

In June 2011, Laos told Thai company Ch. Karnchang, which is building the dam, that Laos' obligations under the Mekong Agreement had been fulfilled, despite the results of the April 2011 meeting.<sup>44</sup> In August 2011, Pöyry inaccurately reported that the prior consultation process had been ended.<sup>45</sup>

This led to the continued implementation of the project. When Laos was later confronted with evidence that project implementation continued,<sup>46</sup> it claimed that it was only building access roads that provided "a significant benefit to the residents of the area and that is in line with the local authorities' policy to improve the livelihood of their people."<sup>47</sup> Other earthworks continued at the dam site as well. In October 2011, Laos informed the Thai energy ministry that the process had ended, and the Thai government signed the project's power purchase agreement without Cambodia's or Vietnam's knowledge.

In December 2011, ministers from the four governments met at an MRC Council meeting and agreed to conduct further studies on the impacts of the proposed Mekong dams.<sup>48</sup> Cambodia and Vietnam left the meeting with the impression that the project was suspended pending further studies.<sup>49</sup> In January 2012, implementation of the project continued on schedule with the

resettlement of the first local village, followed a few months later by digging in the riverbed and construction of concrete structures at the location of the future dam.

After being confronted by further evidence of continuing construction activity in July 2012, the Lao Foreign Minister informed the U.S. Secretary of State that the project was suspended. Days later, a delegation of foreign governments visited the dam site where they learned that the project continued on schedule.<sup>50</sup> Laos insisted that its activities were appropriate because they were merely “preparatory work” and not “construction.”<sup>51</sup> In fact, international law makes no such distinction and prohibits all forms of project implementation.

Meanwhile, the Xayaburi developers informed investors that the project was on schedule.<sup>52</sup> Over the coming months, Laos published several articles in the *Vientiane Times* claiming to have redesigned the dam to address the concerns of neighboring countries. Finally, Laos announced the official start of construction in November 2012.

3.3.4 Under international law, governments are required to take “all appropriate measures” to prevent causing significant harm to other countries. Laos refused to take the measures that all other stakeholders considered to be appropriate, especially transboundary impact studies.

International law requires governments to take “all appropriate measures” to prevent causing significant harm to other countries.<sup>53</sup> In particular, international law requires that a transboundary impact assessment be conducted in situations where the project’s impacts are expected to cross borders.<sup>54</sup> Ideally, this would happen during project design as part of the initial environmental impact assessment.

Similarly, the Mekong Agreement requires the parties 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.”<sup>55</sup>

As with most large dams, the impacts of the Xayaburi Dam are expected to extend hundreds of kilometers downstream, especially because of the large numbers of migratory fish species in the Mekong River. In this case, a transboundary impact assessment was a reasonable request. Without informing other governments, Laos hired Pöyry in May 2011 to review the Xayaburi project’s compliance with the MRC’s environmental and safety requirements. Pöyry faced several conflicts of interest in providing this compliance review. At the time, Pöyry was in business with Xayaburi developer Ch. Karnchang on another project in Laos, the Nam Ngum 2 Dam.<sup>56</sup> This business relationship prevented an independent review from taking place. Pöyry also faced the prospect of taking on more work as an engineer for the Xayaburi project if its review was acceptable to Laos. (Pöyry was indeed later hired for this role).<sup>57</sup> Unsurprisingly Pöyry’s compliance review found that the project was “principally in compliance” with the MRC standards. The report omitted mention of several standards where there was clear non-compliance.<sup>58</sup> Pöyry also recommended that project implementation continue, and that any additional baseline studies could be conducted after construction was underway.

Soon after, the Lao government began to portray Pöyry's research as a substitute for the transboundary impact assessment requested by neighboring countries. Over the next year, Pöyry's research became Laos' primary justification for arguing that the project would cause no harm on neighboring countries.

Leading scientific experts in the Mekong region, as well as the MRC's Secretariat, explicitly disagreed with Pöyry's findings. When the MRC Secretariat conducted an independent review of the Pöyry report in November 2011, it concluded that "even if the recommendations in the Pöyry Report are followed, the Xayaburi Project would be considered only partly compliant [with MRC standards] in the area of fish bypass facilities and fisheries ecology as well as in terms of dam safety."<sup>59</sup>

The MRC Secretariat recommended that the project developers to delay construction while further studies were carried out: "Conducting specific investigations before (rather than in parallel with) dam construction will reduce risks, including those of transboundary and cumulative impacts, and avoid 'regret measures', actions that may ultimately be inappropriate and lead to expensive and/or irreversible unintended negative impacts."<sup>60</sup> Laos ignored the MRC Secretariat's findings, just as it had ignored many of the Secretariat's recommendations in its March 2011 review of the project.

## **4.0 When may the project begin?**

The intention of the Mekong Agreement is to allow projects to proceed after a mutually acceptable solution has been identified. Ideally, agreement is reached during the prior consultation process. If the governments decide that a project can move forward, it begins after consultations end.

### **4.1 The default timeframe for consultations is six months.**

To avoid a situation where the prior consultation is left open indefinitely, the MRC's PNPCA procedures suggest a specific timeframe: "The timeframe for Prior Consultation shall be six months from the date of receiving documents on Prior Consultation. If necessary, an extended period shall be permitted by the decision of the MRC [Joint Committee]."<sup>61</sup> This language originates directly from the UN International Law Commission's 1994 commentary on the international law of watercourses and is also part of the UN Watercourses Convention.<sup>62</sup>

### **4.2 If the six month timeframe is inadequate, downstream governments have a right to extend the consultations for a limited period of time.**

The prior consultation does not end automatically at the conclusion of the six month timeframe. Under the Mekong Agreement and international law, the governments' duty to cooperate towards reaching an agreement takes clear precedence over the six month timeframe. The UN International Law Commission, on whose language the Mekong Agreement is based, explains that six months is an arbitrary timeframe. As a result, the appropriate timeframe will vary on a case-by-case basis.<sup>63</sup>

If one of the downstream governments believes that the proposed project is not an “equitable and reasonable utilization” of the river, they are entitled under international law to extend the consultations.<sup>64</sup> Generally, the extension is expected to last another six months rather than remain open indefinitely. Throughout this time, the governments are expected to work together in good faith to evaluate the project’s impacts and find an equitable solution. The project may not be implemented during this time.<sup>65</sup>

If no agreement is reached after twelve months of good faith efforts, then the law becomes less clear. Generally, the governments should try to resolve their differences using the Mekong Agreement’s dispute mechanism.<sup>66</sup> Further extensions are also possible.

### **4.3 Did the Xayaburi Dam comply?**

The Xayaburi Dam was the first prior consultation ever attempted under the Mekong Agreement. The process began in October 2010. The initial six month period ended in April 2011. Laos argued that the prior consultation ended automatically after six months, and that project implementation could begin at this time.<sup>67</sup>

But during the first six months (as discussed above), Laos failed to provide neighboring governments with the basic information they needed to assess the Xayaburi project’s impacts on their territories. This undermined the primary purpose of the prior consultation. The governments were not able to discuss whether the Xayaburi project was an “equitable and reasonable utilization” of the Mekong River, because there was not enough information for Cambodia and Vietnam to determine if their rights would be infringed.

At the April 2011 MRC meeting, the Cambodian and Vietnamese governments expressed their concerns with the project’s transboundary impacts and recommended a delay while further studies were carried out. The four governments determined “that a decision on the prior consultation process for the proposed Xayaburi hydropower project be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project.”<sup>68</sup> Under such circumstances, international law requires Laos to delay project implementation for at least another six months to allow time for further discussions.<sup>69</sup> Instead, Laos allowed project implementation to advance rapidly during the second six-month period. During this time, Laos made no efforts even to notify Cambodia and Vietnam of its actions. This undermined cooperation under the Mekong Agreement.



## **5.0 What happens if the dam is built and causes harm to neighboring countries?**

If the Xayaburi Dam is built, Laos still has an obligation to avoid, minimize, and mitigate any harm that is caused to neighboring countries.<sup>70</sup> According to the Mekong Agreement, if the Xayaburi Dam causes significant harm to neighboring countries, Laos is required to immediately stop operating the dam.<sup>71</sup> If the harm cannot be prevented, the affected countries are entitled to seek reparations (including compensation) under international law.<sup>72</sup>

### **5.1 Cambodia, Thailand, and Vietnam will have difficulty seeking reparations for any harm caused by the Xayaburi Dam, because comprehensive baseline data was not collected.**

Under international law, injured countries usually have the burden of proving that another government caused them harm.<sup>73</sup> With the Xayaburi Dam, it will be difficult for Cambodia or Vietnam to prove that any harm occurred. Laos has not collected comprehensive baseline data about the river's ecology and people's livelihoods, nor has it provided the MRC Secretariat and neighboring governments with sufficient time to collect this data themselves. It remains unclear if or how scientists will be able to fully assess the Xayaburi Dam's impacts on the Mekong River. As a result, Cambodia and Vietnam will have great difficulty in seeking a remedy for any harm caused by the Xayaburi project.

Thailand is in a similar situation. Yet Thailand will have even more difficulty seeking reparations from Laos for any harm caused, because the Thai government also contributed to the project—by building, financing, and purchasing electricity from the dam.<sup>74</sup> Indeed, Thai communities living along the Mekong River filed a lawsuit in August 2012 arguing that the Thai government violated Thailand's constitution by failing to consider the project's impacts on its own citizens.<sup>75</sup>

### **5.2 Benefit sharing will also be difficult to negotiate, because comprehensive baseline data was not collected.**

In the absence of reparations, the best mitigating option may be for Cambodia and Vietnam to insist on benefit sharing mechanisms before the project is built. Under such mechanisms, all of the governments would share equitably in the revenue generated by the project. However, even the negotiation of these mechanisms depends first on collecting comprehensive baseline information, which has not been done.

Unless Cambodia and Vietnam continue to insist that transboundary impact studies are conducted, they will have difficulty seeking any form of reparations in the future for any harm that occurs. It would be prudent for both governments to begin closely monitoring the Xayaburi Dam's development and impacts using experts that are independent of the Lao government.

## 6.0 Conclusion and recommendations

The Xayaburi Dam is moving forward, although the impacts have not been fully studied. If harm occurs, it will be difficult for neighboring countries to seek reparations from Laos. According to Laos' interpretation of the Mekong Agreement, the Xayaburi Dam can proceed although no genuine efforts have been made to cooperate with neighboring governments. This poses a significant risk to neighboring countries and also sets a dangerous precedent that could undermine future cooperation in use of the Lower Mekong River.

There is now an urgent need to bring the Xayaburi Dam into compliance with the Mekong Agreement and international law. We recommend that the following steps are taken:

- **Delay implementation of the Xayaburi Dam** so that transboundary impact studies can be conducted and baseline data collected. If these studies are conducted in an independent and transparent way, and if they demonstrate that impacts can be prevented, this would most likely satisfy the requirements of the 1995 Mekong Agreement.
- **Monitor the Xayaburi Dam's implementation through an independent and transparent process.** Cambodia, Thailand, and Vietnam should not rely solely on the claims put forth by Laos or its engineer Pöyry, because both have a strong incentive to downplay the project's risks.
- **Delay implementation of further Mekong mainstream projects** to allow adequate time for cumulative impact studies to be carried out. The four governments committed to carry out these studies in December 2011, which are still underway. After the results of these studies are available, the MRC governments will be able to proceed in a more informed manner.
- **Commission an in-depth legal review of the Mekong Agreement,** so that the governments can reach a common understanding of their obligations. The four governments continue to express different views on what is required of the prior consultation process as well as other aspects of the Agreement. This includes, but is not limited to, a review of the MRC's "prior consultation" process.

Ideally, the governments will seek a mutually shared interpretation of the Agreement before further mainstream hydropower projects are implemented. If Laos' current interpretation of the agreement becomes standard practice, then the Mekong Agreement will lose much of its meaning. Future cooperation in the Mekong River Basin now depends on the willingness of governments to make urgent reforms and avoid the precedents set by the Xayaburi Dam.

## Annex A: Xayaburi Dam: Timeline of events

4 May 2007	Lao government signed memorandum of understanding with Thai company Ch. Karnchang to develop the Xayaburi Dam.
25-27 Sept. 2008	MRC convened international fisheries experts, who conclude that no fish passage technology exists that can handle Mekong River fish migration.
Oct. 2008	Thai company Team Consulting and Swiss company Colenco completed the Xayaburi Dam's feasibility study for the Ch. Karnchang.
May 2009	The International Centre for Environmental Management (ICEM) began work for the MRC on a Strategic Environmental Assessment of the proposed Mekong mainstream dams.
June 2009	French consultant Compagnie Nationale du Rhône (CNR) completed an optimization study for the Lao government that identifies locations for the nine proposed Mekong dams in Laos.
June 2010	Ch. Karnchang established the Xayaburi Power Company Limited as the project company and retains majority ownership.
June 2010	ICEM presented the findings of the Strategic Environmental Assessment to the MRC governments. The study recommended delaying Mekong mainstream dam development for 10 years to allow time for further studies.
Aug. 2010	Thai company Team Consulting completed the final draft of the Xayaburi Dam's environmental and social impact assessments. Later, experts in the region widely criticized the poor quality of the assessments. Among other concerns, the assessments examined impacts only 10 km downstream from the dam site.
20 Sept. 2010	Lao governments submitted the Xayaburi Dam to the MRC's PNPCA process. Documentation included the feasibility study, environmental and social impact assessments, but no assessment of the dam's potential transboundary impacts.
15 Oct. 2010	The MRC Secretariat published the final version of the Strategic Environmental Assessments of the proposed Mekong mainstream dams, which recommended a 10 year delay while further studies are carried out.
20-22 Oct. 2010	The MRC began its first ever PNPCA process when the MRC Secretariat provided the Cambodian, Thai, and Vietnamese governments with Laos' documentation about the proposed Xayaburi Dam.
22 Oct. 2010	The World Bank endorsed the recommendations of the Strategic Environmental Assessment and confirmed it will not invest in any Mekong mainstream dams.
Late 2010	Ch. Karnchang began implementing the Xayaburi Dam project, according to its 2010 Annual Report published the following year.
Jan. – Feb. 2011	The MRC governments of Cambodia, Thailand, and Vietnam held consultations and accepted public comments on the proposed Xayaburi Dam. The Lao government did not hold any consultations with Lao citizens.
14 Feb. 2011	The feasibility study was released to the public. Civil society organizations raised concerns that these documents should have been provided before, rather than after, the MRC consultation period.
24 Mar. 2011	The MRC Secretariat released its independent technical review of the Xayaburi Dam. The study identified significant gaps and concerns in Laos' documentation and recommended further collection of baseline data and transboundary impact studies.

March 2011	The Lao government and Xayaburi Power Company signed a concession agreement for the project.
17 Apr. 2011	A Bangkok Post investigation revealed that the Lao government and Ch. Karnchang had already begun implementing the project. The investigation revealed that access roads were constructed and villagers had received as little as USD \$15 in compensation and were being resettled.
19 Apr. 2011	At a special session of the MRC's Joint Committee in Vientiane, Laos, the four MRC governments "agreed that a decision on the prior consultation process...be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project." Cambodia and Vietnam requested a delay in the project, so that further transboundary studies could be carried out.
22 Apr. 2011	The Lao government claimed that the MRC prior consultation for the Xayaburi Dam automatically ended on this day.
23 Apr. 2011	The Prime Ministers of Cambodia and Vietnam met bilaterally and expressed concern over the Xayaburi Dam's transboundary impacts. They expressed a desire for the four governments and MRC Secretariat to conduct joint studies.
5 May 2011	The Lao government hired Finnish engineering company Pöyry to evaluate the Xayaburi Dam's compliance with MRC standards. At the time, Pöyry was also nominated to become the government's engineer for the project, as well as working jointly with Ch. Karnchang on another hydropower project in Laos, raising questions of conflict of interest.
7 May 2011	During a side meeting at an ASEAN Summit, the Lao Prime Minister told the Vietnamese Prime Minister that Laos would temporarily suspend the Xayaburi Dam. Both leaders agreed to conduct joint research on the Xayaburi Dam through the MRC framework.
8 May 2011	In response to revelations that Xayaburi Dam access roads were being built, Laos' Vice Minister of Energy and Mines told the Bangkok Post that "while there of course is a risk that the project will not proceed, the road upgrading was a significant benefit to the residents of the area and that is in line with the local authorities' policy to improve the livelihood of their people." In fact, local people were never provided permission to use the access roads freely.
8 June 2011	Despite the results of the April 2011 MRC meeting, Laos sent a letter to Ch. Karnchang reporting Pöyry's finding that the MRC prior consultation was finished and the project could move forward.
10 June 2011	The Lao government told Radio Free Asia that it planned to carry out a new environmental impact assessment of the Xayaburi Dam, which would focus on the impacts on fisheries. The Electricity Generating Authority of Thailand (EGAT) later confirmed Laos' intention to carry out a new assessment. Pöyry's compliance report was later mistaken for being an impact assessment, when in fact it collected no additional baseline data.
July 2011	A visit by International Rivers to the Xayaburi Dam site revealed that project implementation was well underway, with the construction of worker camps, access roads, and land clearing.
8 Aug. 2011	Pöyry completed its compliance report for the Lao government, in which it concluded that the project is "principally in compliance" with MRC standards despite identifying over 40 additional studies that were still needed. Pöyry recommended that any additional studies could be conducted after construction was already underway.

5 Oct. 2011	The Lao government sent a letter to the Thai Ministry of Energy, citing Pöyry's finding that the MRC prior consultation process had finished. The Thai government then proceeded to finance the project and purchase its electricity.
29 Oct. 2011	EGAT signed an agreement with the Xayaburi Power Company to purchase electricity from the Xayaburi Dam. The Cambodian and Vietnamese governments were not notified of this agreement.
15 Nov. 2011	The Thai cabinet approved a resolution allowing Thai government-owned Krung Thai Bank to co-finance the project.
15 Nov. 2011	The Cambodian government reviewed the Pöyry report and told the Cambodia Daily that the government "would not agree with this report—we strongly disagree with it."
23 Nov. 2011	The Vietnam Union of Science and Technology Association organized a meeting of Vietnam's leading Mekong experts in Ho Chi Minh City to review the Pöyry report. The participants concluded that the report was an unacceptable basis for decision-making on the Xayaburi Dam.
25 Nov. 2011	The MRC Secretariat completed a review of Pöyry's August 2011 report at the request of Vietnam. The review concluded that the Xayaburi Dam would not fully comply with MRC standards even if all of Pöyry's recommendations were followed. The review also recommended that construction be delayed to allow time for transboundary impact studies to take place.
8 Dec. 2011	The MRC Council, composed of the four governments' water and environment ministers, agreed to conduct "further study" on the sustainable development and management of the Mekong River, including impacts caused by mainstream hydropower development projects. Cambodia and later Vietnam indicated their expectation that the Xayaburi Dam would be delayed while these studies were carried out.
Jan. 2012	Project implementation continued, as the Lao government resettled the first village located at the Xayaburi Dam site.
Jan. 2012	The Lao government hired CNR, which had conducted Laos' 2009 optimization study on the Mekong dams, to conduct a peer review of Pöyry's widely criticized report.
20 Feb. 2012	At a Thailand Human Rights Commission hearing, four Thai commercial banks confirmed that they had financed the Xayaburi Dam. The banks indicated that they had relied solely on Pöyry's report as evidence that the project was environmentally and socially responsible.
Mar.– Apr. 2012	The Xayaburi Dam developers began to dig in the Mekong riverbed.
30 Mar. 2012	CNR completed its peer review of Pöyry's work. CNR focused on the issue of sediment flows and did not review Pöyry's work on fisheries. CNR itself acknowledged that the report was only a "desk study" and that further studies were needed.
30 Apr. 2012	Representatives of more than 130 civil society organizations launched a report demonstrating that electricity from the Xayaburi Dam was not needed in Thailand, and that growing electricity demand could be met by cheaper alternatives.
4 May 2012	The Cambodian representative to the MRC sent a letter to his Lao counterpart demanding that construction on the Xayaburi Dam halt.
14-18 June 2012	An investigation by International Rivers revealed that Xayaburi Dam implementation had advanced rapidly, with resettlement, digging in the

	riverbed, and building of structures on the riverbanks. Interviews with villagers revealed significant food security risks at the resettlement sites.
6 July 2012	The Cambodian and Vietnamese governments announce their intention to write a joint letter to the Lao government asking for the Xayaburi Dam to be suspended.
13 July 2012	The Lao Foreign Minister publicly announced that the Xayaburi Dam was suspended. The Lao Ministry of Energy and Mines quickly retracted this statement.
16-17 July 2012	At the request of MRC donors, the Lao Ministry of Energy and Mines invited around 70 delegates from foreign governments to visit the Xayaburi Dam site. The Lao government told that delegation that project implementation would continue and that transboundary impact studies were not necessary. Pöyry led the site visit and presented its plans to redesign the dam. The meeting coincided with a series of articles in the Lao government's Vientiane Times in support of the project.
17 July 2012	The Lao government announced in the Vientiane Times that the Xayaburi Dam had been redesigned to address cross-border concerns.
17 July 2012	The chairman of Ch. Karnchang told the Bangkok Post that the project continued on schedule and that the company had never received official word from the Lao government that the project was postponed.
19 July 2012	The Lao government's Vientiane Times claimed that the Xayaburi Power Company had spent \$100 million to redesign the dam to address the concerns of neighboring countries.
22 July 2012	An investigation by the Bangkok Post confirmed further activities at the dam site, including construction of a dike on the river.
22 July 2012	Laos' Vice Minister on Energy and Mines told the Bangkok Post that it had not allowed "any construction on the Mekong River that is permanent." The Vice Minister also said that decisions by the MRC Council "should not be a factor to base a judgment on whether the Xayaburi Dam should be built or not."
2 Aug. 2012	CNR issued a press release clarifying that the recommendations in its April 2012 were only conceptual and needed to be further developed. Laos ignored this statement and continued to portray CNR's and Pöyry's work as conclusive evidence that the dam would have no harmful impacts.
7 Aug. 2012	Thai villagers filed a lawsuit in Thailand's Administrative Court, arguing that the Thai government had violated their constitutional rights in agreeing to purchase the dam's electricity.
20 Aug. 2012	The Lao government reported in the Vientiane Times that the dam had been redesigned and neighboring governments' concerns had been fully addressed.
Aug. 2012	Both Ch. Karnchang and the Thai Ministry of Energy made public statements indicating that the project was proceeding on schedule.
6 Sept. 2012	The Lao government reported in the Vientiane Times that the dam was in full compliance with MRC standards and would move forward. As evidence of cooperation with neighboring countries, the Lao government also claimed that "no permanent works had been allowed to be undertaken in the Mekong."
7 Sept. 2012	The President of Vietnam warned that dam construction in the Mekong created a risk of regional conflict.

12 Sept. 2012	The Lao Energy Minister told Radio Free Asia that the Cambodian and Vietnamese governments are not opposed to the dam, and that the project will go forward.
13 Sept. 2012	Cambodia's MRC representative told reporters that its concerns with the project remain unanswered.
9 Oct. 2012	The Vientiane Times reported that a redesign of the Xayaburi Dam was nearly complete and will successfully mitigate any impacts on neighboring countries.
Oct. 2012	Cambodian and Vietnamese government delegations separately visited the Xayaburi Dam site and hear presentations by Pöyry.
5 Nov. 2012	Laos' Vice Minister for Energy and Mines told reporters on the sidelines of the Asia Europe Summit in Vientiane that the Xayaburi Dam's groundbreaking ceremony would take place on November 7 <sup>th</sup> .
6 Nov. 2012	The Thai Foreign Minister announced that the Thai government "is not opposed to the project."
7 Nov. 2012	The Lao government held the groundbreaking ceremony for the Xayaburi Dam. Cambodian and Vietnamese government officials attended, indicating that both governments had withdrawn their opposition to the project. By this time, construction on the project was already well underway.
7 Nov. 2012	The CEO of the MRC Secretariat told the New York Times that, as of the date of the groundbreaking ceremony, the Secretariat had not seen Laos' plans for a "redesign" of the dam. The Cambodian and Vietnamese governments also had not been provided with this information.
9 Nov. 2012	Pöyry announced that it has been selected as the Lao government's engineer for the Xayaburi Dam.
7 Dec. 2012	Laos' National Assembly, widely seen as a rubber-stamp parliament, approved the Xayaburi Dam.
11 Jan. 2013	Cambodia's Environment Minister was quoted in the Cambodian Daily saying, "Prime Minister Hun Sen said there has to be an environmental impact study first to see how it affects [us] and we asked Laos to respect the suspension."

## **Annex B: Excerpts from the 1995 Mekong Agreement**

The following excerpts from the Mekong Agreement are discussed in detail in this report. The full Agreement is available at <http://www.mrcmekong.org/assets/Publications/policies/MRC-1995-Agreement-n-procedures.pdf>.

### **CHAPTER II. DEFINITIONS OF TERMS**

For the purposes of this Agreement, it shall be understood that the following meanings to the underlined terms shall apply except where otherwise inconsistent with the context:

...

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

...

### **CHAPTER III. OBJECTIVES AND PRINCIPLES OF COOPERATION**

The parties agree:

#### **Article 1. Areas of cooperation**

To cooperate in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin, including, but not limited to irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism, in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities.

#### **Article 2. Projects, programs and planning**

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.

#### **Article 3. Protection of the environment and ecological balance**

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.



#### **Article 4. Sovereign equality and territorial integrity**

To cooperate on the basis of sovereign equality and territorial integrity in the utilization and protection of the water resources of the Mekong River Basin.

#### **Article 5. Reasonable and equitable utilization**

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 Interbasin Diversion provided for under Article 26 and the provisions of A and B below:

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 diversions 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 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.

...

#### **Article 7. Prevention and cessation of harmful effects**

To make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (ecosystem) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharges of wastes and return flows. Where one or more States is notified with proper and valid evidence that it is causing substantial damage to one or more riparians from the use of and/or discharge to water of the Mekong River, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8.

## **Article 8. State responsibility for damages**

Where harmful effects cause substantial damage to one or more riparians from the use of and/or discharge to waters of the Mekong River by any riparian state, the party(ies) concerned shall determine all relative factors, the cause, extent of damage and responsibility for damages caused by that state in conformity with the principles of international law relating to state responsibility, and to address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means as provided in Articles 34 and 35 of this Agreement, and in conformity with the Charter of the United Nations.

...

## **CHAPTER V. ADDRESSING DIFFERENCES AND DISPUTES**

### **Article 34. Resolution by Mekong River Commission**

Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F.

### **Article 35. Resolution by Governments**

In the event the Commission is unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments to take cognizance of the matter for resolution by negotiation through diplomatic channels within a timely manner, and may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision. Should the Governments find it necessary or beneficial to facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation through an entity or party mutually agreed upon, and thereafter to proceed according to the principles of international law.

[End of Excerpt]

## **Annex C: List of legal references**

**Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin**, 5 April 1995, Governments of Cambodia, Lao PDR, Thailand, and Vietnam [*the “Mekong Agreement”*].

**Commentary and History: Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin**, 1995, prepared by Dr. George E. Radosovich, UN Development Programme [*Provides a history of the negotiation of the Mekong Agreement, including the intent of the four governments in selecting the language of the Agreement*].

**International Court of Justice** [*Rulings by the Court provide authoritative interpretations of international law. Several cases relate directly to international water law.*]

- Gabcikovo-Nagymaros Project (Hungary/Slovakia) judgment, 1997.
- Gulf of Maine (Canada v. U.S.) judgment, 1984.
- North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.) judgment, 1969.

**International Court of Justice**, Pulp Mills on the River Uruguay (Argentina v. Uruguay) judgment, 2010 [*Describes situations where international law requires a transboundary impact assessment to be carried out.*]

**International Law Commission (ILC)**, 1994 Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater [*The ILC is the UN body charged with codifying international law. The purpose of its 1994 commentary was to assist in the drafting of the UN watercourse convention, but the commentary directly shaped the drafting of the 1995 Mekong Agreement as well. Much of the text of the Mekong Agreement is directly drawn from the ILC commentary*].

**International Law Commission**, 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts [*Describes the prevailing international law that governs reparations and compensation when one government harms another*].

**Mekong River Commission, Procedures for Notification, Prior Consultation and Agreement**, approved by the MRC Council in 2003.

**UN Convention on the Law of the Non-navigational Uses of International Watercourses** (1997) [*Although the treaty has not yet gone into effect and is not legally binding on Laos, it is recognized as an influential and authoritative statement of the international law governing the shared use of rivers*].

**Vienna Convention on the Law of Treaties** (1969) [*Sets forth the rules by which governments are required to follow when implementing treaties*].

## Endnotes

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<sup>2</sup> For background on the Xayaburi Dam, please visit <http://www.internationalrivers.org/node/2284>.

<sup>3</sup> Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 5 April 1995, Governments of Cambodia, Lao PDR, Thailand, and Vietnam [hereinafter the “Mekong Agreement”], <http://www.mrcmekong.org/assets/Publications/policies/MRC-1995-Agreement-n-procedures.pdf>.

<sup>4</sup> The Procedures for Notification, Prior Consultation and Agreement (PNPCA) is one of several protocols that the Mekong River Commission (MRC) adopted to implement the Mekong Agreement. The MRC Council approved the PNPCA on 13 November 2003. See link in endnote 2.

<sup>5</sup> UN Development Programme (1995), *Commentary and History: Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*, prepared by Dr. George E. Radosevich [hereinafter History of Mekong Agreement]. When developing laws and treaties, records are often kept to document the drafters’ intent in case any ambiguity arises. This document was drafted by a neutral party and is an unofficial record, but remains the best primary evidence of what the drafters intended.

<sup>6</sup> The language of the Mekong Agreement is drawn directly from authoritative sources of international law. Relevant sources of international law include the 1969 Vienna Convention on the Law of Treaties, art. 26, 1155 (stipulating the rules by which governments are required to implement treaties in “good faith”); the UN International Law Commission’s (ILC) 1994 Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater [hereinafter 1994 ILC Commentary] (The ILC is charged with codifying international law. The purpose of its 1994 commentary was to assist in the drafting of the UN watercourse convention, but the commentary directly shaped the drafting of the 1995 Mekong Agreement as well. Much of the text of the Mekong Agreement is directly drawn from the ILC commentary); UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997) (Although the treaty has not yet gone into effect and is not legally binding on Laos, it is recognized as an influential and authoritative statement of the international law governing the shared use of rivers [hereinafter UN Watercourse Convention]; For more discussion, see Bennett L. Bearden (2010), *The legal regime of the Mekong River: a look back and some proposals for the way ahead*, Water Policy 12 (2010) at pp. 805-807.

<sup>7</sup> History of Mekong Agreement, *supra* note 5, p. 6 (discussing Article 1 of the Agreement): “This Article, perhaps the most important Article in the Agreement for a new framework and spirit of cooperation, is a general statement of the desire and commitment of the parties in areas of cooperation to optimize multiple-use considerations, the sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin for their mutual benefits and to cooperate to minimization of harmful effects from natural occurrences and man-made activities.”

<sup>8</sup> History of Mekong Agreement, *supra* note 5, p. 34: “All four countries stated...that a legal agreement with the status of a treaty should be entered into by the parties. Some concern was expressed about the difference between a ‘Treaty’ or just an agreement, particularly concerning the need for ratification by the parliaments or national assemblies of the member states and the time that might take. However, none of the parties wanted to leave in question the legal status of the agreement. An unambiguous legal commitment would also reassure the donor community of the dependability of the parties to implement the terms of the agreement.”

<sup>9</sup> Chapter III of the Mekong Agreement includes principles such as sovereign equality, territorial integrity, reasonable and equitable utilization, and the duty to prevent harm. History of Mekong Agreement, *supra* note 5, p. 6 (explaining that these are the “fundamental rules providing the mandatory parameters of the rights and obligations of the parties under this Agreement and international law”). Much of the Agreement’s language uses the term “shall” rather than “should” to indicate the binding nature of the obligations. However, several analysts have questioned the legal status of the corresponding PNPCA procedures. See Bearden (2010), *supra* note 6 at p. 807; Philip Hirsch, Kurt Mørck Jensen, et al. (2006), *National Interests and Transboundary Water Governance in the Mekong* (Australian Mekong Resource Centre, Danida & U. of Sydney), at p. xvi, 30.

<sup>10</sup> Hirsch, Jensen, et al. (2006), *ibid.* at p. xvi (describing how the Agreement “lacks the legal ‘teeth’ to enforce any of its provisions.”).

<sup>11</sup> See Chapter V of the Mekong Agreement (“Addressing Differences and Disputes”). See also, History of Mekong Agreement, *supra* note 5 at p. 34 (“All four countries agree this is a function of the institution in the first instance, then through diplomatic channels, and possibly ultimately through mediation or arbitration.”)

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<sup>12</sup> International Centre for Environmental Management (2010), *Strategic Environmental Assessment of Hydropower on the Mekong Mainstream*, pp. 13, 16-17, prepared for the Mekong River Commission.

<sup>13</sup> Agence France-Presse, “Vietnam Warns of Water Conflicts,” 7 September 2012.

<sup>14</sup> At the December 2011 meeting of the MRC Council, for example, the Lao government stated that: “Although we did not arrive at an agreement with the stipulated timeframe, we believe that we have fulfilled all of the obligations under the [prior consultation] process of the 1995 Mekong Agreement...” In July 2012, Lao Vice Minister for Energy and Mines said, “Laos has never violated the agreement and has fully complied with the 1995 Mekong Agreement.” See Bangkok Post, 22 July 2012, “Laos denies lying about dam construction”; Vientiane Times, 1 Nov. 2012, “Laos responds to Xayaboury dam concerns.”

<sup>15</sup> 1994 ILC Commentary, *supra* note 6, pp.105-106: “Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse”; “Other relevant principles include those of good faith and good-neighborliness.”

<sup>16</sup> This section distinguishes between “upstream” and “downstream” for illustrative purposes only. A hydropower project on the Mekong River could also have impacts upstream of the dam site, for example, if it blocks fish migrations.

<sup>17</sup> 1994 ILC Commentary, *supra* note 6, p. 98 (“A survey of all available evidence of the general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses—including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases—reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.”); UN Watercourse Convention, *supra* note 6, at art. 5(2) (“Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”); see also History of Mekong Agreement, *supra* note 5, at pp. 37-39.

<sup>18</sup> See Mekong Agreement, art. 5; History of Mekong Agreement, *supra* note 5, p. 14 (“The clear intent of Article 5 is to address the concerns, expectations and specific interests expressed by each lower Mekong basin riparian within the confines of international law.”)

<sup>19</sup> 1994 ILC Commentary, *supra* note 6, p. 97 (explaining that states not only have a “right to utilize the watercourse” but also the “duty to cooperate actively with other watercourse States”); 1994 ILC Commentary, *supra* note 6, p. 98 (explaining that compromise is required: “In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourse States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized, a ‘conflict of uses’ results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse State’s equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourse agreements.”)

<sup>20</sup> Mekong Agreement, chp. II.

<sup>21</sup> The duty of governments to cooperate in good faith is well established requirement under international law. This is discussed in more detail below. See also, Legal Opinion by Perkins Coie to MRC and Regional Governments, <http://www.internationalrivers.org/node/2451>.

<sup>22</sup> Mekong Agreement, Chp. III, art. 5; History of Mekong Agreement, *supra* note 5, p. 15 (“Article 5.B.2 is an ‘agreement to agree.’” and “The doctrine of reasonable and equitable utilization addresses reasonableness and equity with flexibility for nations to work out an agreement on sharing of waters or proceed to use the water in a reasonable and equitable manner, subject to the reciprocal rights of other riparians (sovereign equality). The customary law doctrine stops short of ‘requiring’ an agreement before use, although it is common among state practice, as reflected in many treaties, for the parties to agree on a sharing arrangement.”) Under international law, this is often referred to as an “obligation of conduct” as compared to an “obligation of result”.

<sup>23</sup> According to the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” (art. 26) and “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.” (art. 31) In its Gabcikovo-Nagymaros Project (Hungary/Slovakia) judgment in 1997, the International Court of Justice further clarified that “In this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to

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apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized.” (para. 142) In its *Gulf of Maine (Canada v. U.S.)* judgment in 1984, the International Court of Justice ruled that one government could not act unilaterally and that a solution “must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.” (para. 112) In the *North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.)* judgment in 1969, the Court held that “the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.” (para. 85); UN Watercourses Convention, *supra* note 6, at art. 8(1) (“Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.”) See 1994 ILC Commentary, *supra* note 6, pp. 133-135 (“The consultations and negotiations should be conducted in good faith and in a meaningful way that could lead to an equitable solution of the dispute. The principle that parties to a dispute should conduct their negotiations in good faith and in a meaningful way is a well-established rule of international law. The court, in the *Northern Sea Continental Shelf* case (Federal Republic of Germany v. Denmark), stated with regard to this principle that the parties to a dispute ‘are under an obligation to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.’”)

<sup>24</sup> See generally, ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), chp. III on Breach of an International Obligation.

<sup>25</sup> Bangkok Post, *ibid.*; See also, Vientiane Times, 6 Sept. 2012, “Laos clarifies Xayaboury dam development.”

<sup>26</sup> Pöyry Energy AG, Compliance Report: Xayaburi Hydroelectric Power Project, 8 August 2011, p. 45.

<sup>27</sup> See e.g., BBC, 6 Nov. 2012, “Laos approves Xayaburi ‘mega’ dam on Mekong.” Laos’ claim remains unverified.

<sup>28</sup> Vientiane Times, 26 Nov. 2012, “Laos has not violated Mekong Agreement: Senior official.”

<sup>29</sup> See Mekong Agreement’s definition of “prior consultation,” Chp. II; History of Mekong Agreement, *supra* note 5, p. 9 (“Prior consultation on the use of waters would be notification plus additional data and information provided the Committee as prescribed in the Rules for Water Utilization of proposed ‘reasonable and equitable uses’ of the waters by any riparian. This would allow the other riparians to evaluate the impact upon their use of water and any other affects, but with the specific understanding that this consultation would not give any riparian a right to veto the use of water.”)

<sup>30</sup> 1994 ILC Commentary, *supra* note 6, p. 111 (“Article 11. Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse”; “Article 11 lays down a general obligation of watercourse States to provide each other with information concerning the possible effects upon the condition of the international watercourse of measures they might plan to undertake. The article also requires that watercourse States consult with each other on the effects of such measures.”); p. 114 (“During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.”); see also, UN Watercourses Convention, arts. 11-12.

<sup>31</sup> See Mekong Agreement, chp. II (definition of “prior consultation”).

<sup>32</sup> PNPCA procedures, *supra* note 4, section 5.2.1 (“In addition to the data and information required for Notification, the notifying State shall timely provide the MRC [Joint Committee] with available and additional technical data and information on its proposed use of waters for an evaluation of impacts by the other riparian States...”)

<sup>33</sup> As described above, the Lao government is required to provide the other governments with sufficient information for them to evaluate the impacts that the Xayaburi project would have on their countries. Under the PNPCA process, this includes both “available” and “additional” information. Mekong Agreement, chp. II; PNPCA Procedures, section 5.2. If the other governments request additional information, the Lao government is required “to employ its ‘best efforts’ to comply with the request, that is to say it is to act in good faith and in spirit of cooperation in endeavoring to provide the data or information sought by the requesting watercourse State.” 1994 ILC Commentary, *supra* note 6, p. 109. To reduce the burden on the Lao government to provide this information, the MRC Secretariat can help to meet these requests for additional information. See PNPCA Procedures section 5.3.2 and 5.4.2. However, even with this available technical support, the Lao government indicated no willingness to set aside adequate time for this additional information to be collected. As discussed in Section 3.3 of this report, the

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information that the Cambodian and Vietnamese governments requested about the project's transboundary impacts should have been provided at the onset of the prior consultation process.

<sup>34</sup> Xayaburi Hydroelectric Power Project, Environmental Impact Assessment (Aug. 2010), <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-EIA-August-2010.pdf>.

<sup>35</sup> MRC, Xayaburi Prior Consultation webpage (see "Reply Forms"), <http://www.mrcmekong.org/news-and-events/consultations/proposed-xayaburi-hydropower-project-prior-consultation-process>. International law indicates that a transboundary impact assessment is reasonable and expected in this type of situation. In 2010, the International Court of Justice ruled that "[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works." ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, at 60-61, para. 204 (20 April 2010). See also, Perkins Coie, *Analysis of International Environmental Laws Implicated by Decision to Approve Construction of Xayaburi Dam* (Oct. 2011), <http://www.internationalrivers.org/node/2448>.

<sup>36</sup> International Rivers blog, 27 Aug. 2012, "Pöyry Responds on its Role in the Xayaburi Dam," <http://www.internationalrivers.org/node/7655>.

<sup>37</sup> For example, see MRC Secretariat, 25 Nov. 2011, *Observations and Comments on the Pöyry Report on the Xayaburi Hydropower Project*, p. i ("It is the opinion of the MRC review team that conducting specific investigations before (rather than in parallel with) dam construction will reduce risks, including those of transboundary and cumulative impacts, and avoid "regret measures", actions that may ultimately be inappropriate and lead to expensive and/or irreversible unintended negative impacts."); p. ii ("However, due to the major challenges involved it is the MRC Review Team's observation that even if the recommendations in the Pöyry Report are followed, the Xayaburi Project would be considered only partly compliant [with MRC standards] in the area of fish bypass facilities and fisheries ecology as well as in terms of dam safety.") Pöyry has also been blacklisted by the World Bank for alleged corruption on unrelated projects. The Finland government's National Contact Point is also investigating Pöyry's role in the Xayaburi Dam.

<sup>38</sup> On 19 April 2011, the MRC governments of Cambodia, Laos, Thailand, and Vietnam met to discuss the Xayaburi Hydropower Project. Details about this meeting are recorded on the MRC website at <http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level>. The governments' "reply forms" (available on the website) list their concerns in detail.

<sup>39</sup> PNPCA Procedures, *supra* note 4, section 5.4.3.

<sup>40</sup> 1994 ILC Commentary, *supra* note 6, p. 114; pp. 115-116 ("Article 17: (1) If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. (2) The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State. (3) During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months."); see also, p. 116 ("Implementation of the measures during a reasonable period of consultations and negotiations would not be consistent with the requirements of good faith laid down in paragraph 2 of article 17..." but "By the same token, however, consultations and negotiations should not further suspend implementation for more than a reasonable period of time."); see also, UN Watercourses Convention, *supra* note 6, art. 14.

<sup>41</sup> 1994 ILC Commentary, *supra* note 6, p. 114 ("It perhaps goes without saying that this second obligation is a necessary element of the procedures provided for in part three of the draft, since these procedures are designed to maintain a state of affairs characterized by the expression 'equitable utilization' within the meaning of article 5. If the notifying State were to proceed with implementation before the notified State had had an opportunity to evaluate the possible effects of the planned measures and inform the notifying State of its findings, the notifying State would not have at its disposal all the information it would need to be in a position to comply with articles 5 to 7. The duty not to proceed with implementation is thus intended to assist watercourse States in ensuring that any measures they plan will not be inconsistent with their obligations under articles 5 and 7.")

<sup>42</sup> Ch. Karnchang Public Company Limited, *2010 Annual Report*, p. 78 ("in the second half of the year, the subsidiaries' preliminary construction works of the Xayaburi Project somewhat progressed...").

<sup>43</sup> MRC press release, 19 April 2011, *supra* note 38.

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<sup>44</sup> International Rivers press release, 23 June 2011, “Laos Steamrolls Neighbors in Xayaburi Dam Process,” <http://www.internationalrivers.org/node/3708>.

<sup>45</sup> See Pöyry report (2011), *supra* note 26, p. 45 (“The MRCS determined that the end date for the Prior Consultation process of Xayaburi Project occurred on April 22, 2011, being the last date of the sixmonth period under the 1995 Mekong Agreement. By this date, all comments from other Member countries had been rendered to the MRCS” and “In the Joint Committee Meeting on 19. April 2011 it was concluded that the Prior Consultation Process had been ended as no extension was agreed between the member countries and that any further topics related to the Xayaburi Project would be tabled for consideration at the ministerial level.”)

<sup>46</sup> International Rivers press release, 4 Aug. 2011, “Illegal Construction on the Xayaburi Dam Forges Ahead,” <http://www.internationalrivers.org/node/3707>.

<sup>47</sup> Bangkok Post, 5 Aug. 2011, “Early work on dam ‘normal practice’”, <http://www.bangkokpost.com/lite/topstories/235879/early-work-on-dam-normal-practice>.

<sup>48</sup> MRC press release, 8 Dec. 2011, <http://www.mrcmekong.org/news-and-events/news/further-study-on-impact-of-mekong-mainstream-development-to-be-conducted-say-lower-mekong-countries>.

<sup>49</sup> See Radio Free Asia, 1 May 2012, “Cambodia Lodges Dam Protest with Laos,” <http://www.rfa.org/english/news/laos/xayaburi-05012012190456.html>; Thanh Nien News, 24 Apr. 2012, “MRC Vietnam condemns Thai company’s contract to build Xayaburi dam,” <http://www.thanhniennews.com/2010/pages/20120424-mrc-vietnam-condemns-thai-firm-contract-to-build-xayaburi-dam.aspx>.

<sup>50</sup> International Rivers blog, 20 July 2012, “Testing the Waters: Laos Pushes Xayaburi Dam to Critical Point,” <http://www.internationalrivers.org/node/7601>.

<sup>51</sup> On 22 July 2012, Laos’ Deputy Minister for Energy and Mines told the Bangkok Post, *supra* note 14, “Regarding construction work, we have been preparing the site and conducting further surveys and studies to collect more information. Laos has not given a permit for any construction until we are satisfied with the studies. We have not started any construction that is permanent and we have never given a permit for such construction.”; “Preparatory work does not involve permanent structures and is just to support the project development. Roads, apartment buildings for workers and such are preparatory and are commonly built ahead of the project to help save time.”; “There have been media reports that we have halted the project. That’s the biggest misunderstanding. We have not carried out the work and then halted, as we never started any construction.”

<sup>52</sup> International Rivers blog, 13 Nov. 2012, “Xayaburi: A Closer Look at How Laos Got to ‘Go’,” <http://www.internationalrivers.org/node/7731>.

<sup>53</sup> For example, see UN Watercourses Convention, *supra* note 6, art. 7 (“Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.”); 1994 ILC Commentary, *supra* note 6, p. 103.

<sup>54</sup> See a discussion on the requirement to conduct a transboundary impact assessment, please see *supra* note 35.

<sup>55</sup> Mekong Agreement, art. 3. History of Mekong Agreement, *supra* note 5, p. 17 (“This Article is basically an effort by the riparians to agree not to intentionally or otherwise cause harm to each other individually through the uses of water and related resources in their own territories, nor jointly through any projects or programs.”)

<sup>56</sup> Ch. Karnchang completed the Nam Ngum 2 Dam in Laos in 2011. Between 1994 and 2011, Pöyry played numerous roles in developing the project, including conducting the feasibility study, conducting the environmental impact assessment, and acting as an engineer for the project.

<sup>57</sup> See Pöyry report, *supra* note 26, at p. 10 (Pöyry noted in its compliance report that it “has been nominated as Government of Laos Engineer for the Xayaburi run-of-river Hydropower Scheme in Lao PDR...”)

<sup>58</sup> See “Pöyry Responds on its Role in the Xayaburi Dam,” *supra* note 36.

<sup>59</sup> MRC secretariat review of Pöyry report, p. ii, *supra* note 37.

<sup>60</sup> MRC secretariat review of Pöyry report, p. ii, *supra* note 37.

<sup>61</sup> PNPCA Procedures, *supra* note 4, section 5.5. When the four governments first drafted the 1995 Mekong Agreement, they intended to build a number of dams on the Mekong Mainstream but did not have a strong understanding of the risks involved. The prior consultation process was originally designed for negotiations that would focus on the quantity of water flows in the river rather than other issues. It was not until the MRC’s 2010 Strategic Environmental Assessment (SEA), *supra* note 12, that more details emerged about the dams’ economic, environmental, and social risks. The SEA revealed that the scale of risks was much higher than previously expected and recommended that a ten year delay to allow time for further impact studies. Given these new developments, the arbitrary six month timeframe was an unreasonable amount of time in which to discuss the first Mekong mainstream dam. Indeed, the International Law Commission has noted that “A use which causes significant harm to human



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health and safety is understood to be inherently inequitable and unreasonable.” 1994 ILC Commentary, *supra* note 6, p103.

<sup>62</sup> 1994 ILC Commentary, *supra* note 6, pp. 113-114; UN Watercourses Convention, *supra* note 6, art 13.

<sup>63</sup> 1994 ILC Commentary, *supra* note 6, pp. 113-114 (“The Commission considered the possibility of using a general standard for the determination of the period of reply, such as ‘a reasonable period of time’, rather than a fixed period such as six months. It concluded, however, that a fixed period, while necessarily somewhat arbitrary, would ultimately be in the interest of both the notifying and the notified States. While a general standard would be more flexible and adaptable to different situations, its inherent uncertainty could at the same time lead to disputes between the States concerned. All these considerations demonstrate the need for watercourse States to agree upon a period of time that is appropriate to the case concerned, in light of all relevant facts and circumstances. Indeed, the opening clause of article 13, ‘unless otherwise agreed’, is intended to emphasize that, in each case, States are expected and encouraged to agree upon an appropriate period. The six-month period for reply as well as the six-month extension of the period of reply provided for in article 13 are thus residual, and apply only in the absence of agreement between the States concerned upon another period.”); see also, UN Watercourses Convention, *supra* note 6, art. 13.

<sup>64</sup> 1994 ILC Commentary, *supra* note 6, pp. 113-114 (“This period shall, at the request of a notified State for which the evaluation of the planned measure poses special difficulty, be extended for a period not exceeding six months.” Here the use of the word “shall” indicates that notified States have a right to this extension if requested. In the Xayaburi Dam case, the absence of any information on the project’s transboundary impacts would certainly be considered a legitimate reason to extend the initial six month timeframe, because this information was needed to fulfill the primary purpose of the prior consultation period.)

<sup>65</sup> For more information, please see Section 3.3 of this report.

<sup>66</sup> Mekong Agreement, chp. V. Diplomatic discussions about the Xayaburi Dam took place outside the MRC, so it is unclear if these discussions remained within the framework of the Mekong Agreement.

<sup>67</sup> On 26 November 2012, for example, a Lao government representative to the MRC was quoted in the Vientiane Times saying, “Laos held prior consultations with MRC member countries concerning construction of the Xayaboury dam, and completed the process of prior consultation in April last year.” Laos made numerous other public statements of this position as well.

<sup>68</sup> MRC press release, 19 April 2011, *supra* note 38.

<sup>69</sup> See Section 3.3 of this report.

<sup>70</sup> Mekong Agreement, chp. III, art. 7.

<sup>71</sup> Mekong Agreement, chp. III, art. 7 (“Where one or more States is notified with proper and valid evidence that it is causing substantial damage to one or more riparians from the use of and/or discharge to water of the Mekong River, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8 [State Responsibility for Damages].”)

<sup>72</sup> See generally, UN ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), Chp. II on Reparation for Injury, *supra* note 24. For a more in-depth discussion on reparations, see Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, Am. J. of Intl. Law 96 at 833; see also, History of Mekong Agreement, *supra* note 5, p. 35 (“All countries acknowledge the right of a riparian not to be harmed by another riparian’s use of the waters. It was also universally accepted, that where harm is caused (injury), the injured party is entitled to compensation; but how to determine the cause of the injury, how much compensation, and for how long, remain unresolved issues which may best be covered “in principle” in the preamble with resolution by the organization if and when harm or actual injury occurred.”)

<sup>73</sup> See Shelton, *ibid.*, at pp. 846-847.

<sup>74</sup> 1994 ILC Commentary, *supra* note 6, p. 105 (If the project causes harm, several factors determine the amount of compensation that a state can receive. One factor is “the extent to which the injured State would also derive benefits from the activity in question such as a share of hydroelectric power being generated, flood control, improved navigation, and so forth. In this connection the payment of compensation is expressly recognized as a means of balancing the equities in appropriate cases.”); see also, Shelton, *ibid.*, at pp. 846-847.

<sup>75</sup> International Rivers Blog, 9 Aug. 2012, “Thai Villagers File Lawsuit on Xayaburi Dam,”

<http://www.internationalrivers.org/node/7622>; see also, Op-ed by Senator Kraissak Choonhavan, “Thailand must say ‘no’,” Bangkok Post, 15 Dec. 2012, <http://www.internationalrivers.org/node/7776>.