Legal Briefing: How International Law Applies to the Don Sahong Dam

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The Government of Lao PDR is proceeding with the Don Sahong Dam after claiming that it is only required under the 1995 Mekong Agreement to notify neighboring governments, rather than to undergo a prior consultation. This briefing raises some concerns with Laos' interpretation of the Mekong Agreement and international law.

1. What is the position of the Government of Laos?

In its 16 January 2014 statement at the Mekong River Commission (MRC) Joint Committee, Laos concluded that the Don Sahong Dam will not use the entire water flow of the Mekong mainstream, since it is located on a channel of the river, and therefore is not subject to prior consultation.[1]

2. How does the Mekong Agreement relate to international law?

The Mekong Agreement is a treaty. It meets all of the criteria for being a treaty under the Vienna Convention on the Law of Treaties. When the four governments signed it, they intended for it to have the status of a treaty.[2] This means that the commitments in the Mekong Agreement are binding on the parties and are based in international law. Treaties are binding even if they do not have enforcement mechanisms (which the Mekong Agreement does not have). There are clear rules under international law for how to interpret a treaty if an ambiguity arises.[3]

3. Does the Mekong Agreement require prior consultations for the Don Sahong Dam?

Laos' interpretation of the Mekong Agreement is incorrect, because the primary purpose of the Mekong Agreement is clearly not limited to water flows. Rather, the treaty focuses on overall cooperation around development of the Mekong in a sustainable way that avoids harm to the

[1] In its 16 January 2014 statement, the Lao Government announced that it had decided on a Notification for the following reasons: "1. Extensive studies and investigations have confirmed that the proposed project with mitigation measures will cause no significant impact to the mainstream flows of the Mekong; 2. Don Sahong HPP will temporarily use only 15% of the average natural flow of the river, meaning a non-consumptive utilization, which cannot be considered a significant impact to the mainstream Mekong flow; 3. The project does not include a dam spanning the whole river and the overall flow in the Mekong mainstream is not changed; 4. The Hou Sahong has been a key migratory route in the dry season, but the fact is that there are several channels that support fish migration in the wet season and research indicates that other channels can be modified to improve fish migrations in both directions all year round."

[2] Dr. George W. Radosevich, UNDP (1995). Commentary & History: Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995). Page 34. Available at: http://www.tnmckc.org/upload/document/bdp/2/2.7/Legal/Radosevich-MA-1995.pdf

[3] See Section 6 of this briefing paper for more details.

environment and natural resources. This is clear from Article 1 of the Mekong Agreement, as well as its preamble and opening paragraph.

The notification requirement that Laos is relying upon *only* applies to water flows impacts[4] and does not govern how the four countries are supposed to interact with respect to other types of transboundary impacts.

For transboundary impacts other than water flows impacts, the treaty does not say explicitly what the governments should do. Even when a treaty is silent on an issue such as this, governments are still expected to follow international law. As described in the next section, the international standard in this case is to conduct prior consultations before beginning any activity that could cause transboundary harm.

4. Does international law require prior consultations for the Don Sahong Dam?

Each of the governments of Cambodia, Vietnam, and Thailand has a *right* to demand prior consultation, if they believe that the Don Sahong Dam carries a risk of significant transboundary harm to their territories. According to international law, if a neighboring government requests a prior consultation, Laos is obligated to enter into prior consultations and make a good faith effort to find a mutually acceptable solution before proceeding with the project.

Customary international law says that states are obligated to prevent transboundary environmental harm from happening. This rule has been incorporated into all modern international environmental and water treaties, conventions, etc., including the Mekong Agreement.[5] It has also been included in a number of international court rulings. Laos has not disputed this rule in its public statements. However, the prohibition on transboundary harm only applies to "significant" harm. Laos' public statements claim that any harm to the Mekong River Basin from the Don Sahong Dam will not be significant. There is not a clear definition of "significant" under international law and this point needs to be argued out on a case-by-case basis. The UN's International Law Commission has defined "significant" as "something more than detectable but need not be at the level of 'serious' or 'substantial'."[6]

What specific measures must be taken in order to prevent transboundary harm from happening? According to customary international law, states have a "duty to cooperate in good faith" in order to prevent transboundary harm from happening. This duty to cooperate is also found throughout the Mekong Agreement, especially in Articles 1 and 4. In its 10 March 2014 Vientiane Times article, Laos acknowledged that it has a duty to cooperate. The director general of the Ministry of Energy and Mines' Energy Policy and Planning Department was quoted as saying: "We will continue to be transparent and cooperate in good faith in the spirit of the 1995 Mekong Agreement."

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[4] See article 5.B of the Mekong Agreement and the MRC's Procedures for Notification, Prior Consultation and Agreement (2003).

[5] See Mekong Agreement, articles 7 & 3.

[6] UN International Law Commission (2001). Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries. Page 152, commentary #4 on article 2. Available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

In international law, the "duty to cooperate in good faith" is consistently interpreted to include prior consultations between governments. Prior consultations are required in numerous treaties and court rulings. However, it's also important to note that there is not universal consensus on this point. Some upstream governments have opposed the use of prior consultations in various river basins around the world. On the other hand, there are no international treaties or court rulings that support these upstream governments' positions. Prior consultations are so widely recognized by many states and international conventions that it is safe to call it customary international law.[7] In the case of the Don Sahong Dam, it would be appropriate for Cambodia, Vietnam, and Thailand to say that they have a right to prior consultations under international law.

5. What happens when a government requests prior consultations?

Whereas "notification" is automatically required, governments have to formally request "consultations." The Governments of Cambodia, Thailand, and Vietnam have a right to prior consultations, and if requested, the Lao Government must enter into these consultations. The purpose of the consultations is to make a good faith effort to reach agreement on the measures for preventing the significant transboundary harm from happening. There is no clear international law standard for what happens if the consultations stall or fail to reach agreement.

The Lao Government has suggested that its actions to date already are equivalent to a "prior consultation." In an article on 24 March 2014 in the Vientiane Times, for example, the Lao Deputy Minister of Energy and Mines said, "we are already doing everything required under prior consultation, maybe more."

This interpretation is problematic for several reasons: (1) the consultations are not "prior," i.e. there has been no formal period of time set aside for the four governments to negotiate in good faith, based on assessments of the project's transboundary impacts, before the project begins; and (2) discussions between Laos and other Lower Mekong governments that have taken place have not been in an equitable setting. Rather, Laos is using coercive tactics to indicate that it will move forward with the project on a pre-determined timeframe regardless of the outcome of consultations. It has not indicated any willingness to compromise on its position, nor has it

[7] For example, see Article 17 of the UN Watercourses Convention (1997), which is considered to be a statement of existing customary international law related to transboundary rivers, although the convention itself has not entered effect; Article 9 of the ILC's draft Articles on the Prevention of Transboundary Harm (2001); Principle 19 of the Rio Declaration on Environment and Development (1992); art. 19.2.e and 18.2.e of the ASEAN Agreement on the Conservation of Nature and Natural Resources (1985). See also, 1957 Lake Lanoux Arbitration (France v. Spain); International Court of Justice rulings in the 1974 Fisheries Jurisdiction Case (UK v. Iceland), paras.73-78; 1969 North Sea Continental Shelf Cases (Germany v. Denmark, Germany v. Netherlands), para. 85; 1997 Gabčikovo/Nagymaros Case (Hungary v. Slovakia), paras.112-113; and 2010 Pulp Paper Mills on the River Uruguay case (Argentina v. Uruguay), para. 143,152. Other international practices using prior consultation before high risk activities can be found in article 5 of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991); article 17 of the Convention on Nuclear Safety (1994); article 21.1 of the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic (1992); article 5 of the Geneva Convention on Long Range Transboundary Air Pollution (1979); article 5 of the Ramsar Convention on Wetlands of International Importance (1987); among others.

provided governments with information on transboundary impacts although it was clearly in a position to do so during the impact studies. All of this amounts to a lack of good faith, failure to cooperate, and a violation of neighboring governments' right to be consulted.

6. What are the rules that governments must follow when interpreting a treaty?

There are clear rules for how governments must act when there are ambiguities or differing opinions among the parties in how to interpret a treaty. The Vienna Convention on the Law of Treaties is extremely authoritative and describes how states are supposed to act under treaties.[8] According to the Convention, there are several rules for how to interpret a treaty.

The main rule is that "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 the light of its object and purpose."[9] With respect to the Mekong Agreement, the object and purpose of the treaty clearly extend beyond water flows impacts. One of the primary purposes of the Mekong Agreement is clearly to cooperate fully in the prevention of transboundary environmental impacts. There is no indication that cooperation under the treaty is intended to be limited only to water flows impacts.

In addition to looking at the text of the treaty, the parties are also supposed to look at any related instruments and subsequent agreements made between the parties.[10] In this case, it might be relevant to look at the MRC Basin Development Plan, or any other documents approved by the four governments, which express a mutual understanding that Don Sahong is a mainstream dam and that all mainstream dams must undergo prior consultation. It would also be persuasive to point to the precedent set by the Xayaburi Dam to demonstrate the parties' intent to discuss all of the mainstream dams' transboundary environmental impacts, not just water flows, through a prior consultation process.

The rules of international law also apply when interpreting a treaty, even if they are not found in the treaty.[11] In other words, it is appropriate to look at the broader rules of international law and not just at the treaty language itself. This is particularly relevant for the Mekong Agreement, which was explicitly based on the draft UN Watercourses Convention, whose language has already been carefully interpreted and negotiated by international legal experts.[12]

If there is ambiguity in the text, it is appropriate to look into preparatory work of the treaty and the circumstances of its conclusion to understand the parties' intent.[13] This is particularly relevant when the language of the treaty is "ambiguous or obscure" or when it "leads to a result

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[8] Vienna Convention on the Law of Treaties (1969). Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

[9] Vienna Convention, article 31.1.

[10] Vienna Convention, article 31.2 and 31.3.

[11] Vienna Convention, article 31.3.c.

[12] Much of the text of the Mekong Agreement is drawn directly from 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. This document served as the foundation of the UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997).

[13] Vienna Convention, article 32.

which is manifestly absurd or unreasonable."[14] In the case of the Mekong Agreement, there are clear ambiguities and differences of opinion in how to interpret the language of the treaty. Fortunately, a history of the making of the treaty was prepared by one of its facilitators in the UN Development Programme, which clarifies some of the points.[15]

7. What options exist to resolve differing views among the Lower Mekong governments?

Finally, if the governments do not believe that their differences can be resolved through inter-governmental negotiations in a timely manner, two formal dispute resolution options exist: arbitration and mediation. For both arbitration and mediation, all parties have to consent to participate in the process.

It might be difficult for the Lower Mekong governments to agree at this time to submit to arbitration because the decisions of the arbitrator are legally binding. This requires the governments to give up some of their sovereign decision-making power.

Mediation, on the other hand, cannot bind the parties to any finding, but can merely facilitate a discussion. Article 35 of the Mekong Agreement specifically mentions the option of "assistance of mediation" but first requires "mutual agreement."

Over the longer term, it would be valuable for MRC development partners to facilitate a regional process of awareness building on international water law, so that the Mekong governments are better equipped in the future to understand the rules of transboundary rivers. Among other benefits, this could lead to greater clarity and mutual understanding of the governments' obligations under the Mekong Agreement and international law. However, this process would probably take years and would be unlikely to provide a solution in the short-term for the Don Sahong Dam.

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[14] Vienna Convention, article 32.

[15] Radosevich (1995). Commentary & History: Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin. See footnote #2.