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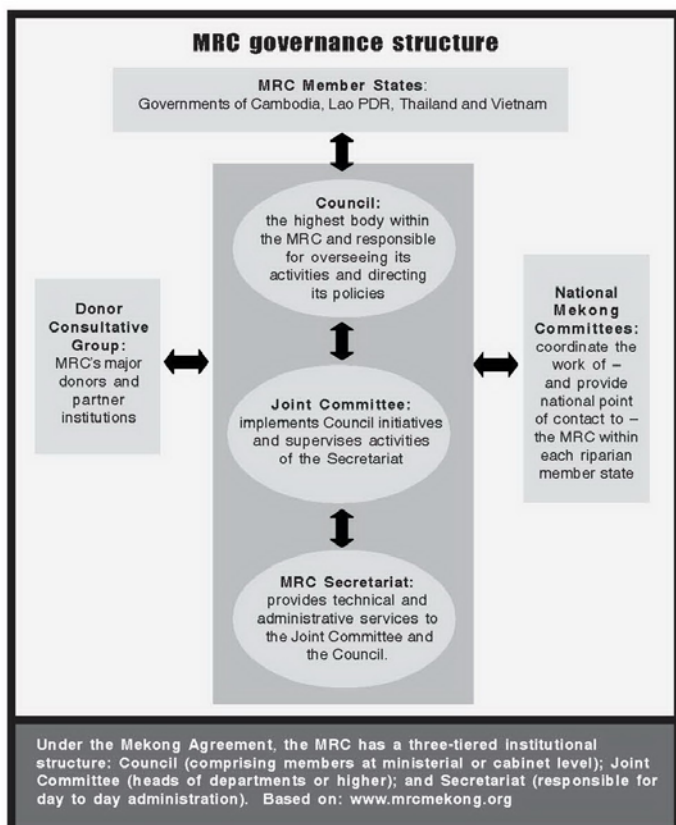
## **The governance role of the MRC vis-à-vis Mekong mainstream dams**

- Revived plans to dam the lower Mekong mainstream focus attention on the MRC as a governance body.
- There are different understandings and expectations of MRC's role among donors, civil society and governments.
- Several Articles of the 1995 Agreement place responsibilities on MRC with regard to mainstream dams.
- MRC has obligations to manage the river for sustainable and equitable use.
- MRC has no authority over sovereign member states.
- Under its charter, MRC is not directly accountable to the public.
- MRC is currently involved in some key activities in relation to mainstream dams:
  - Basin-wide assessments
  - Advice on individual projects on request of member states
  - Administering Procedures for Notification, Prior Consultation and Agreement
  - Facilitating dialogue
- Each of these activities raises key issues and questions

This brief examines the role, responsibilities and obligations of the Mekong River Commission (MRC) under the 1995 Mekong Agreement,<sup>1</sup> related procedures, plans and programmes. It does so in an effort to clarify expectations and interpretations of MRC's governance role vis-à-vis proposed dams on the Mekong mainstream.

The revival of plans to dam the Mekong mainstream focuses attention on the governance role of the MRC as an international river basin organisation assigned with the task of ensuring the sustainable use and management of water and related resources of the Lower Mekong Basin (LMB). MRC Member States, the Secretariat, donors and civil society actors, all continue to draw on the 1995 Mekong Agreement to make claims about what the MRC should and should not be doing and what type of river basin organisation it ought or ought not to be.

While questions regarding MRC's role have been posed since its inception, revived proposals for damming the main stem of the river signal an especially critical time for the MRC. How the MRC addresses key concerns and balances different interests in the basin will have significant bearing on MRC's perceived relevance to its Member States, donors and the people of the basin.



## MRC's responsibilities and obligations with respect to mainstream dams under the 1995 Mekong Agreement and related Procedures

The 1995 Mekong Agreement, signed by the four lower Mekong governments, establishes the MRC as the institution through which international cooperation is to be achieved (Article 11), and outlines its governance arrangements through the MRC Council, Joint Committee and Secretariat (18, 24, 30). The Agreement outlines a number of principles and commitments for cooperation in the sustainable development and management of the LMB. Those of particular relevance to mainstream dams are outlined below.

- Recognition of multiple uses:** The Agreement clearly recognises that there are different uses and users of water and related resources in the LMB, and that sustainable development requires coordination across a range of sectors in order “to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects...” (Article 1). Implicit in this article is that planned interventions in one sector (e.g. hydropower) must be compatible with others (e.g. fisheries).
- Basin development plan:** Article 2 states that the MRC should focus on joint and/or basin-wide projects and programs and that this should be done by drawing up a Basin Development Plan (BDP). The BDP is the framework under which the MRC can be informed of, and assess, proposed developments, in particular those considered to have significant basin-wide implications. Since the proposed mainstream dams were not included in the development scenario analysis of BDP phase 1, assessments of their potential impacts are currently being ‘fast-tracked’ under BDP phase 2.<sup>2</sup> If the BDP is to remain meaningful, dams should not go ahead without reference to the Plan.
- Ecological responsibility:** Articles 3 and 7 underline the MRC's responsibility “to protect the environment, natural resources, aquatic life and conditions and ecological balance of the Mekong River Basin,” including “making every effort to avoid, minimize and mitigate harmful effects that might occur” from the development and use

of the river. This includes recognition of the need to maintain certain flow regimes on the Mekong mainstream important for fisheries productivity and other environmental considerations (Articles 6 and 26).

- **Water utilisation:** Agreement for use of water from the Mekong mainstream rests in the principle of “reasonable and equitable” utilisation (Article 5). Precise rules as to what is “equitable” and “reasonable” are not outlined. While there are provisions in the Agreement stipulating that Rules will be

formulated (Article 26, 5B), these presently take the weaker form of informal “Procedures”.

A number of Procedures have been agreed to by the four member governments (see Box). However, these Procedures are not Rules enforceable under the Agreement on which parties could rely if and when a dispute arises over mainstream dams. The MRC does not wield authority over countries when it comes to the management of major projects in the LMB such as the proposed mainstream dams.

### MRC Procedures

- **Procedures for Information Sharing and Exchange**, approved in 2001, provides a framework for operationalising data and information exchange among the four MRC member countries, with the Secretariat as custodian and manager of the MRC Information System (IS). The Guidelines on Custodianship and Management of the MRC-IS, adopted in July 2002, define key operating principles and activities of data custodianship and management.
- **Procedures for Water Use Monitoring**, approved in 2003, provides a framework for implementing intra- and inter-basin water use monitoring.
- **Procedures for Notification, Prior Consultation and Agreement (PNPCA)**, approved in 2003, outlines the scope, timeframe, content, format and institutional mechanism for administering the PNPCA.
- **Procedures for Maintenance of Flows on the Mainstream**, approved in 2006, provide a framework for technical guidelines, institutional arrangements, directions and information to enable the MRC to maintain and manage flows on the Mekong mainstream as required by Articles 6 and 26 of the Mekong Agreement. Technical Guidelines that define acceptable flows to be maintained at specific locations are yet to be established. Rules for Maintenance of Flows on the Mainstream was renamed Procedures at the 11<sup>th</sup> MRC Council Meeting in December 2004.

The Procedures are available at: <http://www.mrcmekong.org/programmes/wup.htm>

### MRC's governance role: Expectations and interpretations

The Mekong Agreement gives the MRC an outline of responsibilities, but descriptions of its functions and authority are vague. This has contributed to differing interpretations and expectations of the MRC's role and authority, as can be seen by the statements made by different actors, all of whom have a stake in the MRC and its activities (see Box below).

The MRC is an intergovernmental organisation, whose strategic direction, policies and decisions

are decided by the Joint Committee and Council, comprised of member governments, while the Secretariat plays an advisory role. The MRC has no statutory supra-national authority, so in a formal sense, the MRC has limited or no regulatory authority. The MRC is instead driven by the national interests of its member governments, as represented through the National Mekong Committees (NMCs). These interests tend to focus on the economic benefits countries think they can extract from the river, and it is primarily this that drives Member States' views about the MRC's function and purpose.

## Different perspectives on MRC's role

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

**- Vietnamese Joint Committee member, 2005.<sup>3</sup>**

*“[T]he countries have been lately showing more impatience at the MRCS' weak record in helping the countries identify opportunities for development and helping facilitate investment.”*

**- World Bank/ADB, MWRAS Working Paper, June 2006.<sup>4</sup>**

*“Donors are concerned about the direction towards increased emphasis on MRC becoming an organisation that drives investments. In our view the MRC should maintain and strengthen its unique role as a knowledge-based river basin organisation to support decisions on developments in the basin”.*

**- Donor Group Statement, December 2005.<sup>5</sup>**

*“Development Partners are particularly concerned that public and private stakeholders are not being consulted, and that the cumulative impacts of dams on fisheries and food security are not being given adequate attention. In this regard, we request the MRC Council to provide information on how the procedures for notification, prior consultation and agreement are being applied.”*

**- Statement by Development Partner Consultative Group, 15 November 2007.<sup>6</sup>**

*“It is also evident that member countries are looking for practical outcomes to improve their understanding of the MRC as an organisation that is helping plan for development in the river basin - it is not, in other words, just a body undertaking scientific studies.”*

**- AusAID, Mekong Water Resource Strategy, September 2007.<sup>7</sup>**

*“We are not set up as a development finance organization. We have a role to support development in the basin. We do not have an enforcement role, we have a facilitation role.”*

**- CEO of MRCS, Interview with IPS, May 2008.<sup>8</sup>**

*“It is now time that the MRC's role is reviewed to ensure it is acting in the manner befitting an objective, scientific river basin management organization that it was set up to be. An important first step would be for the MRC to publicly call for a dam development moratorium until scientific evidence of the individual and cumulative impacts of dam development is in the public domain and all party stakeholders including public consensus has been achieved on the best way forward.”*

**- Statement by Thai People's Network for Mekong and Rivers Coalition of Cambodia, September 2008.<sup>9</sup>**

While the MRC is a 'governed', rather than a 'governing' organisation, this is not always understood by civil society groups in the region who have called on the MRC – and the Secretariat in particular – to intervene in its own right to address concerns or resolve grievances arising from developments with transboundary impacts.

Likewise, donors who have poured significant amounts of money into the MRC since 1995, have done so with an expectation that it would be sufficiently empowered by the political will

of its Member States to support decision-making processes in the interest of the broader public and the river system, beyond the narrow interests of individual states.

While there has been much heated debate around the MRC's regulatory versus investment facilitating role, there is less controversy around it evolving into knowledge-based organisation that provides objective scientific knowledge to inform decision-making and planning processes in the basin. The MRC Strategic Plan 2006 – 2010 suggests that, “The MRC needs to engage

actively and visibly in large national projects with significant basin-wide implications,” and that its ‘added-value’ in this role is its knowledge base and assessment tools.<sup>10</sup> Particular emphasis is placed on the BDP as the principal tool by which the MRC can ensure that developments in the basin are well-coordinated, based on an integrated water resources management (IWRM) approach.

The emphasis on the MRC as a knowledge-based organisation raises a number of important questions regarding the process of knowledge generation, and the accessibility and use of that knowledge in informing decisions. These issues surface with respect to the proposed mainstream dams.

<b>The MRC is...</b>
<ul style="list-style-type: none"> <li>• An intergovernmental organisation owned and governed by the will of its four member states.</li> <li>• Capable of generating knowledge which can be used to assess individual projects in a basin-wide context.</li> </ul>
<b>The MRC is not...</b>
<ul style="list-style-type: none"> <li>• A supranational organisation with regulatory authority.</li> <li>• An organisation that can make decisions or intervene in its own right.</li> <li>• Accountable directly to the broader public.</li> </ul>
<b>Grey area</b>
<ul style="list-style-type: none"> <li>• Allowable extent of public engagement and accountability.</li> <li>• Role as a proactive knowledge-based river basin organisation.</li> <li>• Responsiveness to knowledge requests by the public.</li> <li>• Capacity to inform or influence development decisions in the basin.</li> </ul>

## Mainstream dams and the role of the MRC

With questions raised by donors and civil society groups about the role of MRC with respect to mainstream dams, the MRC has made some recent efforts to clarify its role and initiated or ‘fast-tracked’ a range of activities focused specifically on mainstream dams. As the CEO of the MRC Secretariat noted in June 2008, “[A]cross all our work there is already a push to meet the challenge posed by the mainstream dams.”<sup>11</sup> The stated roles of MRC in relation to mainstream dams include:<sup>12</sup>

### A. Basin-wide assessments of mainstream dams

In recent months, the MRC has initiated a number of studies to assess the potential implications of mainstream dams on, among other things, fisheries, sediment and water flows, which will culminate in a strategic environmental assessment of the dams.<sup>13</sup> These activities are being ‘fast-tracked’ so as to provide a framework under “which to review individual proposals as and when they are initiated for prior consultation.”<sup>14</sup> As mentioned by the MRCS CEO on a number of occasions, the priority from the MRC’s point of view is to place this information and analysis on the “desks of decision-makers.”<sup>15</sup>

#### *Key issues and questions*

- While acknowledging the value of the MRC’s knowledge base, concerns have been raised around the transparency of the knowledge generation process and its accessibility, which has implications for its perceived credibility as an organisation providing objective scientific advice. As a recent independent review of the MRCS and NMCs notes, “MRCS is starting to become known (among civil society organisations, scientific organisations), as an institution that will not release information that may illustrate negative environmental and social consequences of development projects. This is a threat to the credibility of the organisation.”<sup>16</sup>
- The independent review of the MRC also noted that a new Disclosure Policy was being submitted to the Joint Committee.

However, the current status or content of this policy has not yet been made public.<sup>17</sup>

- There is also the question of how and whether the knowledge produced by the MRC will inform decisions, given the insufficient linkages between MRC programs and national planning systems.<sup>18</sup> As noted in the MRC Strategic Plan, “Studies and research work, no matter how well done, will have no impact if they are not used in development planning.”<sup>19</sup> Similarly, in its Hydropower Development Strategy 2001, the MRC recognises that a limitation of its EIA or SEA work is “its lack of formal link to any decision-making functions of legal or economic character” and that “its value will be dependent on the willingness of the primary decision makers (national political authorities, and international donors and financing institutions) to accept and take into consideration the conclusions and recommendations of the EIA.”<sup>20</sup>

## **B. Advice upon request on individual projects**

Under Article 30B, the role of the Secretariat is to “Provide technical and financial administration and advice as requested by the Council and the Joint Committee.” In 2007, the Lao government’s Water Resource and Environment Administration requested the Secretariat to review the draft EIA prepared for the Don Sahong project by a private company. In response to the request by civil society organisations to publicly release the report, the MRCS CEO stated, “In such cases, we need to seek the concurrence of the commissioning agency prior to releasing our report. However, it would not be appropriate to release the report publicly until the other member countries have had an opportunity to consider this work in detail.”<sup>21</sup>

### *Key issues and questions:*

- Studies or technical advice on specific projects must be requested by Member States. There are currently no mechanisms by which non-State actors can request for information or studies on specific projects directly to the MRCS; such requests must be

made through the Member States (i.e. NMCs).

- While in principle, community interests are represented by the NMCs, in practice, when a community has concerns about or has been affected by a development project, it is very difficult for them to get their concerns raised through these administrative structures. As the case of the Yali Falls dam on the Sesan River demonstrates, there is no guarantee that NMCs will take the grievances of communities to the MRC in cases of transboundary impacts, including requesting for impact studies.
- The MRCS has undertaken an economic evaluation of the potential loss of fisheries resulting from the proposed Don Sahong dam which, to the authors’ knowledge, was not formally requested by a Member State. The extent to which the Secretariat can proactively undertake assessments of individual projects therefore remains unclear.

## **C. Administering of Procedures for Notification, Prior Consultation & Agreement (PNPCA)**

Article 5 of the Mekong Agreement and related Procedures for Notification, Prior Consultation and Agreement (PNPCA), specify that intra-basin water use on the mainstream of the Mekong River during the dry season shall be subject to arriving at an agreement by the Joint Committee. This means that all dams proposed on the Mekong mainstream require prior notification and consultation, with the aim of reaching an agreement by the Joint Committee.

According to the Agreement, Prior Consultation means “Timely notification plus additional data and information to the Joint Committee,” and it is not a right to veto. According to the PNPCA, the timeframe for Prior Consultation is six months from the date of formal receipt of relevant documents, with the possibility of extending the period pending a decision by the Joint Committee.

To date, no formal notification has been given by Member States for any of the proposed mainstream dams.<sup>22</sup> However, in June 2008, the Lao National Mekong Committee provided

informal notice on eight planned dams on the mainstream in Lao PDR and the Lao-Thai border.

#### *Key issues and questions*

- Governing all of the notification procedures are general principles of timeliness and good faith and cooperation. However, nowhere in the procedures is “timely notification” or “consultation” explained. The PNPCA only notes that prior consultation should take place before the implementation of projects and that certain level of studies shall be provided with the notification. Given the ambiguities, clarification on how the Procedures for Notification, Prior Consultation and Agreement are being applied in relation to the mainstream dams has been requested by civil society and donors alike.<sup>23</sup>
- There is no requirement under the Procedures to extend notification and consultation to stakeholders beyond member states, including potentially affected communities.

#### **D. Facilitating dialogue**

Recently, the MRC has highlighted the role it can play in facilitating dialogue among different and at times competing interests, and building on its knowledge base to inform discussions over developments in the basin, including the mainstream dams. According to the MRC website, one of the key activities of the Hydropower Programme will be to facilitate dialogues at different levels and between different interests. Activities identified to date include facilitating joint ministerial briefings in each member country to foster discussions and disseminate relevant results of the Hydropower Programme; dialogue with private investors and financiers; continuing dialogue with China; and multi-stakeholder consultations.

Citing the BDP and Hydropower Programme regional stakeholder consultations, the CEO of the MRCS claims, “the MRC’s work plans for its various programmes are increasingly incorporating a broader interpretation of stakeholder participation that goes beyond involvement of government agencies to include

representatives of civil society and the private sector.”<sup>24</sup>

#### *Key issues and concerns*

- Regional multi-stakeholder workshops are no substitute for long-term engagement with and meaningful participation of non-State actors. These regional forums have not included the participation of potentially affected communities.
- Diversity of interests in water and river basin management are not represented through NMCs. Given that MRC is governed by the interests of its Member States, its capacity to be responsive to concerns raised by other actors is limited.
- The MRC Strategic Plan (2006-2010) places emphasis on the importance of public involvement in ensuring the success of IWRM in the Mekong basin. However, a clear commitment and strategy for involving civil society is still lacking.
- MRC’s aspiration to be an objective knowledge-based organisation is constrained by limits placed on different actors to contribute or receive information.

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<sup>2</sup> Jeremy Bird, MRCS CEO, Remarks to Informal Donor Meeting: Vision for the Next Three Years, 20 June 2008. [http://www.mrcmekong.org/MRC\\_news/speeches/ceo-speech-IDM-20Jun08.htm](http://www.mrcmekong.org/MRC_news/speeches/ceo-speech-IDM-20Jun08.htm)

<sup>3</sup> Nguyen Hong Toan, Secretary-General of VNMC and JC Member for Vietnam, in the Donor Consultative Group Meeting in Chiang Rai on 1 December 2005, in Hirsch, P. et al. (2006) *National interests and transboundary water governance in the Mekong*, Australian Mekong Resource Centre, School of Geosciences, University of Sydney in collaboration with Danida, p. 96. Available at [http://www.mekong.es.usyd.edu.au/projects/mekong\\_water\\_governance2.htm](http://www.mekong.es.usyd.edu.au/projects/mekong_water_governance2.htm)

<sup>4</sup> World Bank & Asian Development Bank (2006) *WB/ADB Joint Working Paper on Future Directions For Water Resources Management In The Mekong*

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<sup>5</sup> Donor Group Statement, 10<sup>th</sup> Meeting of the MRC-Donor Consultative Group, Chiang Rai, Thailand, 1 December 2005.

<sup>6</sup> This Statement was supported at the 12th Development Partner Consultative Group held on 15 November 2007 in Siem Reap, Cambodia by the following development partners: Asian Development Bank, Australia, Finland, France, Germany, Japan, Netherlands, Sweden, EU Commission, USA, World Bank.

<sup>7</sup> AusAID (2007) *The Greater Mekong Subregion: Australia's Strategy to Promote Integration and Cooperation 2007-2011*, September 2007, p. 25.

<sup>8</sup> Nette, A. Mekong Commission Fends Off Credibility Charges, *Inter Press Service*, 11 May 2008.

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<sup>10</sup> Mekong River Commission, Strategic Plan 2006-2010, p.12

<sup>11</sup> Op. cit. 2

<sup>12</sup> For example, see Jeremy Bird CEO of MRCS, Introductory Speech, 7 April 2008, Vientiane, Lao PDR; Hydropower in the Context of Basin-wide Water Resources Planning, Speech by Jeremy Bird at *Regional Multi-Stakeholder Consultation on the MRC Hydropower Programme*, Vientiane, Lao PDR, 25-27 September 2008.

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<sup>14</sup> Bird, J. (2008) Integrated Water Resources Management in a rapidly-growth private sector development context: the Mekong Basin. Presentation at the *World Water Week, Stockholm Asia Day: Theme 5 - Promoting Effective Basin Management*, 19 August 2008.

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<sup>15</sup> For example, see Bird, J. CEO of MRCS, A Responsible Approach to Dam Building, 25 September 2008; Op. cit. 7.

<sup>16</sup> Mekong River Commission, *Independent Organisational, Financial and Institutional Review of the Mekong River Commission Secretariat and the National Mekong Committees*, Final Report, January 2007, p. 20.

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<sup>17</sup> *ibid.*, pp.19-20.

<sup>18</sup> *ibid.*, pp.13-14; AusAID (2007) *The Greater Mekong Subregion: Australia's Strategy to Promote Integration and Cooperation 2007-2011*, September 2007, Annex 3 Mekong Water Resource Strategy 2007-2011, pp. 20-30; Hirsch, P. et al. (2006) *National interests and transboundary water governance in the Mekong*,

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<sup>19</sup> Op. cit. 9, p.10.

<sup>20</sup> Mekong River Commission (2001) MRC Hydropower Development Strategy, October 2001, Phnom Penh, p. 33.

<sup>21</sup> Jeremy Bird, MRCS CEO, Statement in response to letter from TERRA dated 27 March 2008, 11 April 2008, p. 2.

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<sup>23</sup> Op. cit. 6

<sup>24</sup> Op. cit. 8

### AMRC's Mekong Brief Series

This Brief is the tenth in a series of information sheets to be produced by the Australian Mekong Resource Centre (AMRC), University of Sydney, for students, teachers and others with an interest in the Mekong Region.

The AMRC was established in 1997 to promote research, discussion and debate on development and environmental issues in the Mekong Region. The AMRC is a focal point for information, dialogue and activities in support of an equitable and sustainable development path for the Mekong Region.

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