Public Participation in Transboundary EIA in the Mekong Region

MPE Webinar Series
AECEN Secretariat/Mekong Partnership for the Environment
Why Focus on Public Participation in Transboundary EIA (TbEIA)?

- TbEIA is one of the most important techniques to implement principles and rules of international environmental law, because it prevents environmental harm, promotes cooperation among states, and consequently helps avoid conflicts and project delay.

- Public participation as a center-piece of TbEIA is to promote the transparency and legitimacy of decision-making processes in projects with transboundary effects.
A Reminder - Public Participation

“involves those who are affected by a decision in the decision-making process. It promotes sustainable decisions by providing participants with the information they need to be involved in a meaningful way, and it communicates to participants how their input affects the decision.”

*International Association for Public Participation*
Define “Transboundary”

• No single nation can adequately address challenges of international river basin management, international trade in endangered species, regional infrastructure development, and regional air pollution, for example.

• Such cross-border or transboundary issues require a different governance approach, often involving regional institutions.

• A general obligation of States is to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction.

• Transboundary activities that could trigger a TbEIA are either located close to an international frontier or more remote proposed activities which could give rise to significant transboundary effects far removed from the site of development (Espoo Convention).
What is “Transboundary Harm”? 

- Transboundary damage can arise from a wide range of activities carried out in one country but inflict adverse effects in the territory of another country.
- Generally it refers to border-crossing damage via land, water or air.
- Important considerations are (i) physical relationship between the activity and damage caused; (ii) human causation; (iii) threshold of severity; and (iv) transboundary movement of the harmful effects.
Large Body of International Law

Transboundary Damage in International Law

XUE HANQIN

United Nations
General Assembly

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26 May 2006
Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Fifty-eighth session
Geneva, 1 May-9 June and 3 July-11 August 2006

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (INTERNATIONAL LIABILITY IN CASE OF LOSS FROM TRANSBOUNDARY HARM ARISING OUT OF HAZARDOUS ACTIVITIES)

Title and texts of the preamble and the draft principles on the allocation of loss arising out of hazardous activities adopted by the Drafting Committee on second reading

Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities

The General Assembly,

Reaffirming principles 13 and 16 of the Rio Declaration on Environment and Development,

Recalling the Draft articles on the Prevention of Transboundary Harm from Hazardous Activities,
Prevention of Transboundary Harm from Hazardous Activities (2001)

• Drafted by International Law Commission and submitted to 56th Session of UN General Assembly.

• **Article 13** – States concerned shall...provide the public likely to be affected by an activity...with relevant information..., the risk involved, and the harm which might result, and ascertain their views.
International Court of Justice

• In a famous case, Argentina argued that Uruguay had breached the Statute of the River Uruguay by allowing construction of polluting pulp mills upstream.
• The ICJ found that Uruguay breached procedural obligations to cooperate with Argentina and the River Uruguay Commission during planning for the pulp mills.
• It found that “EIAs which are necessary to reach a decision on any plan that is liable to cause significant transboundary harm to another State must be notified by the party concerned to the other party”
• But ICJ refused to uphold Argentina’s claim in respect of compensation for alleged injuries suffered in tourism and agriculture.
Regional Treaties and Agreements

• **Agreement on the Cooperation for Sustainable Development of the Mekong River Basin** (1995)

• **ASEAN Agreement on Transboundary Haze Pollution** (2002)

• **ASEAN Agreement for the Establishment of the ASEAN Centre for Biodiversity** (2005)

• **GMS Cross-Border Transport Facilitation Agreement** (2003)
Preparation of MRC’s draft TbEIA Guidelines

• ERM’s first draft was prepared in 2002.
• TbEIA Working Group prepared a draft TbEIA Framework document in 2006.
• Seminars and regional consultations discussed this draft in 2007-2008 based on guidance from the Joint Committee of 2006.
• Pilot study (2008-2010), and training and national and regional workshops, intended to lead to finalization of the TbEIA document.
Transboundary Haze Agreement

• The Parties, in addressing transboundary haze pollution, should involve, as appropriate, all stakeholders, including local communities, non-governmental organisations, farmers and private enterprises.

• No mention of environmental impact assessment.
Mekong River Agreement

- MRC has developed TbEIA Guidelines consisting of: (i) Framework; (ii) Technical Guidance (TG); and (iii) Institutional Support.
- After drafting, TbEIA TG were reviewed by member countries which recommended a pilot case study to verify/test the process and procedures spelled out under the TG.
- Consultant team is (i) advising Se San River case study and review teams; (ii) reporting on the case study; (iii) reporting on the legal and institutional review; and (iv) improving TG and/or Framework.
Draft Table of Contents of TbEIA Framework

I. Statement of Intent
II. Definition of Terms
III. Screening and Trigger of the TbEIA Framework
IV. Notifying Potentially Affected Countries and their Response
V. Arrangements for the TbEIA Process; reporting, review and monitoring
VI. Mechanism for resolving disagreements
VII. Roles and Functions of the MRC
VIII. Implementation Arrangements
IX. Revision and Amendments
   • Annex 1: Format of TbEIA Notification Announcement
   • Annex 2: Format of TbEIA Response
   • Annex 3: Outline of TbEIA report preparation
Public Participation in Draft TbEIA

• Dialogue to be coordinated by the relevant NMCS to agree on TORs for the TbEIA.
• Data and information and report of the TbEIA implementation shall be exchanged and shared in a timely manner.
• Potentially affected countries should respond to the results and report of TbEIA within 60 days, and may request MRCS to extend the response period.
• Any disagreement should be resolved in line with the provisions of the 1995 Agreement.
Environmental Law Institute Review (2009)

- As public participation is a vital element of an EIA, explicit requirements for it should be included in any TbEIA framework.
- It should be non-discriminatory and ideally developed to harmonize EIA procedures of the different parties to a TbEIA agreement.
- Include specific translation requirements, funding for affected communities to travel to meetings (as needed), and requirements ensuring the public is easily able to access the information.
- Provide a meaningful response to public comments, including acknowledgment of comments received and justification for excluding any comments from the TbEIA.
Why are the MRC Guidelines So Delayed?

• Government consensus from the original draft of the TbEIA Guidelines by ERM in 2002 until now has been hard to find.
• The initiative has enjoyed broad donor support, however.
• For example, training for regional government leaders in 2009 was funded by the European Commission and USAID.
• But upstream and downstream countries have different interests and some countries felt TbEIA was being imposed from the top.
What about the PNPCA?

• Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (Chiang Rai 1995)
• Procedures for Notification, Prior Consultation and Agreement (2003) and Guidelines on Implementation
• First applied to the Xayaburi Hydropower Dam and now the Don Sahong Dam
• But no mention of TbEIA – first step?
Public Participation in PNPCA

• **Objective** - To promote better understanding and cooperation among the MRC member countries in a constructive and mutually beneficial manner to ensure the sustainable development, management and conservation of the water and related resources of the Mekong River Basin.

• **Principle c** - Respect for rights and legitimate interests.

• **Role of NMCs** - To inform the relevant line agencies of the scope, content and form/format required for Prior Consultation of a proposed use covered by the Procedures.

• **Role of the Public** – the word does not appear anywhere in the Procedures.
Other TbEIA Guidelines to learn from?

- Convention on the Protection & Use of Transboundary Watercourses & International Lakes (Helsinki 1992)
- Memorandum of Understanding on Environmental Principles (1995) for the Tumen River Area Devt. (China, Russia, Mongolia, South Korea)
Can we learn from RTWG approach?

- If TbEIA is left to government agencies and the MRC to agree, then another 10 years may be needed.
- Bringing together governments, civil society, and the private sector in a cooperative, constructive, non-binding setting (like the RTWG) may help to find consensus.
- However, potential benefits to PRC and Lao PDR as key upstream countries need to be addressed.
Can RTWG assist in the TbEIA agenda?

• Should the Regional Guidelines on Public Participation in EIA have a specific chapter on TbEIA?
• If so, how might that feed into the current case study process being carried out by the MRC?
• Could including TbEIA considerations actually jeopardize “endorsement” of the Regional Guidelines on Public Participation in EIA?
• Would MRC welcome this “intrusion” into their carefully crafted ongoing process of finalizing the TbEIA Framework?
What is at stake?

• There is no question that additional hydropower projects will be built on the mainstream Mekong, now that at least 2 are proceeding.

• Lack of public participation in TbEIA or PNPCA procedures could lead to international conflict and lengthy project delays.

• Weak regional institutional procedures may lead one or more governments to consider international law remedies.

• Economic development of the Mekong Region has been a “peace dividend” – it must not become a renewed source of conflict.
Final Words

• Public participation in EIA is regarded as an essential success factor, and should be even more important in a TbEIA context.
• MRC is continuing to finalize the TbEIA Framework, but an end point is not near.
• The Regional Guidelines on Public Participation in EIA could accelerate the process by including a chapter on TbEIA.
• But there are risks that it could jeopardize eventual endorsement and adoption of the Regional Guidelines.
• The discussion during this webinar should help to clarify the best way forward. I look forward to hearing your opinions.
Webinar Materials can be downloaded at:
www.aecen.org and www.mekongeye.com

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### Environmental Impact Assessment Compendium in Asia

Click on the map to the left or the list below to access each country's EIA laws and regulations, news, and links to other resources on the web.

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### EIA News

- **Selangor government to finally meet anti-SUKE lobby to hear groused**
  Jan 18 2016 [Malaysia]
- **Gov't approves environmental impact rules for investments**
  Jan 18 2016 [Myanmar]
- **At the borders of ecological destruction**
  Jan 18 2016 [Thailand]
- **Under fire, Pahang MB says couldn’t catch any illegal bauxite miners because they ran**
  Jan 18 2016 [Malaysia]
- **Highway project causes diversity loss for forest**
  Jan 18 2016 [Vietnam]
- **Conduct study before opening coal mines: NPCB**
  Jan 18 2016 [India]
- **Penang mulls avenues to fund LRT ops under TMP**
  Jan 18 2016 [Malaysia]
- **Govt told to prioritise construction of Nijgadh International Airport**
  Jan 18 2016 [India]
- **US$ 1.4 bn Sri Lankan port project back on track**
  Jan 18 2016 [Sri Lanka]
- **Mumbai: BMC submits report on coastal road project to state authority**
  Jan 18 2016 [India]

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### EIA Documents and Case Studies

- **[Laos] Evaluation of the Environmental Impacts Assessment (EIA) System in Lao PDR**
- **[Malaysia] EIA System in Sabah**
- **[Cambodia] Environmental Impact Assessment on the Cambodian Side of the Srepok River due to Hydropower Development in Vietnam**
- **[Thailand] Pak Mun Dam Mekong River Basin**
- **[Vietnam] Support to Harmonization of Environmental Impact Assessment (EIA) under the Hanoi Core Statement on Aid Effectiveness**
- **[Vietnam] EIA: Thanh Hoa Pulp and Paper Mill Project**
- **[India] Summary EIA: LPG Pipeline Project in India**
- **[Indonesia] EIA: Exploration Drilling Program at Karaka Block**
- **[Srilanka] Draft EIA: Dry Zone Urban Water Supply and Sanitation Project**
- **[China] IEE: Hellongjiang Energy Efficient District Heating Project**