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Institutional, Legal and Policy Perspectives on the Management of Aquatic Resources (esp. Fish) and the Aquatic Environment in Wetlands, Flood-plains, Lakes and Rivers in the Mekong River Basin.

Introduction

The paper is prepared and organised keeping in mind that it is one of several papers of a panel addressing a broad range of issues with regards to the Mekong River region and the sustainable use and development of its natural resources and environment. To keep the focus on issues related to the headline the paper will highlight a number of critical issues. The paper is not going deep into areas of background information on the Mekong River, related resources or the riparian countries as it is expected that other papers of the panel will address related issues.

When “wetlands” are referred to in this paper it covers the whole range of wet areas, seasonal or permanent, as listed in the “Wetlands classification system of the lower Mekong Basin” (See Annex 1) ranging from near coastal areas, lakes and rivers to rice fields and man-made ponds - or with other words “all” wet areas of the region.

When “wild wetlands resources” are referred to this likewise covers “all” non-cultured animals and plants that are in one way or another used for human consumption or production such as fish, snails, frogs, eels, snakes, crabs, etc. In this context the values in terms of tourism potential should also be considered among the values linked to “wetlands”.

Background

Fish and other aquatic products (such as frogs, eels, snails, crabs, etc.) found in “commons” like wetlands, flood-plains, etc. are central to livelihoods throughout the Mekong River Basin for the rural poor and others with limited ownership to (productive) land,. These very same areas are today threatened by increasing

pressure through encroachment, over-exploitation, destructive practices, pollution and environmental degradation (both man made and natural).

While there is a general agreement on the need to slow the degradation of the catchments, wetlands and other water bodies and related resources - and to ensure that utilisation is made more equitable and sustainable, policy responses have been generally weak and uncoordinated. National government jurisdiction and authority over forests, fisheries and other natural resources as well as lakes, rivers, wetlands, and environmental protection tends to be fragmented and overlapping, international co-operation is scant, and governments lack the capacity to monitor resource use or to enforce regulations.

A common objective for programmes for sustainable use of natural resources is to seek long term sustainability for the benefit of the society - usually with the stated aim to improve living conditions for the poorer segments of the society.

A major problem that seemingly affects the possibilities to reach objectives of sustainable utilisation of natural resources is the lack of ability, willingness, and/or functioning systems to address and consider all the multifaceted and different factors that provide the limits (and possibilities) within which viable options for natural resources management have to be sought. In relations to “commons” and common property the weaknesses of applied systems is easily detectable when it comes to matters like to safeguard the resource base and the interests of, or means of survival for the poorer communities, including their possibilities to secure access rights, provide for equity in resources utilisation, etc.

Geographical setting - Mekong Basin/Greater Mekong Subregion

- Borders - political status
- Status of resources and environment
- Social context (economy, religion, etc.).

A good background on the various geographical parameters of the region is important for any type of analysis. With the assumption that other papers of the panel will be more elaborate this paper will not go any deeper into the geographical background per se. Good and extensive overviews can be found in MRC/UNEP-EAP May 1997, MRC/UNEP-EAP June 1997, Hirsch - Cheong 1996 and Öjendal-Torell 1997 as well as in a range of other publications.

Lack of information and understanding

Out of publications like those referred to above, and others, it is obvious that there is in the region a clear lack of information on the availability and a lack of regional

understanding of the local, national and regional importance on key natural resources (such as fish and the value of fish for the local households and economies). Another message is that there is in general unclear structures with regards to legal and administrative responsibilities for planning and management of resources utilisation and environmental protection including rules and responsibilities for central and local authorities as well as with regards to rights and responsibilities for communities, user groups and/or individual users.

Another aspect that has not really been fully addressed in various analysis is the relations between “wetlands” and sustainable use of natural resources in the context of the whole range of wetlands as listed in the “Wetlands Classification System of the Lower Mekong Basin” (Annex 1). In principle this would imply that the whole rationale for the “Agreement on the Co-operation for the Sustainable Development of the Mekong River” would be to form the basis for a region wide “wetlands programme” covering the whole basin as per the classification all water areas (seasonal as well as non seasonal) of the Basin falls within the classification (including aquaculture ponds, fishing areas, rice fields, lakes. etc.) (MRC Environment Programme, Aug. 1997). But, in spite of the broad classification of wetlands there is a tendency to view all “wetlands projects” as “environmental” projects. This in turn has led to some implications - and complications - which will be shown later in the text.

Valuation of resources/sectors

“Wetlands” in its broad classification are central and basic to the whole region, its development, its people and those cultures that have emerged in the region - or as expressed by King Ramkamhaeng around year 1300 (during the Sukhothai period of present Thailand) “there are fishes in the water and rice in the fields” - and it is worth remembering that the fields referred to are wetlands as well with a lot of aquatic products besides the rice (and the fish). The expression is also an indication of the importance and expected availability of fish as a central source of food.

It could be argued that due to the abundance and the more or less free access to freshwater aquatic products these has not been very well recorded and official statistics are to say the least not representative of the real quantities and the real values for such products as fish, frogs, eels, snakes, crabs, etc. To try to get some assessments of the amounts consumed and the values involved attempts are now increasingly being made to make household surveys in different areas and from there come up with revised figures. Such surveys are for example done within the framework of MRC’s Fisheries Programme and AIT’s Aqua Outreach Programme (see for example Gregory, et al. 1997).

Also in other fields/sectors, like the present level of tourism (a sector that already today brings large revenues into the region) and further development of tourism there are no real assessments made on present value and the potential for

development in large parts of the region and calculations are not made on the subsequent loss of revenues due to a deterioration of the environment and/or development projects that excludes further development of tourism (Öjendal - Torell, 1997).

From the point of policy formulation and development planning this evident gross under valuation of “wild wetland resources” in the Mekong Region has significant implications as planning decisions and policy formulations are based on false assumptions on the economic benefits - and economic losses - of the various sets of options often “unduly” favouring urban based needs and/or options related to intensive agriculture schemes. This is not an argument against urban development schemes per se, as they are important and unavoidable in a region like this one - the important point is that options and opportunities should be assessed based on adequate information and thus being able to value and assess, as far as possible, trade offs and other “sacrifices” that has to be made.

Environmental Impact Assessments (EIA*s)

All countries of the region are in different stages of developing laws and schemes with regards to Environmental Impact Assessment (EIA). In line with the brief arguments put forward above with regards to the under valuation of “wild wetlands products” a basic assumption could be made with respect to the recommendations coming out of the EIA’s. The assumption is that “wild wetland resources” will not be given sufficient weight and thus making these resources and the target areas (for the EIA) more vulnerable for encroachment by competing users than if the “real value” would have been included in the calculation. Major economic (and subsistence) values might again be lost, leaving rural poor without or with reduced means to generate income and subsistence.

History of legal and institutional development

The history of legal and institutional development is quite disparate when comparing the countries of the Mekong River Region. If looking at the four present members of the Mekong River Commission it is only Thailand that have been in the position to have a long “unbroken” history of being able to develop its legal and institutional structures going back to the Sukhothai period up to the recent (1997) adoption of a new constitution. The developments in the other countries have been more fractured and is well exemplified by looking at the Cambodian history (from Cambodian Working Group Team 1998):

- up to 1870s - pre-colonial systems based on traditional Khmer laws and institutions,
- 1870’s to 1954 - French systems progressively super imposed,
- 1954 to 1975 - a dual system of French and traditional laws were maintained,
- 1975 to 1979 - the Khmer Rouge scrapped all laws and legal institutions,

- 1979 to 1991 - the State of Cambodia established a system of revolutionary people's courts,
- 1992 to 1993 - the UNTAC period,
- 1993 to the present - 21 September 1993, the constitution of the Kingdom of Cambodia promulgated.

The example is important as it gives a background to the struggle to develop and re-establish functional legal and institutional systems - and to try to trace back what are the traditional values and other aspects that already in the short term affects peoples willingness to follow rules and regulations as well as to form the basis for sustainable management schemes. And Cambodia for one is very much in the middle of this struggle, some examples will be given below.

The histories of Laos and Vietnam are also presenting radical shifts in the legal and institutional development.

Local level perspective on laws, rights and institutions

If seen from the individual user or the local community than the legal, institutional and policy instruments available to implement, or back up, different types of locally-based management systems for “commons” (such as, flood-plains, lakes, rivers and other types of natural wetlands) and “wild wetlands resources” (such as fish, snails, frogs, snakes, etc.) throughout the Mekong River Basin are not really well developed - if at all in place (Tasneeyanond - Rubthong 1991, Chircop - Torell, 1997, The Nation 1997, Jerndal 1997).

In practical terms it means that central questions such as those related to access rights, equity, granting of new (land)titles, etc. still needs to be clarified. In Vietnam for example there is still not possible to privately, or collectively, own land (Chircop - Torell 1997). The user rights in Vietnam is based on long term leases of the land to be used/developed. When it comes to the “wild wetlands resources” guarantees for continuous use or longer term user rights is not really available and there is a constant risk for encroachment by outside “developments” taking over the area. In terms of legislation and policy changes some positive steps has been taken in some countries (see below).

In the absence of formal systems for allocation of rights to exploit and manage “wild wetland resources” it is common in all countries that accepted practices, sharing of user rights and management, etc. are be based on unwritten and customary laws or rights of different varieties and/or a kind of “intentional” non-enforcement of specific rules by local authorities. This intentional non-enforcement is unfortunately also practised vis-a-vis larger scale commercial intrusions (as for example in the recent case with the logging scandal in the Salween National Park in Thailand on the border to Myanmar which has been extensively covered by Thai

newspapers in the early months of 1998), thus adding to the lack of security of continued traditional access to “wild wetland resources”.

On a seasonal basis there seems also to be areas where there are open access to the available “wild wetlands resources”. In Cambodia, where there are strong seasonal variations in the flow of water, it is reported from provinces like Svay Rieng that during the periods of floods (when rice fields are submerged) it is open for anyone to fish, collect snails, etc. but when the water recedes and the borders of the fields become visible it is also the end of the open right to harvest the “wild wetland resources” (personal communication with the AIT Aqua Outreach Programme in Cambodia).

Out of the discussion above and related literature it could be argued that one central question as to the successful implementation of locally based management schemes and the sustained and improved well being of local communities is the extent to which traditional practices and customary laws and rights are integrated, or acknowledged in the mainstream (i.e. capital based) legal and institutional development.

Constitutional basis for local management and customary law

The constitutions could be supportive of local management and customary law in different ways like stating certain rights for individuals and groups. Direct reference could also be made to traditions and customs. Seen in another perspective one basic factor is that the constitution should not contain Articles that are contradictory to the implementation of local management schemes or application of customary law.

Cambodia: In principle the necessary elements are present in constitution of Cambodia. The constitution states that “All persons, individually or collectively, shall have the right to ownership.” (Article 44) The Article goes on to specify that only Khmer entities and citizens shall have the right to own land. “Commons” (in a broad definition) is considered as “State property” and its use and management to be determined by law (Article 58). Any direct reference to customary practices is not made in the constitution - but references are made to Khmer traditions and culture and already in the Preamble reference is made to the “fine Angkor civilisation”.

Laos: The Lao constitution should, in principle, be a sufficient base on which to integrated local management and customary law as for instance Article 8 states that “All ethnic groups have the right to protect, preserve and promote the fine customs and cultures of their own tribes and of the nation” and Article 14 “collective and individual ownership” is recognised. There are, however, a number of provisions that if, backed up by laws to that effect, could imply reduced rights for local communities and the use of customary law such as “the rights (of the

people) are exercised and ensured by the Lao People's Democratic Party (Article 3) and the whole Chapter VII that could form the basis for the implementation of "top-down" management and lines of "command". But again, if the back up laws and regulations are relevant than the constitution could well be supportive of local management and customary law.

Thailand: The launching of the Eight National Economic and Social Development Plan (1997 - 2001) and the recent promulgation (1997) of a new constitution have brought about some radical changes in Thailand as to the fundamental basis for decentralised and local management. The Eight plan have focused whole sections to "popular governance" (Part VII) "popular participation in natural resources management" (Part VI, Chapter 3) and in the text references are made to the "incorporation of local wisdom", etc.

The constitution is also containing several provision with regards to the right of people and community such as in Chapter III, Section 46; "..... traditional community shall have the right to conserve and restore their custom. Local intellect, arts or good culture of their community and the nation and participate in the management, maintenance, preservation and exploitation of natural resources and the environment in a balanced fashion and persistently as provided by law". Furthermore, Section 48 states that "property right is protected" and another new element is Chapter IX which contains provisions related to "local government" including among other things a "duty to conserve local arts, custom, intellect or good culture" (Section 289).

Vietnam: It is possible to find basis in the constitution for local management and customary law but same as in the case of Laos these are dependent on suitable back up instruments not to be "over shadowed" by the more "centralistic" elements. Examples of provision supportive of the development of customary practices are Article 5 that states the right to "promote fine customs, habits, traditions and culture" and Article 121 that stipulates that "the deputy of the People's Council represents the will and aspirations of the local people" and he is also suppose to "answer their requests and proposals".

Comparing the constitutions it is obvious that the new Thai constitution is the one that states the most clear and the most far-reaching commitments to locally based management and development of traditional systems.

Having a good or a sufficiently good constitutional base is only part of the "matrix" - and the intentions might not always be followed up in the institutional development or in the development and applications of more specialised laws and regulations. Some examples will be given below - especially with reference to distortions caused by external influences.

External distortion and institutional development

As was mentioned earlier Thailand that has had the opportunity to develop its legal system and institutional structure over a long period of time. The other three countries are in comparison struggling to get a workable legal system in place. This legal development which is very much linked to institutional development is often done with the help of outside support - both financial and technical.

If viewing the situation with “Swedish eyes” (another country that has had the opportunity to develop its legal and institutional system over many centuries) this has led to the establishment of an *ad hoc* legal and institutional structure. Donors and other form of external stakeholders support, with good intentions, the process of development. The lack of co-ordination has to led to the development of different sectors along different “cultures” based on the systems of the donor country and the external expert, something that could be seen in for example Vietnam and Cambodia. A low rate of “adoption” at grass root level is also to be expected based on the fact that the “law establishment process” is usually given to little time and often a ready made “law” is presented to the country for adoption (at government level). The might be laws might be well constructed but the national or local “feeling” for the law and its provisions are missing and subsequently institutions might be built up that are “alien” to national traditions. The weaknesses of such a “patch work” becomes visible when co-ordinated or integrated programmes or management schemes are to be implement as/if the provisions with regards to different sectors or levels of authority do not match.

A related problem is the feeling that it is possible to sense a small battle between “lawmakers” of US type of tradition and those of French (mainland Europe) tradition without really looking or searching for a local traditional base (my own reflection) on which to build a legal and institutional framework..

Another frequent form of external institutional and legal “distortion” is linked to the actual implementation phase of projects and programmes where mandates are being given to agencies and institutions that does not really follow the established legal and institutional structure. A good example is wetlands programmes - if looking at the classification again most wetlands are either lakes, rivers, ponds, flood plains, etc. (fishing areas) or rice fields (agriculture and fishing areas) but nevertheless most “wetlands management programmes” are being “given” to ministries or departments of environment to operate.

In Cambodia for example the “law” states clearly that all wet or flooded areas are fishing areas and when talking to ministries or departments for agriculture, forestry, fisheries, etc. they all verify that flooded forests, mangroves, etc. falls under the authority of the Department of Fisheries. But in spite of that present wetlands programme such as the MRC “Inventory and Management of Cambodian

Wetlands” is being allocated to the Ministry of Environment (co-ordination with other departments such as the Department of Fisheries is anticipated in the project document). It should be stated that the programme itself is well management and the point that should be made is not to criticise the programme but exemplify how actual existing legal structures are ignored by donors and subsequently adds to the institutional confusion.

Rules and responsibilities

Subsequently as/if the laws and the institutional structure are not well co-ordinated it follows that the rules and responsibilities between institutions, individuals and communities, local and central authorities becomes unclear - which in turn will have implications on the possibility to implement successful management schemes (of whatever nature).

Policy expressions

With again reference back to the piece on “external distortion and institutional development” it could be argued that the countries of the region in reality lack policy at all levels to back up the legal and institutional systems - and can countries like Laos and Cambodia afford to. Taking the wetlands as a case, if having strict policies on the institutional responsibilities linked to the existing laws would have been in place the “Cambodian response” to the donor would have been “it is our policy that wetlands fall under the authority of the Department of Fisheries”

This dilemma on trying to develop policies when “external interests” do not really bother anyway was expressed by a Cambodian delegate at the informal session of the Second Meeting of the Donor Consultative Group to the MRC in response to a demand from donors to co-ordinate different initiatives better “if ADB goes to ministry X and ask us to join the GMS - we say yes, if Japan asks ministry Y to join the Indo-China Forum - we say yes, if ASEAN ask ministry Z - of course we say yes as we can not afford anything else”.

Regional agreements and International Commitments

At the regional and international arena the countries of the Mekong Region signed themselves up to a number of regional agreements and international conventions. Central, from the perspective of the Mekong River is “The Agreement on the Co-operation for the Sustainable Development of the Mekong River Basin” signed by Cambodia, Laos, Thailand and Vietnam on 5 April 1995. The way it is formulated the Agreement is open for the entry of China and Myanmar into the Mekong River Commission (MRC), they are presently invited as observers to Council and Joint-Committee Meetings.

Other important regional and international commitments are the co-operation within the Greater Mekong Sub-region initiative and membership of ASEAN as well as the fact that several countries have ratified or acceded to conventions such as the Bio-diversity Convention, the Ramsar Convention, the UNESCO Convention on Cultural and Natural heritage, CITES. All of these contains provisions and objectives towards “sustainable” use with special attention being given to the poorer groups of society, indigenous people as well as strong environmental concerns.

The paper will not analyse the impacts of these commitments much deeper but in this context merely raise the point that it is yet to be seen how the “cumulative” commitment will transpire into plans for local development. A lack of vision or clear expression of direction at national and regional are still sought as has been noted in studies related to the Mekong River Commission and the formulation of a Basin Development Plan (SEI/IEM 1997 and Danida/Sida/Pem-Consult 1997).

Conclusions

Work should be encouraged to strive for a more coherent legal and institutional structure based on local and national customs and traditions including such things as resource management, ownership, user rights, local decision making, etc.

For effective planning and management of wetlands in the full sense of the classification (Annex 1) get “Wetlands” back into the central line ministries and seek co-ordination and integration as appropriate between sectors, central and local level authorities, and user and user groups.

There is an urgent need to raise the awareness on the possible implications for Mekong Region on the applications of EIA’s, Basin Planning, Irrigation planning and other major development schemes based on a gross under-valuation of major natural resources.

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Annex 1.

Wetlands classification system of the Lower Mekong Basin (from MRC Environment Programme Aug. 1997 - Annex 4)

SALT WATER

Marine/Coastal

Sub-tidal

1. Non-vegetated
 - Natural Sub-tidal Bare Marine
 - Sub-tidal Mariculture
2. Vegetated/Coral
 - a) Sub-tidal Marine Coral
 - b) Sub-tidal Marine Seagrass
 - c) Sub-tidal Marine Seaweed
 - Natural Sub-tidal Marine Seaweed
 - Sub-tidal Marine Seaweed Farm

Inter-tidal

1. Non-vegetated
 - Natural
 - a) Inter-tidal Coastal Beach
 - b) Inter-tidal Coastal Mudflat
 - c) Inter-tidal Coastal Cliff
 - d) Inter-tidal Coastal Saltflat
 - Artificial
 - a) Inter-tidal Coastal Salt Works
 - b) Inter-tidal Coastal Aquaculture
2. Vegetated/Coral
 - a) Inter-tidal Marine Coral
 - b) Inter-tidal Marine Seaweed
 - c) Inter-tidal Marine Seaweed
 - Natural Inter-tidal Seaweed
 - Inter-tidal Marine Seaweed Farm
 - d) Trees/Shrubs
 - Coastal Mangrove Swamps
 - Coastal Mangrove Plantation
 - e) Forbs/Coastal Saltmarsh

Non-tidal

- Non-vegetated
 - Non-tidal Mariculture

EstuarineSub-tidal

1. Non-vegetated
 - Natural Sub-tidal Bar Estuarine
 - Sub-tidal Estuarine Aquaculture
2. Vegetated/Coral
 - a) Sub-tidal Estuarine Coral
 - b) Sub-tidal Estuarine Seagrass
 - c) Sub-tidal Estuarine Seaweed
 - Natural Sub-tidal Estuarine Seaweed
 - Sub-tidal Estuarine Seaweed Farm

Inter-tidal

1. Non-vegetated
 - Natural
 - a) Inter-tidal Estuarine Beach
 - b) Inter-tidal Estuarine Cliff
 - c) Inter-tidal Estuarine Saltflat
 - Artificial
 - a) Inter-tidal Estuarine Salt Works
 - b) Inter-tidal Estuarine Aquaculture
2. Vegetated/Coral
 - a) Inter-tidal Estuarine Coral
 - b) Inter-tidal Estuarine Seagrass
 - c) Inter-tidal Estuarine Seaweed
 - Natural Inter-tidal Estuarine Seaweed
 - Inter-tidal Estuarine Seaweed Farm
 - d) Trees/shrubs
 - Estuarine Mangrove Swamp
 - Estuarine Mangrove Plantation
 - e) Forbs/Estuarine Saltmarsh

Non-tidal

- Non-vegetated
 - Non-tidal Estuarine Aquaculture

Coastal Lagoon**Inland Salt Lake**

FRESHWATER

Riverine

River

1. Perennial River
 - a) Pool in Perennial River
 - b) Channel in Perennial River
 - Natural Channel in Perennial River
 - Perennial Canal
 - c) With Perennial Rapid
 - d) With Perennial Waterfall
 2. Seasonal River
 - a) Pool in Seasonal River
 - b) Channel in Seasonal River
 - Natural Channel in Seasonal River
 - Seasonal Canal
 - c) With Seasonal Rapid
 - d) With Seasonal Waterfall
- Riverine Banks/Beaches/Bars
- Riverine Flood Plain
1. Flood Plain Grassland
 - Natural Flood Plain Grassland
 - Man-made Flood Plain Grassland
 - Flood Plain Wet Rice
 - Other Flood Plain Crops
 2. Flood Plain Trees/Shrubs
 - Natural Seasonally Flooded Trees/Shrubs
 - Man-made Seasonally Flooded Crops/Orchards
 3. Seasonal Flood Plain Lake
 4. Seasonal Flood Plain Pond
 5. Seasonal Back Swamp/Marsh
 - Natural Seasonal Back Swamp/Marsh
 - Man-made Seasonal Back Swamp/Marsh
 - Wet Rice in Seasonal Back Swamp/Marsh

Lacustrine

Lake > 8 ha

1. Permanent Lake
 - Natural Permanent Freshwater Lake
 - Man-made Permanent Reservoir
2. Seasonal Lake
 - Natural Seasonal Freshwater Lake
 - Man-made Freshwater Lake

Pond < 8 ha

1. Permanent Pond
 - Natural Permanent Freshwater Pond
 - Man-made Freshwater Pond
 - a) Freshwater Aquaculture Pond
 - b) Sewage Treatment Pond
 - c) Farm Pond
 - d) Cooling Pond
 - e) Borrow Pit, Excavated Pond
 - f) Others
2. Seasonal Pond
 - a) Natural Seasonal Freshwater Pond
 - b) Man-made Seasonal Pond

Palustrine

1. Permanent Palustrine
 - a) Permanently Flooded Grassland
 - b) Permanent Freshwater Marsh, with Trees/Shrubs
2. Seasonal Palustrine
 - a) Seasonally Flooded Grassland
 - Natural Seasonally Flooded Grassland
 - Man-made Seasonally Flooded Grassland
 - Man-made Seasonally Flooded Plantation
 - b) Seasonally Freshwater Marsh, with Sedges
 - c) Seasonally Freshwater Swamp, with Trees/Shrubs
 - Natural Seasonally Flooded Swamp
 - Man-made Seasonally Flooded Plantation

Annex 2**List of Abbreviations**

ADB	Asian Development Bank
AIT	Asian Institute of Technology
ASEAN	Association of Southeast Asian Nations
Danida	Danish International Development Assistance
EIA	Environmental Impact Assessment
GMS	Greater Mekong Sub-region
IEM	International Environment Management
MRC	Mekong River Commission
SEI	Stockholm Environment Institute
Sida	Swedish International Development Agency
UNEP	United Nations Environment Programme
UNEP-EAP	UNEP - Environment Assessment Programme
UNTAC	United Nations Transitional Authority