

Promotion of Innovative Mechanisms to Support Monitoring, Compliance, and Enforcement for EIA Approvals in the GMS

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Abstract

The Greater Mekong Subregion (GMS) has already seen more than \$15 billion invested in infrastructure and much more is planned. Therefore, it is imperative that environmental impact assessment (EIA) procedures are more effective than at present, despite the various laws providing for EIAs in all GMS countries. The need for an effective transboundary EIA framework is a longstanding weakness of the EIA procedures in the GMS.

International best practice for EIA follow-up suggests that the GMS should strengthen monitoring, post-project audits, stakeholder involvement, communication and sanctions regimes. Third party monitoring, including by project affected persons (or their intermediaries), should be specified at the EIA scoping stage, and appropriately funded, either by the project proponent or the government.

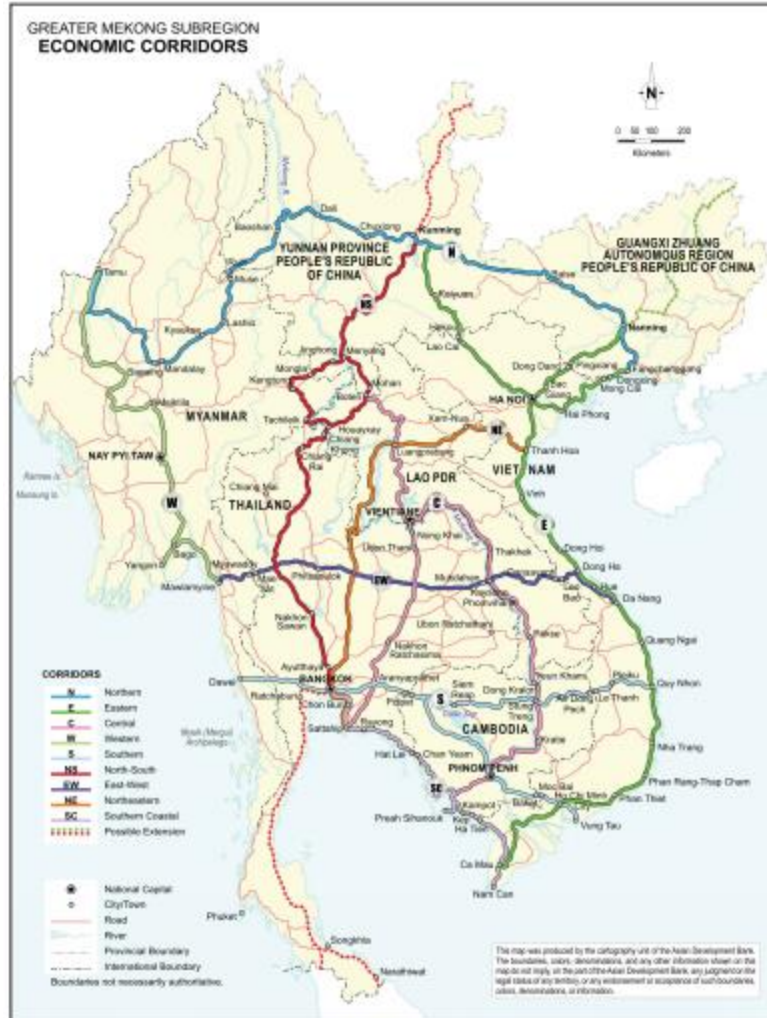
Regulatory compliance should be easy to enforce with a standardised set of fines, as practiced in the US. Environmental damage due to the project needs to be sanctioned at a much higher level than the economic benefit gained from cutting corners and should encompass financial estimates of the damage caused. Post-project audits may also assess the motivations for the damage caused, with wilful damage and repeated offences punished to a much greater extent.

Of course, more needs to be done than simply compiling a post-project audit report. Redress mechanisms need to be available either through the funding body, the responsible government agency, or ultimately through the courts.

The GMS Working Group on Environment and the GMS Environment Operations Centre may be the most appropriate avenues to take up the recommended approach in this paper.

1. Introduction

The Greater Mekong Subregion (GMS) comprises China, Myanmar, Lao PDR, Cambodia, Thailand and Viet Nam. The GMS economic cooperation program, initiated by the Asian Development Bank, envisages a subregion connected by infrastructure and cooperating on all economic and environmental aspects of the subregion's development (Krahl and Dosch 2018). Since 1992, more than \$15 billion has been invested in roads, energy, railways, tourism, and communications.



Source: ADB 2015

Since initiation of the GMS economic cooperation program, many other development partners have contributed such as World Bank, United Nations agencies, Australia, Finland, France, Netherlands, Norway, New Zealand, Japan, Republic of Korea, Sweden and Switzerland. South-South cooperation has also commenced with China, Thailand, Malaysia and Viet Nam providing technical assistance and infrastructure financing to other GMS countries, especially in the hydropower sector. Of the more than 200 major infrastructure projects planned for the GMS, at least 50 are still pending (ADB 2015). Accordingly, the extent of the planned infrastructure development demands a robust environmental impact assessment (EIA) and strategic environment assessment (SEA) (ADB 2018).

2. Current status of EIA in the GMS

Although there is no formal requirement for transboundary environmental impact assessment in the GMS. All Mekong countries have adopted EIA procedures for development projects with potentially significant impacts, while some have commenced formal SEAs for plans and programs.

- Cambodia - Law on Environmental Protection and Natural Resource Management, 1996 (Chapter III) and the Sub-Decree on Environmental Impact Assessment, 1999.

- Lao PDR - Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No. 8030/MONRE, and Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No. 8029/MONRE, 17 December 2013.
- Myanmar - Environment Protection Rules 2014.
- Thailand - Section 46 of the Enhancement and Conservation of Nation of National Environmental Quality Act 2535 1992 (NEQA 1992).
- Viet Nam - Law on Environmental Protection 2014.
- China – Environmental Impact Assessment Law 2003, revised in 2016

There are some minor differences between the different legal provisions (e.g. Thailand requires a separate health impact assessment for significant projects) but generally the procedures have been modelled on similar laws in developed countries. For projects with minimal impacts, most countries have adopted a simpler Initial Environmental Examination (IEE) process.

In the GMS, however, translating the EIA laws into effective implementation is not always an easy process, especially where countervailing forces want the infrastructure to proceed at any cost. Many EIAs in the Lower Mekong countries are of poor quality and their governments have very limited technical capacity to review EIAs (King 2016). The lack of provisions for transboundary EIA in the GMS is also a significant weakness.

3. Global best practice for monitoring, compliance, and enforcement of EIA

Best practice follow-up to an EIA comprises (i) monitoring baseline and post-project activity; (ii) evaluating conformity with standards and impact predictions and overall environmental performance of the project; (iii) managing responses to any issues identified; and (iv) communicating the results of the EIA follow up to key stakeholders and identifying future improvements (Morrison-Saunders *et al.* 2007).

According to the International Association of Impact Assessment, the general best practice principles are: (i) follow-up is essential to determine EIA outcomes; (ii) transparency and openness; (iii) all parties should commit to EIA follow-up; (iv) appropriateness for the society's context; (v) consider cumulative impacts and sustainability; and (vi) follow-up should be timely, adaptive, and action-oriented (*ibid.*). Of course, merely reporting on poor compliance with EIA provisions is not sufficient—sanctions must also be considered. Sanctions should not only remove any economic benefit from the violation but also reflect the severity of the resulting impacts (OECD 2009). One difficulty, however, is translating these factors into financial terms, so an appropriate fine or recourse to a bond can be imposed, without needing court intervention. Regulatory infractions such as reporting or record keeping violations, or failure to obtain a permit or conduct community consultations, may be easier to assign a standardised schedule of fines, as has been done in the US (*ibid.*).

4. Proposed innovative mechanisms for the GMS

Possible improvements in the GMS include (i) mandating follow-up in the EIA scoping stage; (ii) ensuring funds are set aside for monitoring compliance with the environmental management plan; (iii) providing for third party monitoring (including project affected people); (iv) creating an improved redress mechanism, with full sanctions authority; and (v) providing for ultimate legal sanctions in environmental courts (or “green benches” of civil courts).

At the EIA scoping stage, the EIA authority and the project proponent should agree on the terms of reference for project monitoring and follow-up, as well as ensuring that funds are set aside for these purposes, either as a bank guarantee, a paid-up bond, or other verifiable source of funds.

During project implementation, project affected persons (or their trusted intermediaries) should be allocated sufficient resources, either by the government or the project proponent, to keep constant vigilance on project implementation and identify any environmental damage being caused. In the first instance, they should raise their concerns with the environment specialist assigned to the project, but if they don't receive adequate attention, then they should be provided with an additional redress mechanism. In the multilateral development banks, this point of redress is typically a specific "problem solver" or a multi-member compliance panel. Where multilateral development banks are not involved, however, the government needs to provide an equivalent redress mechanism, possibly in a general audit office, or in the inspector-general's office. An environmental bond may be required to ensure that funds are available to remedy the environmental damage caused and to amend project implementation so that additional damage is avoided.

Post-project auditing is not carried out frequently enough to deter project proponents from cutting corners. Effective post-project auditing should be carried out from completion of the physical works until some time after operations commence. In addition to ensuring that the necessary paperwork has been followed and all procedures and permits have been complied with, the audit should also check if the predicted environmental outcomes identified in the EIA have occurred and if the prescribed mitigation measures in the environmental management plan have reduced these impacts to an acceptable level. The audit should also check if the project affected persons accept the project outcomes and are adequately compensated for any personal or community-level damage.

If the audit finds either regulatory non-compliance and/or environmental harm, the audit report should trigger specific sanctions in the form of a fine or relinquishing the environmental bond. If there is evidence of wilful damage, or if the project proponent is a repeat offender, there may even be a case for assigning criminal damages. In such cases, or in case of appeal by the project proponent, a dedicated environmental court or a "green bench" of the civil court may need to hear the case and mete out appropriate remedies, according to the law.

5. Conclusions and recommendations

While all GMS countries have applicable EIA laws and procedures, implementation is often weak because there are few sanctions for poor performance. As there are still several billion dollars of infrastructure planned for the GMS, improved compliance and enforcement of EIAs is urgently needed, especially where new sources of funds may not have adequate safeguard systems in place.

There are international best practices for EIA follow-up and these are documented by the International Association of Impact Assessment and/or presented at their annual conferences. Importantly, the OECD notes that financial sanctions must be significantly higher than the economic benefits derived from cutting corners, and reflect the true environmental damage caused. Otherwise there is no disincentive to prevent similar behaviour in future.

Several suggestions are provided for strengthening the compliance and enforcement of EIAs in the GMS. One avenue recommended for taking up these suggestions is the GMS Working Group on Environment and the GMS Environment Operations Centre in Bangkok, Thailand¹.

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¹ <http://www.gms-eoc.org/the-program>