

Mekong Partnership for the Environment

MEKONG EIA BRIEFING :

Environmental Impact Assessment Comparative Analysis In Lower Mekong Countries



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List of Acronyms

ABA	American Bar Association
ADB	Asian Development Bank
AECEN	Asian Environmental Compliance and Enforcement Network
ASEAN	Association of Southeast Asian Nations
CSO	civil society organization
EA	environmental assessment
ESMMP	Environmental and Social Management and Monitoring Plans
ECC	environmental compliance certificates
EHIA	Environmental and Health Impact Assessment
EIA	Environmental Impact Assessment
EMMP	Environmental Management and Monitoring Plan
EMP	Environmental Management Plan
EPP	Environmental Protection Plans
ESIA	Environmental and Social Impact Assessment
IEE	Initial Environmental Evaluation
IEIA	Initial Environmental Impact Assessment
MoE	Ministry of Environment
MOECF	Ministry of Environmental Conservation and Forestry (Myanmar)
MONRE	Ministry of Natural Resources and Environment (Lao PDR, Vietnam, Thailand)
MRC	Mekong River Commission
NGO	non-government organization
ONEP	Office of Natural Resources and Environmental Policy and Planning (Thailand)
PAP	project affected people
PNPCA	Prior Notification, Prior Consultation and Agreement
SEA	Strategic Environmental Assessment
SPS	Safeguard Policy Statement (ADB)
TbEIA	transboundary EIA
TOR	terms of reference
UN	United Nations
UN ECE	United Nations Economic Commission for Europe

Executive Summary

Background

Environmental Impact Assessment (EIA) is a central process in sustainable development to reduce and mitigate anticipated impacts of development projects. Every national government in mainland Southeast Asia has, or is in the process of developing, legislation on environmental governance and shares a common interest in implementing and enforcing EIA procedures. While there is a growing awareness of the importance of good EIA policy and practice, experience from multiple stakeholder groups highlights that critical gaps still remain in its effective implementation, particularly with respect to public participation. These factors, along with the increasing investments in large-scale regional development projects and associated with the ASEAN Economic Community, reveal new opportunities to advance EIA policy and practice and address the regional dimensions and impacts of investments.

Objective

The objective of this Report is to conduct a comparative analysis of EIA laws, policies, regulations, and guidelines in the Lower Mekong countries Cambodia, Lao PDR, Myanmar, Thailand, and Vietnam in order to determine existing regional harmonization, identify gaps, and recommend options for developing a set of standards that can accompany the EIA process in order to respond in a regional manner to social and environmental impacts from large-scale development and infrastructure projects.

Key Questions

This Report examines existing laws, policies, regulations, and guidelines in each Lower Mekong country, and relevant literature, to answer the following four questions:


- 1) What are the specific provisions for public participation in EIA?
- 2) To what degree are the existing national EIA frameworks already harmonized across the Lower Mekong countries?
- 3) What major gaps exist, particularly with respect to public participation processes?
- 4) What specific recommendations can be made for strengthening the EIA process nationally and regionally, specifically with respect to meaningful public participation and stakeholder engagement?

This Report also examines some regional EIA approaches of the Mekong River Commission, as well as the Asian Development Bank's Safeguard Policy Statement (2009).

EIA and Key Characteristics

EIA is a planning and decision-making tool for a development project aiming for social and environmental protection. EIA has been defined by the International Association for Impact Assessment as "a process of identifying, predicting, evaluating, and mitigating the biophysical, social, and other relevant effects of proposed projects and physical activities prior to major decisions and commitments being made."

The EIA process has been seen from some time as an important tool to contribute to the sustainable development agenda. Primarily, Principle 17 of the Rio Declaration on Environment and Development (1992) provides that signatory nations must undertake an EIA "for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."



Effective EIA implementation is achieved through the adoption and application of seven key principles. These include:

- Proponent is fully responsible for their project including the cost of the application and assessment process;
- Reliance on participatory approaches: genuine and meaningful public participation at all stages of the process, and full access to information by the public;
- Application of the precautionary principle;
- Application of the principle of intergenerational equity;
- Conservation of biological diversity and ecological integrity is a primary consideration;
- Improved valuation, pricing and incentives; and
- Effective compliance and enforcement.

One of the key principles of effective EIA is public participation. As a systematic process, EIA provides opportunities for public participation at different stages. The question of what may constitute public participation is wide and varied, however, there is a need for public participation at four particular stages of the EIA process:

- 1) Screening/scoping;
- 2) Preparation of EIA report by the EIA consultant;
- 3) Evaluation of EIA report by the delegated authority (e.g., Ministry of Environment); and
- 4) Post-approval monitoring, compliance, and enforcement.

It is clear that if public participation and community involvement can occur at the earliest stage in the EIA process, namely the scoping/screen stage, this will help to ensure that the views of the community and project affected people (PAP) are most strongly considered by the EIA consultant, the project proponent, and the government. Community views may lead to more significant project modifications if expressed during the design and evaluation stages of the project. Moreover, public participation at the post-approval stage, where corrective measures and adaptive management of a project may be necessary, can also make important contributions to project sustainability.

Key Findings

To varying degrees, all Lower Mekong countries have established and applied EIA processes with support from bilateral and/or multilateral partners aimed at strengthening the effectiveness of its application towards sustainable development. The Lower Mekong countries have adopted the same general approach to EIA and environmental assessment, which is mandated under an environmental agency (e.g. the Ministry of Environment or Ministry of Natural Resources and Environment). EIA processes consist of more-or-less similar procedures, involving screening, scoping, impact assessment, approval, and post-decision implementation. EIA processes in the Lower Mekong countries are commonly backed by legislation in each country, often with the support of regulations and guidelines for particular sectors or areas.

In general, the implementation of EIA processes in Lower Mekong countries often commences too late, when the major project decisions (including site, design, and construction preparation) already have been made, thereby rendering the EIA process a formality.

For major projects, the environmental impact is assessed at the national level and requires coordination between different ministries. In the cases of Cambodia, Thailand, and Vietnam, the authority bestowed

upon the environment ministry as the responsible body for assessing and managing the EIA process is often trumped by more powerful, often sectoral ministries such as the Ministry of Agriculture, Forestry, and Fisheries in Cambodia; the Ministry of Agriculture and Cooperatives in Thailand; and the Ministry of Planning and Investment in Vietnam. Development-orientated bodies such as the Council for the Development of Cambodia or the Myanmar Investment Commission often operate in a manner that can reduce the ability of the environment ministries to promote best practice for EIA.

Public participation in the EIA process exists in the legal provisions of each country along with supporting guidelines. Table 1 summarizes legally mandated public participation within the EIA process in each of the Lower Mekong countries.

Table 1. Legal mandates for public participation in EIA in the Lower Mekong countries


EIA stage	Cambodia (1999)*	Lao PDR (2000)*	Myanmar (2014)*	Thailand (1992)*	Vietnam (1994)*
Screening	X				
Scoping (development of TOR)			X	X	X
EIA report preparation	X	X	X	X	
EIA report evaluation	X	X	X	X	X
EMP preparation		X	X	X	
Monitoring, compliance, and enforcement		X			

*Year of the official establishment of EIA in each country

Public participation occurs commonly during the EIA preparation and evaluation stages, generally with an explicit section in the EIA report describing the public participation process undertaken. Most countries have a peer review of EIA reports by scientists and/or an independent body before making a final decision. A formal complaints and grievance mechanism is only required in the Lao PDR legislation. Overall, there are differences in the details of public participation, including the meaning of public participation, process, methods, content, and so on.

Across the region, there are a number of gaps and weaknesses in public participation in the EIA process. The following points reflect the most common areas of weakness in the current EIA regimes in the region.

- Under existing laws and regulations, public participation is mostly encouraged but not mandatory, thus in practice public participation is determined by the project proponent.
- Public participation provisions do not mention how the public should be informed about the EIA process, the venue at which the public should gain access to EIA reports, and at which stages of the EIA process the project developers should involve public participation. Guidelines on public consultation are too general concerning what type of methodology and approach shall be used during consultations.
- Legal requirements for the incorporation of public comments and inputs into the EIA reports are not stated (and thus most probably not taken into consideration in the selection of mitigation measures). There is no legal requirement for EIA reports to provide reasons for approval or rejection of public comments (only to list comments as part of a public participation annex to the EIA report).

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- Access to project information and EIA reports can be limited. Without clear laws and guidelines for public access to environmental information it is difficult to have effective public consultation.
 - Current regulations and guidelines for public consultation and participation in the EIA process generally end when the environmental compliance certificate (ECC) is approved. The lack of attention to the involvement of the public and the role of civil society after EIA report approval when project activities have been authorized to begin in the implementation stage is an outstanding weakness in EIA legislation and policy.

Public participation plays an important role not only in project design, impact assessment, and development of alternative mitigation measures, but also in the implementation of the mitigation measures and ongoing project monitoring as identified in the Environmental Management Plan (EMP). Public involvement in the EIA process should go further to include stakeholder input and consultation during the post-approval monitoring, compliance, and enforcement stage of project implementation as well.

To help address these identified weaknesses, this Report recommends the development of Guidelines for Public Participation in EIA. It is recommended that the Guidelines have a short, prescriptive format with a checklist to assist all stakeholders in improving public participation in the EIA process. Keeping the Guidelines short will facilitate both translation and comprehension by PAP and other relevant stakeholders. By including checklists, it will provide PAP and relevant government ministries with an effective management tool.

The focus of these Guidelines should be primarily on four stages of the EIA process: (i) screening/scoping; (ii) EIA preparation; (iii) EIA evaluation; and (iv) post-approval monitoring, compliance, and enforcement.

As part of the development of Guidelines for Public Participation in EIA, a formal scoping stage with public participation should also be established, along with provisions to enable stakeholders to be involved in the post-approval monitoring, compliance, and enforcement stage.

The following recommendations reflect the need to clarify and strengthen public participation in development projects in line with best practices for EIA and based on international principles of EIA. The development of Guidelines for Public Participation in EIA that can be applied across the Lower Mekong countries would have significant benefits to all stakeholders by providing clear, consistent and applicable approaches for meaningful engagement across the region.



Recommendations

- 1) Amend EIA legislation to adopt public participation at the screening and scoping stage of projects to enable better considerations of alternative options, including the “no build” option.
- 2) Develop Guidelines for Public Participation in EIA that provides clear and prescriptive guidance for government, project proponents, EIA consultants, CSOs, and the communities on public participation in environmental assessment of projects.
- 3) Include in the Guidelines for Public Participation in EIA clear and prescriptive guidelines on the timing of public participation, the information that is to be made available to the public, the number and type of meetings to be held, and the reporting requirements.
- 4) Develop a simplified checklist to enable effective implementation of the Guidelines for Public Participation in EIA by project proponents and EIA consultants. This should be developed for the four stages of the EIA process from screening/scoping to preparation, evaluation, and compliance / enforcement.
- 5) Amend EIA legislation to require project proponents to establish consultative committees during the EIA process with PAP to enable issues to be addressed during the EIA preparation, evaluation, and implementation stages.
- 6) Amend EIA legislation to require project proponents to establish appropriate complaints and grievance mechanisms for major projects to assist in the resolution of conflicts between project proponents and PAP, including community participation.
- 7) Engage NGOs and CSOs in post EIA approval project monitoring to assist in improving public participation in the implementation and monitoring of Environmental Management Plans (EMPs) and in improving compliance with and enforcement of the ECC and other commitments made by the project proponent.

I. Background

Sustainable Development

The concept of the health and protection of the environment emerged long ago in different part of the world. Some countries became concerned with these matters at an earlier stage, including Canada, France, the United Kingdom, and the United States. Sustainable development emerged soon after, however awareness of and advancements in sustainable development were limited to Canada, the United States, and some European countries. Since 1992, the Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development, has become a powerful instrument in the promotion of sustainable development, defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹

An important tool, the environmental impact assessment (EIA), was endorsed by the Rio Declaration for application to achieve sustainable development goals in each country and region worldwide.

EIA and its Roles

Principle 17 of the Rio Declaration states “ Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. ”

Nearly all countries of the world employ EIA processes. It has been suggested that 191 of the 193 United Nations Member States either have national legislation or have signed some form of international legal instrument that refers to the use of EIA.² The worldwide spread of EIA was assisted by Principle 17 of the Rio Declaration that provides that signatory nations must employ EIA processes.³

EIA was first introduced in the United States in the early 1970s with the National Environmental Policy Act (NEPA).⁴ Since then the concepts and practices of EIA have developed significantly. In 1996, the International Association for Impact Assessment in Shanghai launched the Review of the Study of the Effectiveness of Environmental Assessment (the 1996 Review).⁵ It identified key issues for the development of effective environmental assessment (EA) practice and suggested four necessary ingredients to effective application :

- Appropriate timing in initiating the assessment so that the proposal is reviewed early enough to scope for development of reasonable alternatives;


1. WCED (1987).

2. Morgan (2012).

3. Morrison-Saunders and Retief (2012), pp. 34-41.

4. Elliot (2014), p. 103.

5. Sadler (1996).

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- Clear, specific directions in the form of terms of reference or guidelines covering priority issues, timelines, and opportunities for information and input at key decision-making stages;
 - Quality information and products fostered by compliance with procedural guidelines and use of “good practices”; and
 - Receptivity of decision makers and proponents to the results of the EA, founded on good communication and accountability.

Further, the 1996 Review proposed two substantive purposes of EA :

First, the immediate aim is to facilitate sound, integrated decision-making in which environmental considerations are explicitly included. The EA process does so by providing clear, well-organized information on the environmental effects, risks, and consequences of development options and proposals.

Secondly, the EA process is usually (but not universally) directed toward achieving or supporting ultimate goals of environmental protection and sustainable development. These reference or end goals are variously phrased and framed in EA laws and policies, as are the specific objectives to be met by the process.⁶

6. Sadler (1996), p. 13.

II. Key Principles of EIA and Procedures

Key Principles of EIA

Effective EIA is achieved through the adoption and application of key principles. These include:

- Proponent is fully responsible for their project including the cost of the application and assessment process;
- Reliance on participatory approaches: genuine and meaningful public participation at all stages of the process, and full access to information by the public ;
- Application of the precautionary principle ;
- Application of the principle of intergenerational equity ;
- Conservation of biological diversity and ecological integrity is a primary consideration ;
- Improved valuation, pricing and incentives; and
- Effective compliance and enforcement.

To achieve the over-arching goal of sustainable development, EIA processes should use key assessment mechanisms. These mechanisms reflect current norms on international environmental law and have become key features of sustainable development over the past two decades. Many of these mechanisms are included within the Rio Declaration.

As set forth in the Rio Declaration, the five primary mechanisms are :

- 1) Reliance on participatory approaches (Principle 10);
- 2) Application of the precautionary principle (Principle 15);
- 3) Application of the principle of intergenerational equity (Principle 3);
- 4) Conservation of biological diversity and ecological integrity is a primary consideration (Principle 4);
- 5) Improved valuation, pricing and incentives (Principles 8, 12, 13 and 16).

Reliance on participatory approaches

A central feature of public participation in EIA processes is to maximize opportunities for the participation of all stakeholders, including other government departments, NGOs, CSOs, the general community, whether directly or indirectly affected, indigenous communities and the corporate sector. Best practice in EIA will provide for the following: public participation at all stages of the process, from scoping to decision-making; community participation in the compliance and monitoring stage of the development; and specific participation strategies for women and indigenous people and their communities.⁷

7. Rio Declaration 1992, Principles 20 and 22.

Application of the Precautionary Principle

Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In the application of the precautionary principle, public and private decisions should be guided by :

- 1) Careful evaluation to avoid, wherever practicable, serious or irreversible damage to the environment; and
- 2) An assessment of the risk-weighted consequences of various options.⁸

Intergenerational equity

The principle provides that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations. This requires consideration of the impact of a proposed activity or project taking into account any long-term impact. This could also require consideration of project closure and site-decontamination.

Conservation of biological diversity and ecological integrity

The starting point for the assessment of any development proposal is that conservation of biological diversity and ecological integrity should be a fundamental consideration.⁹ This does not mean that no project can be approved that will harm the environment. It merely ensures that harm and damage to the environment and society must be justified by the project. The project proponent and EIA consultant must evaluate various options and propose ways to avoid or reduce the potential harm. If harm is unavoidable, the project plan must include measures to provide appropriate compensation for the harm.

Improved valuation, pricing and incentives

The use of economic tools is integral to effective EIA. It is particularly important to accurately evaluate the costs and benefits of projects. Environmental factors should be included in the valuation of assets and services, including ecosystem services. Additionally the EIA process should adopt the principle of "the polluter pays";¹⁰ meaning that those who generate pollution and waste should bear the cost of containment, avoidance, or abatement.

One other economic measure is that the cost of goods and services should include the full life cycle of providing those goods and services, including the use of natural resources and assets and the ultimate disposal of any waste.¹¹

8. Inter-Governmental Agreement on the Environment, signed by the Australian Government and its States and Territories and Local Government, May 1, 1992, www.environment.gov.au/aboutus/esd/publications/intergovernmental-agreement.

9. See for example the National Environment Policy of Myanmar 1994 that makes environmental protection the primary objective in seeking development.

10. Rio Declaration, Principle 16.

11. Rio Declaration, Principles 8, 13, and 16.

Generic EIA Process

Although there are diverse terms in EIA procedures and process, there are broad similarities across EIA theory and practice. Figure 1 depicts a simplified general practice EIA process that includes clear provision for public consultation during the process of EIA preparation and assessment.¹² There is also the opportunity for community participation in the operation stage of the project and in compliance and enforcement.

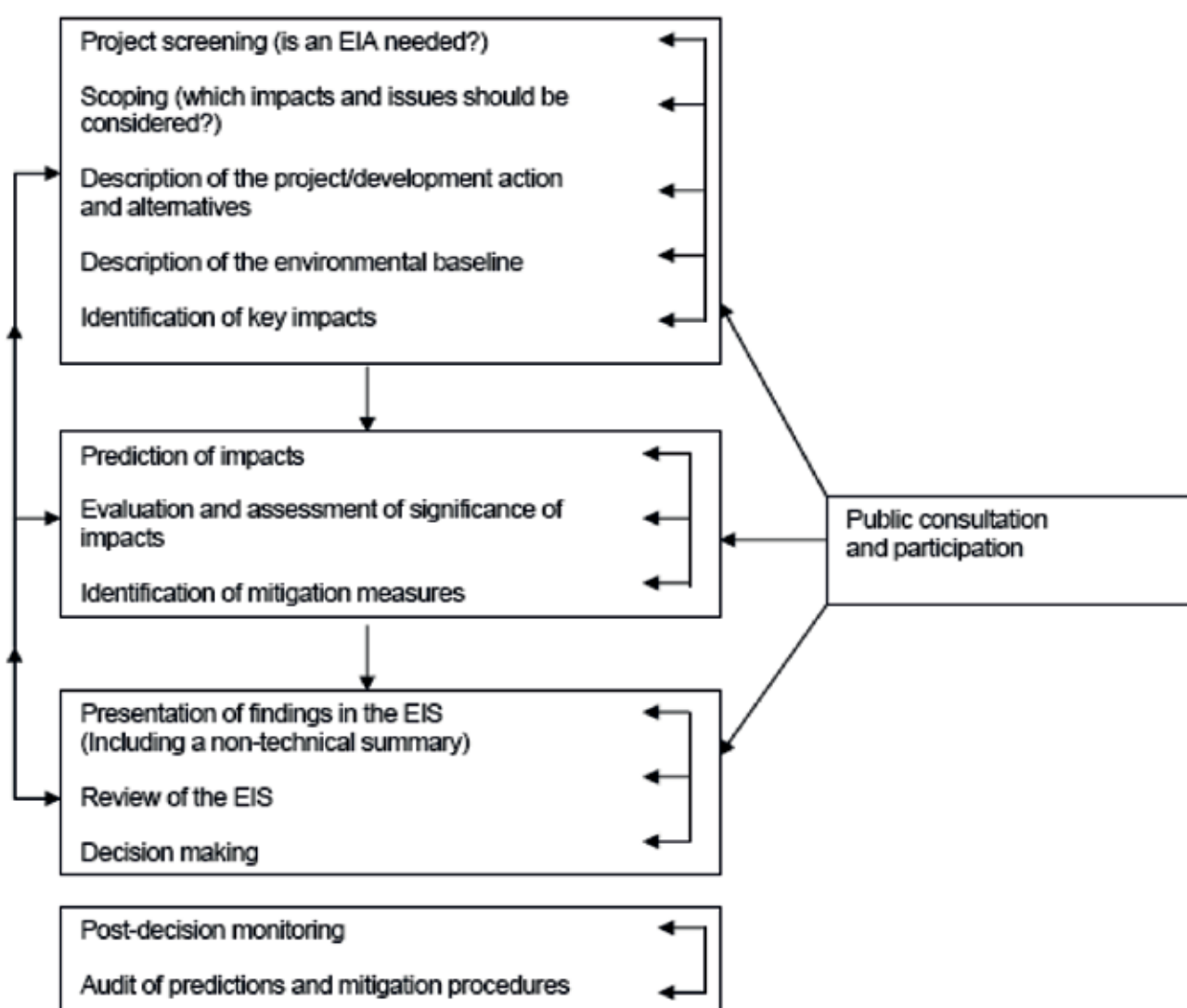
The followings are the stages of the simplified general practice EIA process. It is useful to review this process in order to gain a better understanding of EIA theory, policy and practices in the Lower Mekong countries.

- **Screening** - determines whether or not a proposal should be subject to the EIA process and, if so, at what level of detail. In accordance with Principle 17 of the Rio Declaration, the usual trigger for the preparation of the EIA process is the desire for regulatory approval of a development project that is "likely to have a significant adverse impact on the environment" or society. Projects without a "significant adverse impact" may still require some form of environmental and social impact assessment but to a lesser degree. Country environmental assessment systems have often used a descending level of project assessment from EIA, to initial environmental examinations (IEEs), to planning assessment. All Lower Mekong countries have adopted a screening process that lists certain projects that require either EIA or some lesser form of environmental assessment.
- **Scoping** - identifies the issues and impacts that are likely to be important and establishes the terms of reference (TOR) for the EIA report. Scoping is usually the stage when the project proponent considers the specific issues that are to be addressed by the EIA process. These are usually developed in the TOR. Although this step is usually carried out by the project proponent together with the EIA consultant, some countries (such as Cambodia and Lao PDR) have recognized the benefits of including the community at this preliminary stage.
- **Examination of alternatives** - establishes the preferred or most environmentally sound and benign option for achieving proposal objectives.
- **Impact analysis** - identifies and predicts the likely environmental, social and other related effects of the proposal.
- **Mitigation and impact management** - establishes the measures that are necessary to avoid, minimize or offset predicted adverse impacts and, where appropriate, incorporates these into an environmental management plan or system.
- **Evaluation of significance** - determines the relative importance and acceptability of residual impacts (i.e., impacts that cannot be mitigated).
- **Preparation of environmental impact statement (EIS) or report** - documents clearly and impartially the impacts of the proposal, the proposed measures for mitigation, the significance of effects, and the concerns of the interested public and the communities affected by the proposal.

12. Li (2008), p. 22.

- **Review/evaluation of the EIS** - determines whether the report meets its TOR, provides a satisfactory assessment of the proposal(s) and contains the information required for decision making.
- **Decision making** - approves or rejects the proposal and establishes the terms and conditions for its implementation.
- **Follow up** - ensures that the terms and condition of approval are met; monitors the impacts of development and the effectiveness of mitigation measures; strengthens future EIA applications and mitigation measures; and, where required, undertakes an environmental audit and process evaluation to optimize environmental management.

Figure 1. Simplified EIA process



Source: Glasson et al. 2005.

Public Participation in EIA

Principle 10 of the Rio Declaration states :

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Internationally, public participation is an integral part of the environment assessment process. As a part of a well-conducted EIA, public participation can assist the process without significant economic costs. Studies have indicated that EIA accounts for less than 2% of projects costs, for large-scale projects this could be as low as 0.7%.¹³

Stewart and Sinclair state, "the benefits of public participation have been clearly described in both theoretical and practical terms . . . [but] the design and implementation of specific public participation programs remain contentious."¹⁴ Some benefits may be intangible, such as better decision-making or the development of greater trust in government agencies. Other benefits, such as better project design or efficient environmental management or an effective grievance process, may be difficult to quantify.¹⁵

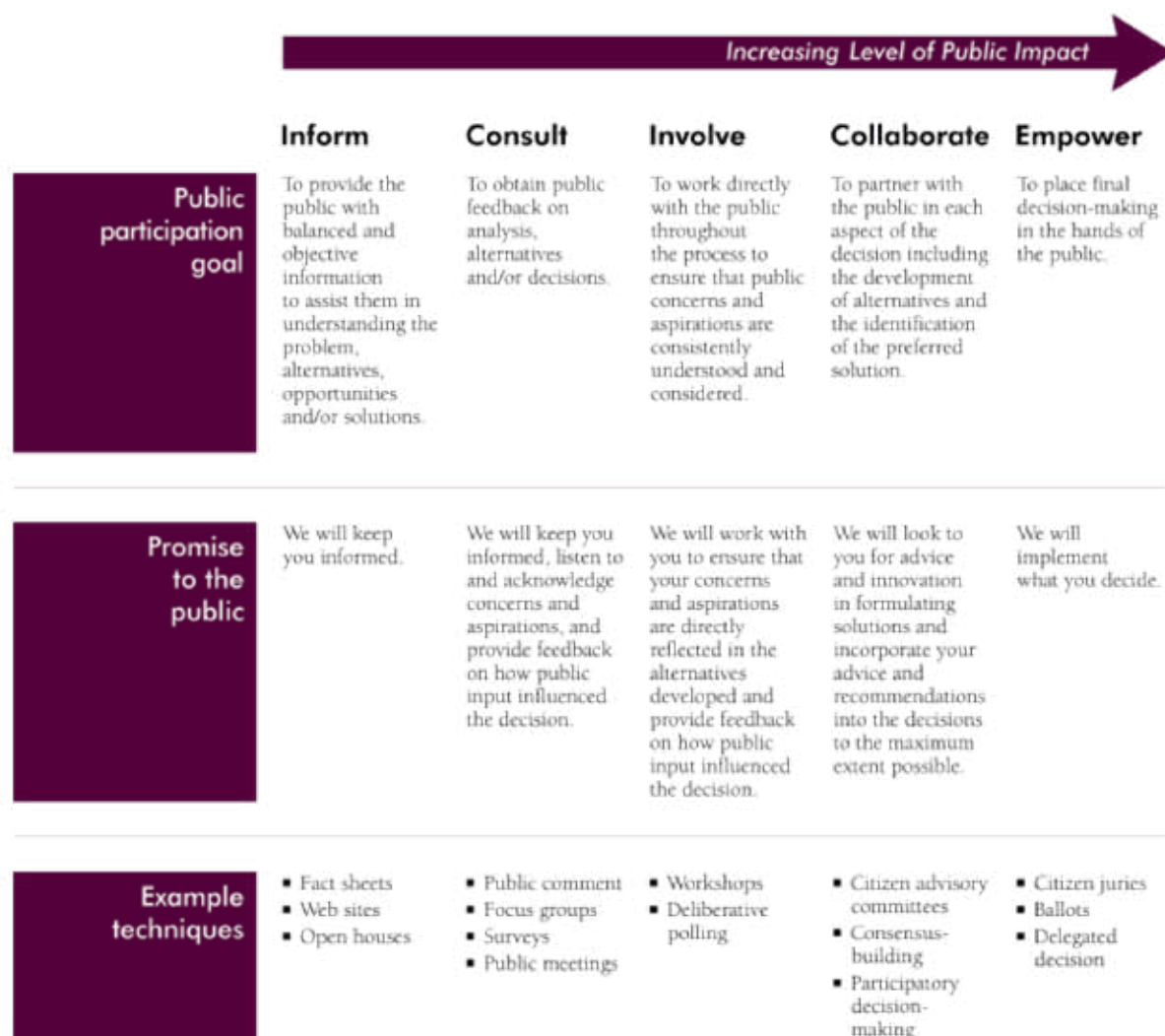
Also, because public participation falls into a broad spectrum of approaches and practices, choosing the most effective and relevant approach can be difficult. The International Association for Public Participation (IAP2) has developed a spectrum for public participation (Figure 2).

13. Elliot (2014), p. 29.

14. O'Faircheallaigh (2010), p. 19.

15. See Elliot (2014), p. 99 and following for an evaluation of the role of public participation in the EIA process.

Figure 2. International Association for Public Participation (IAP2) spectrum for public participation




Source : from www.iap2.org.au.

Another approach to public participation places the purposes of public participation in three broad areas, depending on their relationship to those processes :

- As an aid to decision-making which remains separate from the participating public;
- As a mechanism for achieving a role for the public as joint decision makers; and
- As a mechanism for reconstituting decision-making structures.¹⁶

It has been suggested that where the underlying rationale for seeking public participation is gaining access to information, decision makers are likely to seek only the degree of participation needed to elicit the required information and no more.

16. O'Faircheallaigh (2010), p. 20.



At the other end of the spectrum public participation may be sought by decision makers not just as a way of obtaining information or testing its robustness, but also to assist with problem solving by suggesting ideas, concepts, solutions and resources that can be mobilized to address complex environmental and social issues. Public participation can be a source of creativity and innovation, allowing decision makers to draw on alternatives that are not present in their existing array of responses.¹⁷

Some observers also have noted that when NGOs represent a community or the public and affected communities are not directly involved, the interests of those communities often will not be fully articulated or represented. This has led to the “People’s EIA” approach in Thailand, which aims to facilitate greater local and public participation in the EIA process by “creating a space where local people can frame and articulate their needs, values, and priorities.”¹⁸

It is not just the strengthening of public participation that is important for achieving better EA in the region. Other challenges for EIA have been identified. In 2010, the Asian Development Bank (ADB) together with project partners identified a number of challenges for EIA. ADB and the Asian Environmental Compliance and Enforcement Network (AECEN) jointly organized a regional workshop entitled “Environmental Impact Assessment in Asia: Good Practices and Capacity Needs” at ADB Headquarters in Manila, June 9–10, 2010. During the workshop, participants identified the main capacity challenges within the region, including the following:

- Quality of EIAs – the quality of EIA consultants is currently not adequate. EIAs are not conducted with enough focus. As a result, there is a need to develop a set of objective criteria for selecting consultants. In addition, there were not enough staff to review submitted EIA reports. Better review criteria also need to be developed to assist the review process.
- Public participation – current EIA practices generally do not engage the public properly.
- Official review – genuine public concerns are not adequately addressed, leading to the lack of community acceptance and continuing opposition to development projects. The involvement of NGOs and other representatives of civil society needs to be increased especially for complex projects.¹⁹

17. O’Faircheallaigh (2010), p. 21.

18. Li (2008), p. 9.

19. ADB and AECEN (2010), p. 21.

III. Public Participation in EIA in Lower Mekong Countries

Cambodia

Overview

The legal requirements for EIAs in Cambodia are set out in the Law on Environmental Protection and Natural Resource Management, 1996 (Chapter III) (EPNRM Law) and the Sub-Decree on Environmental Impact Assessment, 1999 (EIA Sub-Decree). There are also a number of Prakas²⁰ on the procedures implementing the EIA Sub-Decree 1999:

- Prakas on Guidelines for Conducting EIA Report (49 MoE, March 2000);
- Prakas on Determination of Service Charge for Environmental Impact Assessment Report Review and Follow-up and Monitoring of Project Implementation (No. 745, October 2000);
- Prakas (Declaration) on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (No. 376 BRK.BST 2009);
- Prakas on Registration of Consulting Firms for Studying and Preparing Environmental and Social Impact Assessment Report (No. 215 Brk MoE 2014); and
- Prakas on Establishment of the Technical Working Group for Reviewing and Commenting on the EIA Report (No. 063 Pr.k MoE 2014).

There is also a Sub-Decree 146 on Economic Land Concessions (ELC), 2005, which requires environmental assessment of ELCs. Article 7, clause 5 of Sub-Decree 146 states that “if the initial environmental and social impact assessment indicates a medium or high degree of adverse impact, arrange for the conduct of a full environmental and social impact assessment.”

Cambodia is currently preparing a new EIA Law.²¹ However while the final draft is due to be presented to the Council of Ministers in June 2015, this review examines the existing situation under the Sub-Decree on EIA 1999.

It has been observed that the Ministry of Environment (MoE), which is in charge of environmental assessments, has remained a relatively powerless agency in natural resource matters, especially when compared to the Ministry of Agriculture, Forestry, and Fisheries.²² This is not helped by the fact that the EIA Sub-Decree lists “other government agencies” as stakeholders in the EIA process (along with community representatives and NGOs) that can openly challenge an EIA. The agency that is authorized to oversee the implementation of the Forestry Law and the 1999 Sub-Decree on EIA is the Ministry of Agriculture, Forestry, and Fisheries, with a track record of pro-development policies in the forestry sector.²³

EIA Procedure

The EPNRM Law stipulates that an EIA shall be done on every project and activity, private or public, and shall be reviewed and evaluated by the Ministry of Environment before being submitted to the Royal Government for decision (Article 6).

20. A “Prakas” is a regulation promulgated by a Ministry to implement a law.

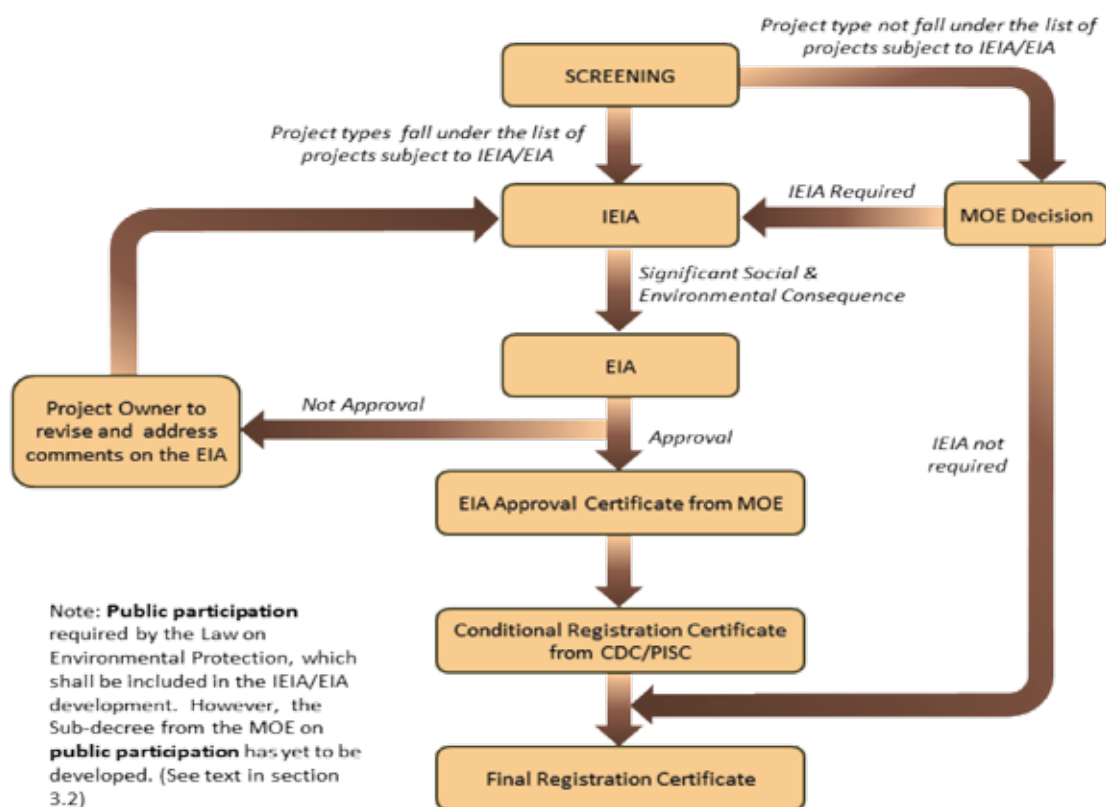
21. Schulte and Stetser (2014).

22. Li (2008), p. 12.

23. Tan (2004), cited in Li (2008), p. 12.

Figure 3 reflects the EIA procedures from the General Guidelines for Developing Initial Environmental Impact Assessment (IEIA) Report and EIA Report published in September 2009. It should be noted that the current EIA process in Cambodia requires an IEIA for all projects as a scoping process to determine whether a full EIA is required.

Figure 3. EIA procedures from the General Guidelines for Developing Initial and EIA Reports




Source: General Guidelines for Developing Initial and EIA Reports, MoE, N. 376 BRK.BST, September 2009.

With respect to public participation, public involvement is “encouraged” in the EIA Sub-Decree (Article 1) but no concrete requirements are stipulated. Additionally, the EIA Sub-Decree contains no requirements for consideration of alternatives or information disclosure. Article 7 of the EPNRM Law provides that the MoE shall encourage public participation in “environmental protection and natural resources management.” Article 8 also requires the MoE to develop a sub-decree on public participation and access to information. To date this has not been done. The MoE has developed Prakas on preparing an EIA report.

The responsibility for reviewing and monitoring EIA for projects is at two levels, national and provincial. For projects with less than US\$2 million in investment, the responsibility for reviewing and monitoring is delegated to the provincial department of environment, but these departments do not have adequate capacity for effective EIA implementation. Also, due to weaknesses in the legislation, it is difficult to enforce penalties for non-compliance and violations. The overall effectiveness of EIA implementation in Cambodia is therefore considered to be low.²⁴

24. ADB and AECEN (2010), p. 17.



The EIA Sub-Decree identifies the specific project types covered by EIA. In total these cover four areas: industry, agriculture, tourism, and infrastructure. Under each area there are a number of specific projects types listed. This list had been attached as an annex to the EIA Sub-Decree. According to the list, the current EIA in Cambodia is project-based rather than referenced to significant environmental impact.

All investment-project applications and all projects proposed by the state shall have an IEIA, report of pre-feasibility study, or an EIA as specified in Article 6 of EPNRM Law (Article 7). A copy must be submitted to the Project Approval Ministry/Institution and the MoE.

The MoE is to review and provide recommendations on the IEIA or the EIA to the competent organization within the period determined in the Law on Investment of the Kingdom of Cambodia. If the MoE does not respond to the findings and recommendations (as described in Article 15 and 17) within a 30-day period, the Project Approval Ministry/Institution will assume that the revised IEIA or EIA report has complied with the criteria of this sub-decree. The EIA Sub-Decree stipulates 30 days as the timing for processing an EIA and responding to the project proponent and relevant ministry. The project owner must acknowledge the findings and recommendations of their IEIA/EIA report(s) that have been approved by the MoE, before they can proceed with project implementation.²⁵

EIA Practices in Cambodia with Respect to Public Participation

The EIA Sub-Decree states that public participation in the implementation of the EIA process is “encouraged” in order to take into account the conceptual input and suggestions of the public prior to the implementation of any project. According to the general guidelines, public participation is implemented at three levels:

- 1) Local level - project developers, local authorities such as heads of villages, chiefs of communes, and affected people or representatives of local communities;
- 2) Provincial level - project developers, concerned agencies at the provincial level, local authorities (district level), and NGOs; and
- 3) National level - project developers, line ministries, provincial level authorities, and NGOs.

Project proponents and EIA consultants are responsible for implementing public participation provisions in the EIA. As these are not specific there are no legal requirements or standards for EIA consultants to comply with. There is also no standard against which the MoE can measure the level or effectiveness of public consultation unless by reference to safeguards issued by ADB or International Finance Corporation (IFC).

It has been recognized that that only a small number of projects complete the IEIA / EIA process under the existing EIA Sub-Decree. A clear consequence is the considerable weakness of the EIA process to effectively engage with affected communities.

25. Li (2008), p.19.

Lao PDR

Overview

Since the establishment of Lao PDR in 1975 and the adoption of a new constitution in August 1991, a number of laws and regulations have been created. The Ministry of Science and Technology was created in 1984 and became the Science, Technology and Environment Organization in 1993, changing in 1999 to the Science, Technology and Environment Agency under the Prime Minister's Office. The Agency became the Water Resources and Environmental Administration in 2008, and was then upgraded into the new Ministry of Natural Resources and Environment (MONRE) in 2011 by merging with parts of the National Land Management Authority and the Geology Department, as well as the Protection and Conservation Divisions of the Department of Forestry.²⁶

The 1999 Lao Environmental Protection Law (EPL 1999) established a framework for the management of environmental resources with the objective of conserving and facilitating the sustainable use of natural resources. The Environmental and Social Impact Assessment (ESIA) Department within MONRE is responsible for overseeing the implementation of the EIA process. MONRE issues environmental compliance certificates (ECCs) for projects that have successfully completed the EIA process and coordinates with line agencies to carry out follow-up (compliance) monitoring and evaluation. Project proponents are required to submit regular monitoring reports to MONRE based on their Environmental Management and Monitoring Plans (EMMPs).²⁷

Under the EPL 1999 there is an obligation to protect the environment in Articles 4 and 5 and the requirement to conduct EIA contained in Article 8.

There have been a number of changes in the environmental assessment regime in Lao PDR over the past decade. The first EIA regulation was issued in 2000 and upgraded into Lao PDR Decree of Environmental Impact Assessment 2010 (EIA Decree 2010), the most recent EIA decree.²⁸ It prescribed the thematic issues to be covered and the outputs expected at the different stages of the EIA process (preconstruction, construction, operation, and closure stages), and it addresses two categories of investment projects requiring environmental and social assessments:


- Category 1: Investment projects, which are small or create fewer impacts on the environment and society, and require IEEs;
- Category 2: Large investment projects which are complicated or create substantial impacts on the environment and society, and require EIAs.

The Ministerial Agreement on the Endorsement and Promulgation of List of Investment Projects and Activities Requiring for Conducting the Initial Environmental Examination or Environmental and Social Impact Assessment provides the list of projects that are in Category 1 and Category 2. In accordance with the Prime Minister's Decree on Compensation and Resettlement of People Affected by Development Projects No. 192/PM, all projects that require resettlement and compensation, and hydropower projects over 15 MW require ESIA.

26. Wayakone and Makoto (2012), p. 1655.

27. Wayakone and Makoto (2012), p. 1658.

28. No. 112/PM, 16 February 2010.



In December 2013 two Ministerial Decrees were passed to implement the provisions of Articles 21 and 22 of the Law on Environmental Protection (Amended) No. 29/NA 2012. These were Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No. 8030/MONRE, 17 December 2013 (Ministerial Instruction on ESIA 2013) and the Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No. 8029/MONRE, 17 December 2013. These Decrees maintain the distinction between the IEE and EIA processes. It appears from these decrees that the EIA Decree 2010 has been replaced.

In Lao PDR EIA is now subject to the Ministerial Instruction on ESIA 2013. This covers every investment project that causes or is likely to cause environmental and social impact (Article 1.1). Articles 2.14 and 2.15 provide details of public participation in EIA. These are discussed below.

EIA Procedure


The Lao PDR Environmental Impact Assessment Guidelines 2012 (EIA Guidelines 2012) contain detailed provisions for the preparation of EIA and IEE reports in Lao PDR. The guidelines run to some 140 pages. The EIA Guidelines 2012 were developed by MONRE in consultation with line agencies, provincial governments, project developers, and EIA consultants, and with technical assistance from a team of experts from the international consulting company Grontmij and the Finnish Environment Institute (SYKE).²⁹ The EIA Guidelines 2012 were based on practical experience in preparing and reviewing EIAs in Lao PDR, as well as in other developing and industrialized countries.

The EIA Guidelines 2012 were drafted in line with the following : the Lao PDR EIA Decree 2010 for category 2 projects (i.e., those identified as having significant potential impacts [Article 2]); recent guidelines issued under the Decree; and other legislation and guidelines in Lao PDR. The EIA Guidelines 2012 are also broadly in accordance with the Ministerial Instruction on ESIA 2013. However, the EIA Guidelines 2012 were developed to implement the EIA Decree 2010. This Decree appears to have been repealed by the Ministerial Instruction on ESIA 2013. In which case, it is likely that the EIA Guidelines 2012 are no longer applicable to EIA in Lao PDR. Nevertheless, for the purposes of this Report an examination has been made of the EIA Guidelines 2012.

The EIA Guidelines 2012 identify that the normal project planning cycle will generally include the following phases:

- Pre-feasibility;
- Feasibility;
- Design and procurement;
- Pre-construction;
- Construction or survey-exploration;
- Operation; and
- Decommissioning, closure and post-closure.

29. EIA Guidelines 2012, Preface.



During each phase, the developer is required to undertake investigation and consultation activities to minimize the environmental and social impacts of a project.

The EIA Guidelines 2012 provide a detailed overview of EIA process:

EIA is a legal requirement for all projects that may have a significant adverse impact on the environment and/or society. EIA is therefore a regulatory tool to identify and minimize adverse environmental and social impacts, and to ensure that proper management and mitigation measures are implemented.

An EIA should consider the environmental issues in all project phases, including planning, pre-feasibility, feasibility, design and procurement, preconstruction, construction, operation, decommissioning, closure, and postclosure. The EIA helps the project developer to prepare a project in consideration of its consequences on the environment without threatening its technical and economic feasibility.

An EIA should consider all biological, physical, social, economic, health cultural and visual components of the environment that could be affected by a project. It offers the possibility of analyzing and defining the relations and interactions between the factors having an influence on the ecosystems, resources and quality of life of the population and communities.³⁰

The EIA Guidelines 2012 contain detailed definitions to assist in the implementation of EIA.


The Definitions also include references to public participation :

Involvement – the process of consulting and disseminating information on an investment project to gather comments from people or groups who are likely to be affected by, gain benefits from, or have an interest in the project. The comments are to be used as references in preparing and deliberating on an initial environmental examination (IEE), environmental impact assessment (EIA) report, or environmental and social management and monitoring plan (ESMMP). Involvement can take the form of meetings with stakeholders at all levels, or with those who are likely to be affected by the investment project during all phases of the project.

Project Affected People – a natural person, legal entity, or organization that is directly or indirectly affected, or likely to be affected, by the investment project. The people may be affected by legal expropriation of land or real estate, changes of land category, and impacts on the ecological and environmental systems in the their settlement areas.

Stakeholders – persons, groups or communities external to the core operations of a project who may be affected by the project or have an interest in it. This may include individuals, businesses, communities, or local government (IFC, 2012).

30. EIA Guidelines 2012, p. 6.



One of the key issues in the Ministerial Instructions on EIA (2013) is the focus on scoping and screening. Although project scoping and screening are not defined in the Ministerial Instructions on EIA 2013, there are detailed definitions in the EIA Guidelines 2012.

Project Screening means study and analysis of data contained in a proposed investment project to determine whether the project requires initial environmental examination (IEE), or environmental impact assessment (EIA).

Scoping means the process of determining the scope of the environmental impact assessment (EIA), i.e., the data that need to be collected and analyzed to assess the impacts of the investment project on the environment. The primary objective of the scoping process is to produce a terms of reference (TOR) for preparation of an environmental impact assessment report.

The EIA Guidelines 2012 identify the main responsibilities of the project developer. These are :

- To send an investment application form to MONRE to enable MONRE to determine the scale of the project ;
- To prepare a scoping report and TOR for the EIA report;
- To prepare the EIA report, environmental and social management and monitoring plan (ESMMP), and development plans;
- To conduct public consultation meetings during preparation of the EIA;
- Incorporate mitigation measures in the design and procurement documents;
- To improve the ESMMP frequently, and implement the mitigation measures during the pre-construction, construction, operation and decommissioning, closure and post-closure phases;
- To carry out monitoring and auditing activities as stipulated in the ESMMP.³¹

Chapter 2.3 of the EIA Guidelines 2012 outlines the EIA process. The EIA process requires completion of a screening and scoping report and TOR for EIA activities prior to preparation of the EIA report. For the project screening, the project developer shall submit an investment application to MONRE. The project developer shall utilize the list of projects subject to EIA, in addition to considering the significance of the potential impacts of the project. MONRE will make a decision based on the information provided by the project developer as to whether the proposed project will have to undertake an IEE or an EIA.

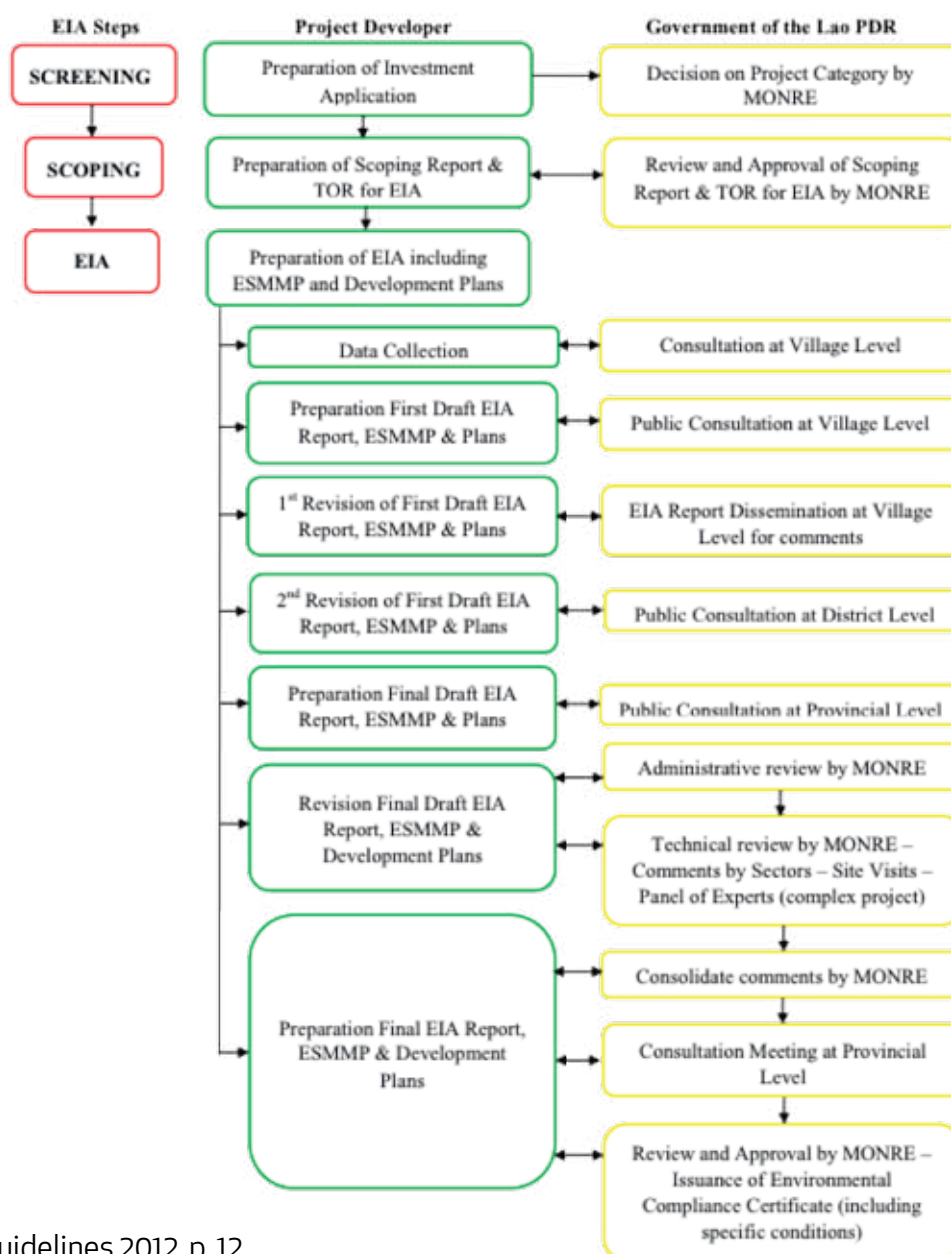
During the project scoping, the project developer will prepare a scoping report and detailed TOR for preparation of the EIA report.³² Section 3 of the EIA Guidelines 2012 provides guidance on how to prepare the scoping report and the TOR. MONRE will revise, comment on and approve the scoping report and TOR before the project developer begins preparing the EIA report. Preparation of the EIA report, ESMMP and development plans will require consultations with the local authorities and PAP.

31. EIA Guidelines 2012, p. 9.

32. Ministerial Instructions on EIA (2013), Part II, Screening and Scoping.

The EIA Guidelines 2012 describe this consultation process. Figure 4 indicates the most important steps to undertake during preparation of EIA reports, especially with regard to public consultation. MONRE will conduct an administrative and technical review of the EIA report, ESMMP and development plans. The project developer will be required to revise the EIA report, ESMMP and development plans to comply with the consolidated comments provided by MONRE and those of the panel of experts.

Figure 4. Responsibilities during preparation of EIA reports



Source : EIA Guidelines 2012, p. 12.

Scoping

Scoping is the first phase in carrying out EIA studies.³³ The project developer is responsible for preparing the scoping report and TOR for preparing the EIA study. When completed, these documents shall be sent to MONRE for comments and approval within 15 days under Art 2.4 of the Ministerial Instructions on EIA (2013).

33. Ministerial Instructions on EIA (2013), Article 2.3.

Scoping is a fundamental phase in the EIA process,³⁴ which :

- Defines the study area, area of influence, time boundaries, project phases, and potential stakeholders;
- Starts the process of understanding the applicable regulations and standards, and their context for project design and completion of the EIA process;
- Makes a provisional identification of impacts, which provides focus on the environmental and social issues that need to be addressed in subsequent EIA studies;
- Provides an indication of what baseline data and information are required, and how to obtain it ;
- Provides an opportunity for consultants, relevant authorities, project developers, interested and affected parties to express their views and concerns regarding the proposal before an EIA proceeds;
- Enables an efficient assessment process that saves time, resources, costs and delays;
- Identifies potentially-affected communities and other stakeholders with an interest in the project.

During scoping, the likely key environmental impacts and risks of the project are identified in a preliminary manner. The scoping phase establishes the framework of activities and impacts that require further investigation during the EIA study. One of the main reasons for scoping is to limit further investigation to those issues that are most important for decision-making and efficient, sustainable project execution.

According to the EIA Guidelines 2012, the scoping report should include the following main sections. A proposed table of contents for the scoping report is presented in Appendix 2 of the Guidelines.

- Executive summary;
- Context of the project;
- Overview of the policy, legal and institutional framework;
- Project description and alternatives;
- Description of the environment;
- Key potential environmental impacts and mitigation measures;
- Public consultation and disclosure; and
- Conclusions and recommendations.

Following scoping, MONRE will review the scoping report and approve the TOR.³⁵

The project proponent is then required to prepare the ESIA report including the ESMMP. The ESIA report will be reviews by MONRE in conjunction with other line agencies. MONRE is required to hold consultation meeting with relevant stakeholders including PAP and provide comments to the project proponent. This may require further assessment if resettlement is required.³⁶ The ESMMP has to be prepared in Lao language and is subject to review and approval prior to the issuance of the ECC by MONRE. The ECC document is the formally approval the ESIA report and the ESMMP. MONRE is able to suspend the ECC should the project proponent not comply with the ECC or the ESMMP.

34. EIA Guidelines 2012, p. 13.

35. Ministerial Instructions on EIA (2013), Article 2.4.

36. Ministerial Instructions on EIA (2013), Article 2.8.

EIA Practices in Lao PDR with Respect to Public Participation

The involvement of PAP and other stakeholders is outlined in Ministerial Instructions on EIA (2013) Articles 2.14 and 2.15 however these are fairly limited to receiving information about the project and participating in consultation meetings. While the project proponent is required under Ministerial Instructions on EIA (2013) Article 2.18 to provide information to MONRE, Article 2.20 details the information to be made available to PAP and other stakeholders by the project proponent.

This includes :

- Information about the project proponent;
- The Social and environmental impacts of the project;
- The ESIA reports;
- Mitigation measures proposed;
- The proposed budget for ESMMP; and
- Any breaches of the obligations of the project proponent.

With respect to public consultation in EIA, Article 2.5 of the Ministerial Instructions on EIA (2013) and section 3.8 of the EIA Guidelines 2012 on Public Consultation and Disclosure detail the information required to be included in the EIA report.³⁷ Involving the public in the preparation of the EIA report is fundamental to increasing the understanding and acceptance of the project, to understanding how the project may affect their living conditions, as well as to identifying impacts and issues that are not immediately obvious to the team preparing the EIA report.

In the Lao PDR, the project developer shall undertake a process of consultation during the EIA study involving the affected communities and the project stakeholders.³⁸ According to the EIA Guidelines 2012 consultation shall be conducted in coordination with local authorities on a continuous basis starting as early in the EIA process as possible.

According to the EIA Guidelines 2012 the following sub-sections should be included in the “Public Consultation and Disclosure” section of any draft EIA report:

- Methodology and approach;
- Summary of consultation activities undertaken:
 - Overview of consultation activities;
 - Summary of the opinions of the people or communities consulted.
- Results of consultations during project scoping:
 - Issues identified by stakeholders and groups affected by the project;
 - How these issues were taken into account.
- Recommendations for consultations to be undertaken during the EIA Studies.

The EIA Guidelines 2012 also provide a detailed description of groups to be consulted during the scoping phase (see Box 1). Public consultation is recognized as an important responsibility of the project proponent, and is as a crucial step toward building understanding and acceptance of the project by the stakeholders. Public consultation provides the proponent with feedback and information about “valued environmental components” of the communities affected by the project.

37. EIA Guidelines 2012, p. 24.

38. Ministerial Instructions on EIA (2013), Article 2.12.

Box 1. Checklist of groups and individuals to be consulted during the scoping phase

1. Government Authorities
 - National, provincial, district and local authorities;
 - Authorities responsible for pollution control, including water, waste, soil, noise and air pollution;
 - Authorities responsible for protection of nature, cultural heritage and the landscape;
 - Health and safety authorities;
 - Land use control, spatial planning and zoning authorities;
 - Authorities in neighboring countries where trans-boundary impacts may be an issue.
2. Other Interested Parties
 - Local, national and international environmental, social and development interest groups¹;
 - Government departments responsible for agriculture, energy, forestry, fisheries, etc., whose interests may be affected;
 - International agencies whose interests may be affected, e.g., Mekong River Commission;
 - Local employers² and business associations, such as chambers of commerce, trade associations, etc.;
 - Mass organizations such as Lao Women's Union, Lao Youth Union, Lao Front for Reconstruction, etc.
 - Employees³ organizations such as trade unions;
 - Groups representing users of the environment, e.g., farmers, fishermen, women using NTFs for their own consumption and trade, tourism operators; Research institutes, universities and other centers of expertise
3. The General Public
 - Landowners and residents;
 - Ethnic groups in the affected area
 - Elected representatives and community figures such as religious leaders or teachers;
 - Local community groups, residents' associations, etc.;
 - General members of the local and broader public.

Source : EIA Guidelines 2012, p. 23.

It can be seen from Figure 4 that in Lao PDR public consultation is seen as a spectrum of participation and as part of the continuum of the EIA procedure. The consultation process is an ongoing activity that will take place throughout the project implementation cycle. The scoping report should define the future consultation process in terms of the following:

- Objectives of consultations during preparation of the EIA report;
- The participants who will be involved in future consultations; and
- Information disclosure.

The public participation process under the ideal situation can be broken down into four key sequential phases, each of which is a prerequisite for the next:

- Information gathering: collection of baseline data from the public to feed into the description of the environment and impact prediction;
- Information dissemination: stakeholders are informed about the project;
- Consultation: stakeholders are given the opportunity to voice their views about the project; and
- Participation: an extension of consultation, where stakeholders become joint partners in the design and implementation of projects (mitigation measures, community development activities, etc.) and take part in decision-making.³⁹

While the project proponent is clearly responsible for community consultation during the scoping phase, during preparation and review of the EIA report and the ESMMP, MONRE, the local administration, the responsible agencies, and the project proponent shall organize consultation meetings at the village, district, and provincial levels. These consultation meetings provide a forum for PAP and other stakeholders to share their opinions and provide their comments on the report and plans, from the first drafts through the final drafts.⁴⁰

The community consultation process will continue throughout the construction, operation and decommissioning, closure and post-closure phases. The ESMMP

Report should define the future consultation process in terms of:

- Objectives of the consultation for each project phase;
- Consultation committee(s);
- Complaint and grievance mechanisms; and
- Disclosure.⁴¹

Article 2.14 of the Ministerial Instructions on EIA (2013) provides that the people affected by the project and other stakeholders should participate in discussions on implementation of the environmental and social activities, as well as the ESMMP of the investment project. Article 7 (7) of the EIA Decree 2010 provided that people affected by the project and other stakeholders have the right and duty to make a written proposal to solve the environmental and social problems caused by the investment project to the local administrations at each level, or directly to MONRE if the problems have not yet been solved. This part was not included in the Ministerial Instructions on EIA (2013).

Complaints and grievances mechanisms

Under the EIA Guidelines 2012 the project proponent is required establish a complaints and grievances mechanism related to environmental and social issues arising during the construction, operation and decommissioning, closure and postclosure phases.⁴² It is suggested that this mechanism be managed by the project developer with involvement of local authorities.

The introduction of a grievance mechanism is an important step to allow an ongoing involvement of the community in the resolution of disputes.

39. EIA Guidelines 2012, p. 64.

40. EIA Guidelines 2012, p. 64.

41. EIA Guidelines 2012, p. 86.

42. EIA Guidelines 2012, p. 85.

Access to information

Article 2.20 of the Ministerial Instructions on EIA (2013) provides details of the information that is required to be disclosed to the public, including the ESIA report, the EMMP, the ESMMP and EIA budget and any other information required to be disclosed by MONRE. This is to be in Lao and local language. There is a provision that allows information to be withheld by MONRE upon request by the project proponent. There is no provision that the information is in English.

The EIA Decree 2010 required that the project proponent make suitable information available to stakeholders in a language and format that is understandable to them to facilitate meaningful consultation with groups affected by the project, civil society organizations, and NGOs active in the project area. The EIA Guidelines 2012 still require the project proponent to provide stakeholders sufficient time to review and understand the project and its issues to enable them to participate effectively during consultation. For the public consultation meetings, the project information provided to the people affected by the projects and the stakeholders should include the scoping report and the presentation materials. This information was to be provided in Lao and in English.⁴³ There is no equivalent Article in the Ministerial Instructions on EIA (2013).

According to the EIA Guidelines 2012, disclosure of information is an important part of the project proponent's engagement process during the construction, operation and decommissioning, closure, and post-closure phases. At the start of the construction phase, the project developer should prepare and distribute informational materials about the construction activities. Information disclosure should be focused on the local and district levels.

The EIA Guidelines 2012 provide that all informational material shall be provided in Lao and in English, and written in nontechnical terms to make it easy to understand by the population.⁴⁴ Under the EIA Guidelines 2012 the public consultation continues throughout the EIA preparation phase. The project proponent must undertake a process of consultation during the EIA study involving the affected communities and the project stakeholders. Consultations should take place on a continuous basis starting as early as possible in the EIA process.⁴⁵

Articles 12 and 13 of the Lao PDR Decree on Compensation and Resettlement of People Affected by Development Projects⁴⁶ describes additional requirements when the project involves resettlement and compensation. The Public Involvement Guidelines provide information on the dissemination, participation, and consultation activities to be carried during the EIA process.⁴⁷

The overall public participation process in the Lao PDR EIA Guidelines 2012 is quite comprehensive. It starts at the scoping phase and continues to the operation and decommissioning phase. The actual scope of public participation in the Ministerial Instructions on EIA (2013) and the EIA Decree 2010 is more limited. Wayakone and Makoto observe that while public participation is required under Lao PDR EIA Guidelines 2012, the lack of independent and active NGOs and the reliance on the project proponent to undertake the consultation without supervision or review from MONRE provides a gap between the theory and practice.⁴⁸

43. EIA Guidelines 2012, 3.8.1.3, p. 26.

44. EIA Guidelines 2012, p. 87.

45. EIA Guidelines 2012, p. 62.

46. No. 192/PM, 7 July 2005.

47. EIA Guidelines 2012, p. 64.

48. Wayakone and Makoto (2012), p. 1662.

Myanmar

Overview

The Ministry of Environmental Conservation and Forestry (MOECF) was formed in 2010 and demonstrates the government's commitment to improving the planning and management of natural resources and the environment. The Environment Conservation Law 2012 (ECL 2012) provides the legal basis for implementing a range of enhanced environmental management measures. Currently the regulations to enact the ECL 2012, including regulations and technical guidelines on environmental safeguards and pollution abatement are being developed.⁴⁹

The government is working to put in place the policies, laws, and regulations needed to properly manage the country's natural resources and environment. These encompass: (i) environment policy and legislation; (ii) a sustainable development strategy; (iii) forest policy and master planning; (iv) a biodiversity protection area system; (v) soil conservation and land rehabilitation programs; (vi) disaster risk reduction planning; and (vii) mining legislation.

The Myanmar National Environment Policy was adopted in 1994. The policy states:

The wealth of the nation is its people, its cultural heritage, its environment and its natural resources. The objective of Myanmar's environmental policy is aimed at achieving harmony and balance between these through the integration of environmental considerations into the development process to enhance the quality of the life of all its citizens. Every nation has the sovereign right to utilize its natural resources in accordance with its environmental policies; but great care must be taken not to exceed its jurisdiction or infringe upon the interests of other nations. It is the responsibility of the State and every citizen to preserve its natural resources in the interests of present and future generations. Environmental protection should always be the primary objective in seeking development.

The Foreign Investment Law 2012 and Foreign Investment Rules 2014 (FI Rules), implements the Government's approach to foreign investment and to promote sustainable economic development by growing foreign investments in Myanmar. The investors have to carry out their activities in a way not to cause environmental pollution or damage in accord with existing laws.

Article 34 of the FI Rules provides that for proposals for capital-intensive investment projects designated by the Myanmar Investment Commission (MIC), which need to assess environmental and social impact, and EIA or social impact assessment report shall be attached together with the investment proposal. This is then referred to MOECF for initial assessment and review.

The ECL 2012 provides the overview on environmental protection in Myanmar.

EIA Procedure

The Environment Protection Rules 2014 (EP Rules) establish a framework for EIA in Chapter XI. MOECF is to determine which projects, categories of plan, businesses or activities that are required carry out environmental impact assessment.⁵⁰ The EP Rules would allow for a two-tiered system of IEE or EIA.⁵¹

49. <http://www.adb.org/sites/default/files/linked-documents/icps-mya-2012-2014-ena.pdf>.

50. EP Rules, Article 52.

51. EP Rules, Article 53.

EIAs or IEEs are to be carried out by qualified and registered third party consultants.⁵² Proposed projects must include an Environmental Management Plan (EMP) that is to be submitted together with the IEE or EIA. These are to be submitted prior to the project being approved⁵³ and are to be assessed by MOECF.

The EP Rules also make provision for an Environmental Impact Assessment Report Review Body with the experts from the relevant government departments and other government organizations.⁵⁴ MOECF may approve the EIA or EMP following approval of the proposed project by the EIA Report Review Body.⁵⁵ The EP rules do not make any specific reference to public participation or community consultation.

The Environment Impact Assessment Procedures Draft 2014 (Draft EIA Procedures) detail the proposed EIA system in Myanmar. These are still being refined and developed. Although there have been some community workshops to inform civil society and the private sector on the Draft EIA Procedures, there has been no formal public consultation process on the procedures.

Chapter 2 of the Draft EIA Procedures provides that “all Projects undertaken in the Republic of the Union of Myanmar by any ministry, government department, organization, corporation, board, development committee, local government or authority, company, cooperative, institution, enterprise, firm, partnership or individual having the potential to cause significant adverse impacts, are required to undertake IEE or EIA and to obtain an ECC in accordance with this Procedure.” The Draft EIA Procedures includes a screening Annex listing those projects required to carry out either an EIA or IEE.

The Draft EIA Procedure establishes an EIA Report Review Body.

The current draft the EIA process does not address specific matters in relation to resettlement or in relation to Projects that may have an Adverse Impact on Indigenous People. These must prepare further assessment in accordance with the respective Rules and Procedures of other Ministries.

The Draft EIA Procedures provide that EIA consultants must be registered with MOECF. No EIA or IEE may be conducted unless the consultant of firm is registered.

The Draft EIA Procedure provides a standard process for IEE or EIA (Figure 5):

- Selection and check of the EIA expert;
- Screening;
- Scoping:
 - Information disclosure and consultation;
 - Scoping report and EIA TOR;
 - Revision/approval/conditions within 15 days.
- EIA investigation;
- EIA report;
- EIA review process;
- ECC issuing;
- Appeal process.

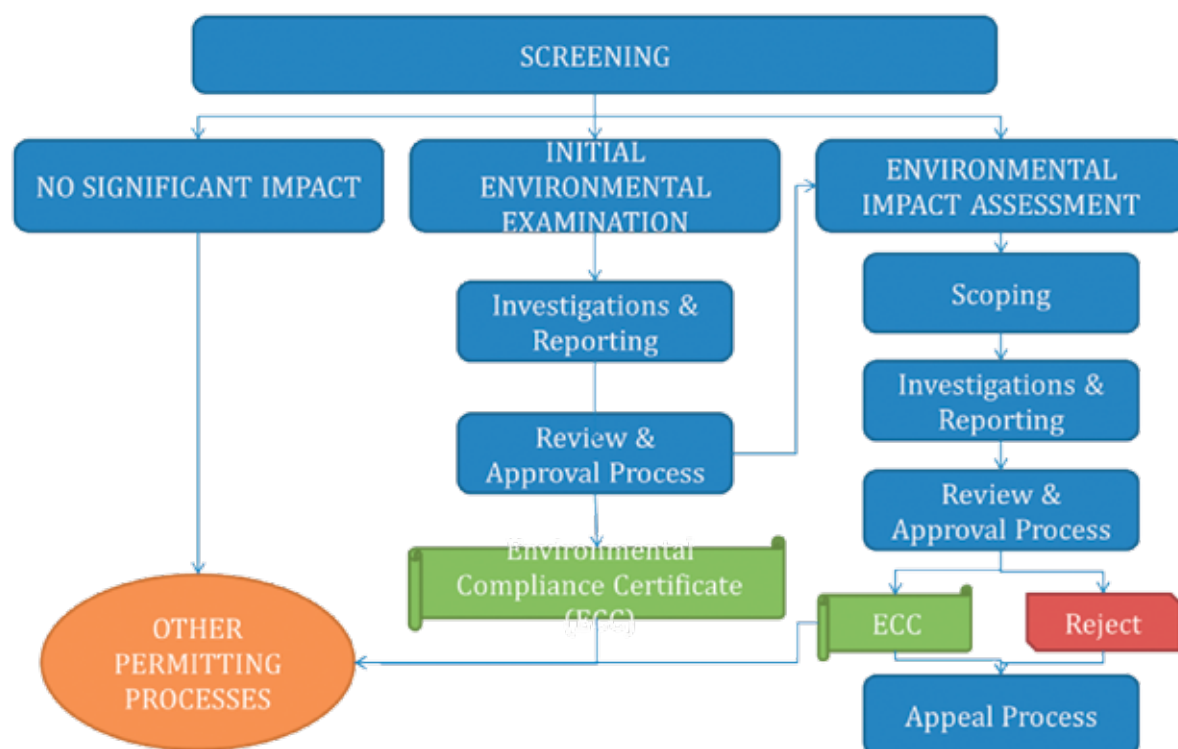
52. EP Rules, Article 56.

53. EP Rules, Article 52.

54. EP Rules, Article 58.

55. EP Rules, Article 61.

Figure 5. EIA procedures in Myanmar : the EIA process



Source : prepared by Martin Cosier, Vermont Law School, and Matthew Baird for presentations in 2014.

EIA Practices in Myanmar with Respect to Public Participation

Under the Draft EIA Procedures, the project proponent shall undertake the following public consultation process in regard to an EIA type project:

- Disclose information about the proposed project to the public and civil society through local media, including by means of the prominent posting of legible sign boards at the project site which are visible to the public; and
- Arrange consultation meetings as advised by the ministry, with local communities, people potentially affected by the project, local authorities, community based organizations, and civil society.

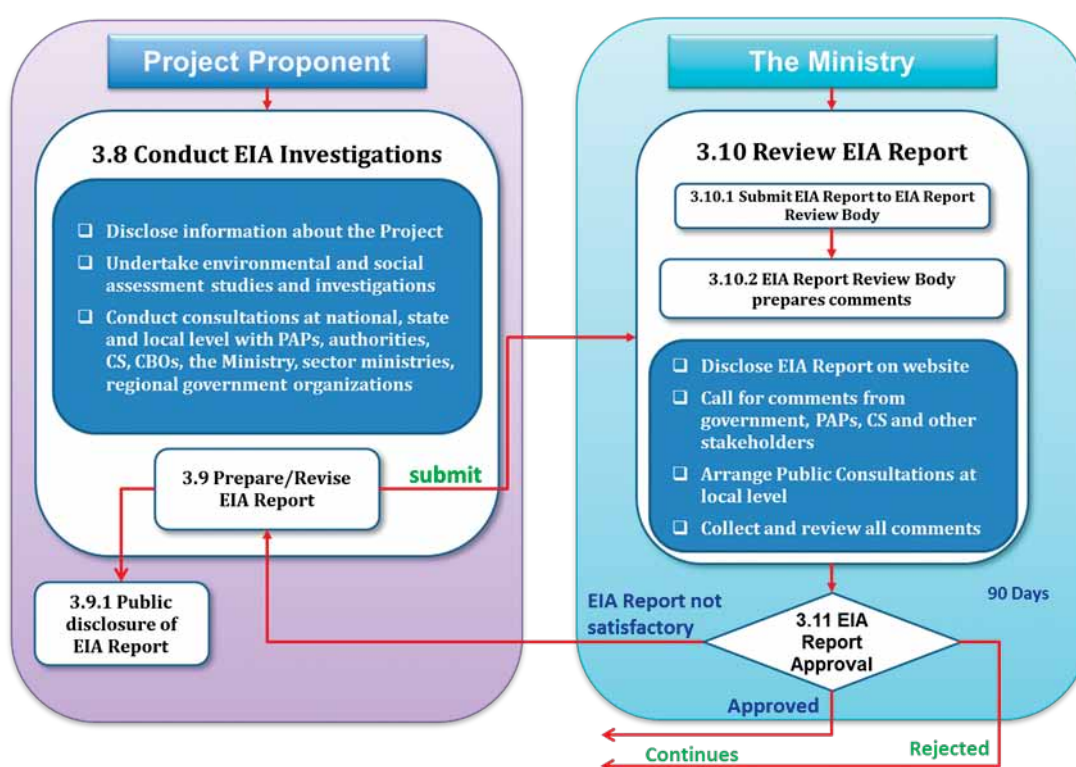
In addition, the EIA process provides for the scoping of projects that should include consultation with PAP. Consultation and information disclosure about the project is required at the Scoping Stage. Under the Draft EIA Procedures, the EIA shall “consider the views, concerns, and perceptions of stakeholders, communities and individuals that could be affected by the project or who otherwise have an interest in the project. The EIA should include the results of public consultations and negotiations with the affected populations on the environmental and social issues. Public concerns should also be taken into account in assessing impacts, designing mitigation measures, and selecting monitoring parameters.”

During the EIA preparation phase, which occurs after the TOR has been finalized with MOECAF, the project proponent shall undertake the following consultation process:

- 1) Timely disclosure of all relevant information about the proposed project and its likely adverse impacts to the public and civil society through local and national media, the website of the project proponent, at public places such as libraries and community halls and sign boards at the project site visible to the public;
- 2) Arrange consultation meetings at national, state and local level with PAPs, authorities, community based organizations, and civil society;
- 3) Consultations with concerned government organizations including MOECAF, the concerned sector ministry, regional government authorities, and others; and
- 4) Field visits for the MOECAF and concerned government organizations.⁵⁶

The EIA report must also include a section on the public consultation process, including the comments from PAP.

Figure 6. EIA preparation and review



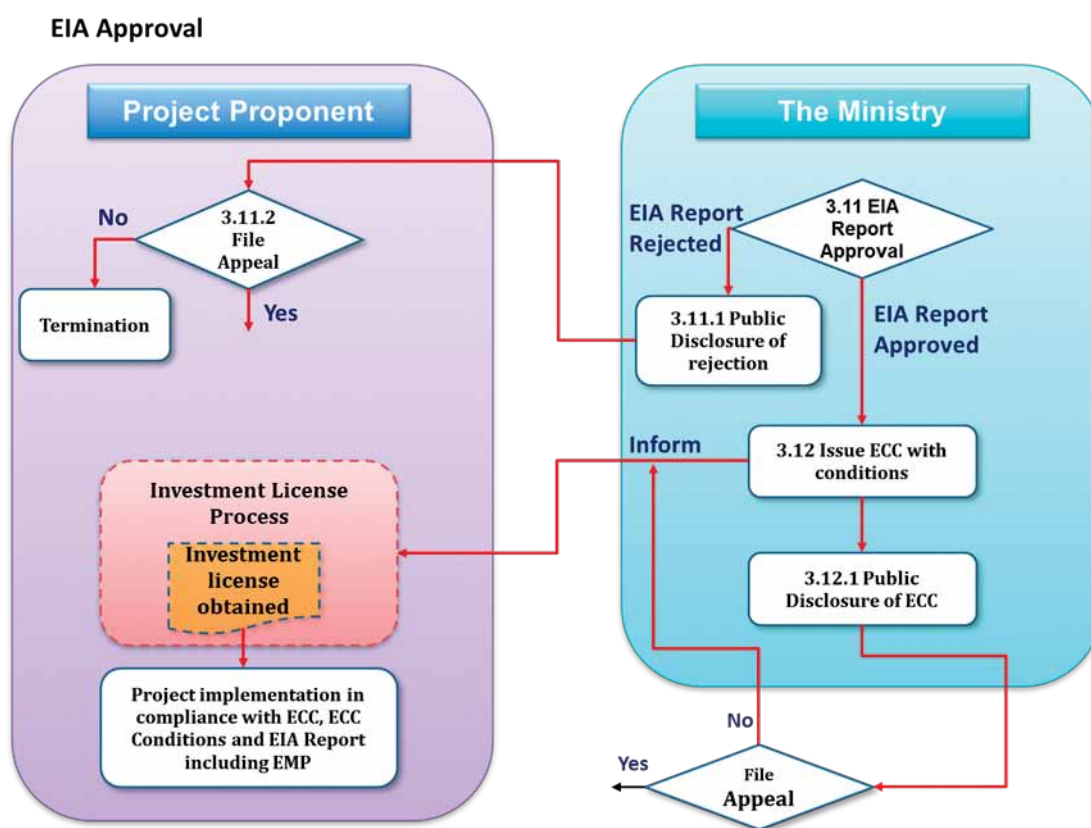
Source : Included in the Draft EIA Procedures.

Figures 6 and 7 show the processes of EIA preparation and approval. Following submission of the draft EIA report to MOECAF, it will be made public, MOECAF will arrange public consultation meetings and the EIA Review Report Body will examine the EIA report, the EMP and either recommend the project be approved, amended or rejected. If approved, MOECAF will then issue an ECC for the project.

⁵⁶. None of the details are clarified in the Draft EIA Procedures. This must be subject to further guidelines.

The project proponent is liable for monitoring and compliance with the EIA, EMP and ECC. There is no requirement for the project proponent to establish any community consultative committee or grievance mechanism for PAP.

Figure 7. EIA approval



Source : Included in the Draft EIA Procedures

The Draft EIA Procedures also provide for an appeal process. This is applicable for both the project proponent and those potentially adversely affected by the project.

The Draft EIA Procedures do not make any provision for a community consultative committee or grievance committee to be established. Likewise, public participation and community involvement in the operation phase and in the monitoring and enforcement of the EMP is not specified.

Thailand

Overview

The first mandatory provisions for EIA in Thailand were issued in 1975. By Section 46 of the Enhancement and Conservation of National Environmental Quality Act 2535 1992 (NEQA 1992), The Ministry of Natural Resources and Environment (MONRE) with the approval of the National Environment Board, has the power to specify the type and size of projects or activities requiring EIA.

Under Article 67 of the Constitution of Thailand of 2007,⁵⁷ any projects and activities which may cause severe adverse impacts to the community with respect to environmental quality, natural resources and health are required to prepare Environmental and Health Impact Assessment (EHIA). Projects and activities which are required to prepare EHIA are issued in the Ministerial Notification of MONRE.

EIA Procedure

Part 4 of NEQA 1992 establishes the EIA system for Thailand. The procedure depends on whether a project requires Cabinet approval or not.

In the case of the project or activity that is required to prepare EIA, the project or activity of a government agency or of a state enterprise which requires the approval of the Cabinet, the EIA report has to be submitted to the National Environment Board for its review and comments and then submitted to the Cabinet for consideration.


NEQA 1992 does not have any provisions on public participation and information disclosure with respect to EIA. Section 6 provides rights for participation and access to information in general matters of environmental conservation.

The 2007 Constitution and the Guidelines prepared by MONRE provide that a project is required to hold public participation at least twice. This will occur at the start of the preparation of the EIA report for the public to review the TOR of the project and the scope of the study, and during the preparation of the draft EIA report including the proposed prevention and mitigation measures. In the case of a project requiring EHIA it requires four public meetings.

The project has to disclose information at the office of local authorities, project site and communities, in accordance with the Prime Minister Office Rule on Public Hearing (2005) at least consisting of the following information :

- Rationale and objectives of the project;
- Main points of the project;
- Project proponent;
- The project site;
- Products and outcomes of the project, including positive benefits that each stakeholder group will receive from the project;
- Negative impacts that might happen to the people living or working in area and neighboring areas of the project site and general public including prevention, mitigation and remediation measures; and
- The estimated project cost.

57. The 2007 Constitution was abrogated on May 22, 2014.



In accordance with the Official Information Act (1997), the Office of Natural Resources and Environmental Policy and Planning (ONEP) must disclose EIA Reports to any individual if requested.

Other than including private projects and activities, the EIA report has to be reviewed and approved by the Expert Review Committee (ERC) appointed under the National Environment Board prior to obtaining the permit for construction or operation from a legally authorized permitting agency. The ONEP of MONRE is in charge of EIA, coordinating with permitting agencies and the Secretariat of the committees of experts.

Five steps and corresponding tasks of the EIA process are established and public participation is included in all steps as well.

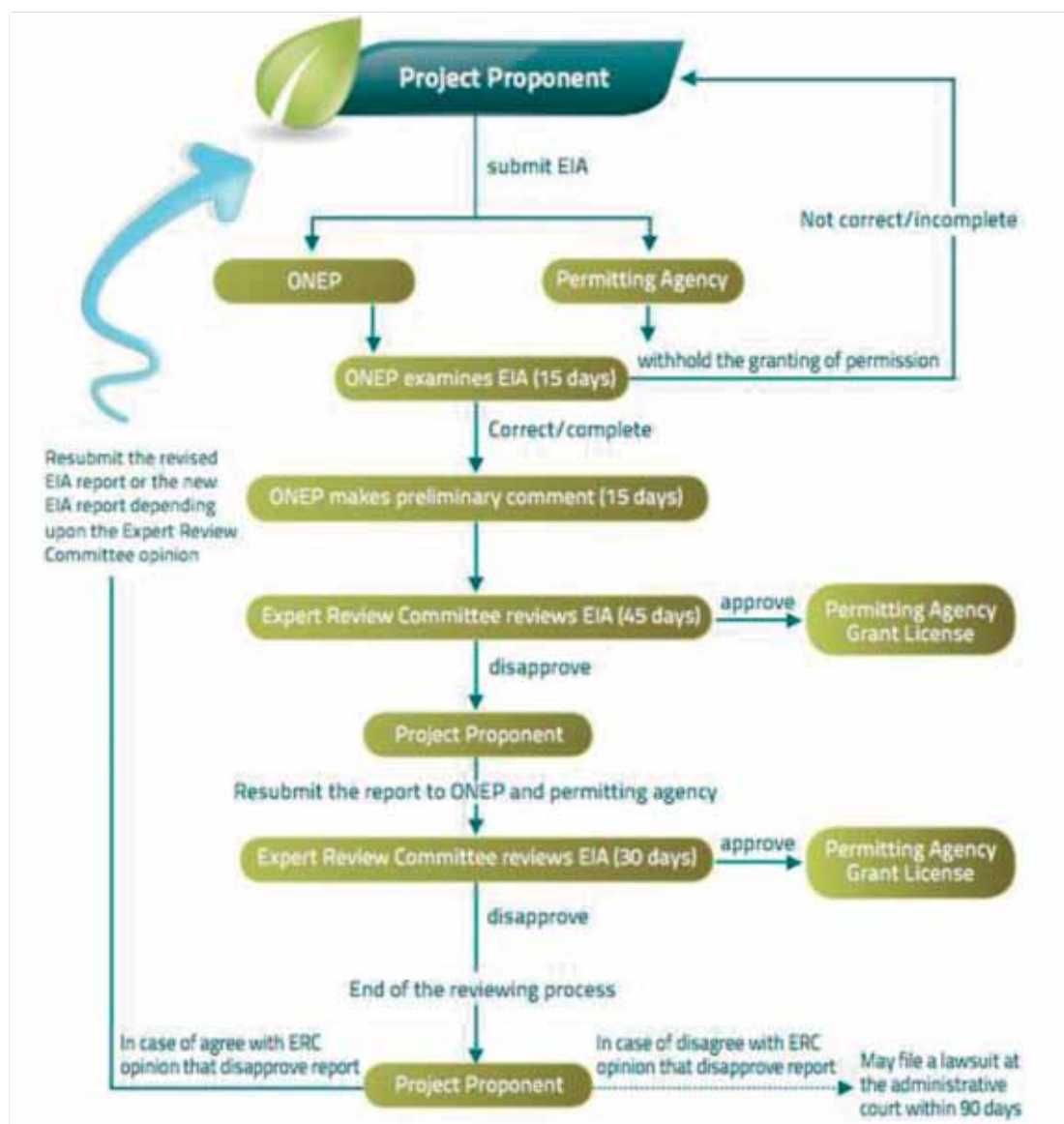
- 1) Screening comprises of initiation of the project, site evaluation and local authorities involvement;
- 2) Scoping comprises of site selection, scope of EIA and public and stakeholders' involvement;
- 3) Report preparation comprises of consultant selection, draft report preparation and data acquisition/public input/opinion;
- 4) EIA review comprises of final report preparation, EIA expert panel review for private project submitted to permitting authority, for government project submitted to National Environmental Board and to the Cabinet; and
- 5) Monitoring comprises of project owner submitted report, follow-up by permitting authority and monitoring by a third-party.

Figures 8 and 9 depict the EIA process in Thailand.

Guidelines for preparation of the EIA report for a project or activity which may seriously affect a community with respect to quality of environment, natural resources and health are provided by ONEP. The EIA report must include a summary containing the description, location and alternative location and operational method of the project or activity. It must report on impacts which may significantly affect the environment, protection and remedy thereof and investigation and examination of environmental impact and conclusion. Furthermore, the main report must contain an introduction, followed by sections on the location of the project or activity, description, existing environmental conditions and evaluation of the alternatives, measure for protection and remedy of environmental impact, compensation and summarizing table.

For larger scale projects that may cause significant impacts, the EIA report must be submitted to ONEP to be reviewed and for recommendations to be made. EIA have to be prepared by a consulting firm that is registered by ONEP.

Figure 8. Approval process for projects or activities which are required by law and projects or activities which are not required by law to receive the approval of the cabinet



Source : ONEP (2012), p. 11.

The official contents of an EIA report and preparing system are well-organized in Thailand. The EIA reports must be submitted to the ONEP to be reviewed and given a recommendation. Well-established environmental legislation and EIA guidelines such as rules, procedures, and acceptable methods and how to prepare the report, guidelines for evaluation of health impact assessment, guidelines for consultation with the public and interested parties, forms of the report, certificate for report preparation, list of the persons preparing the report, and form for report submission, have been clearly identified and formulated. ONEP uses a listing method as a key quality control instrument for accuracy and veracity of the reports.

Figure 9. Approval process for projects or activities which may seriously affect community with respect to the environment, natural resources and health, and are required by law or not required by law to be approved by the cabinet

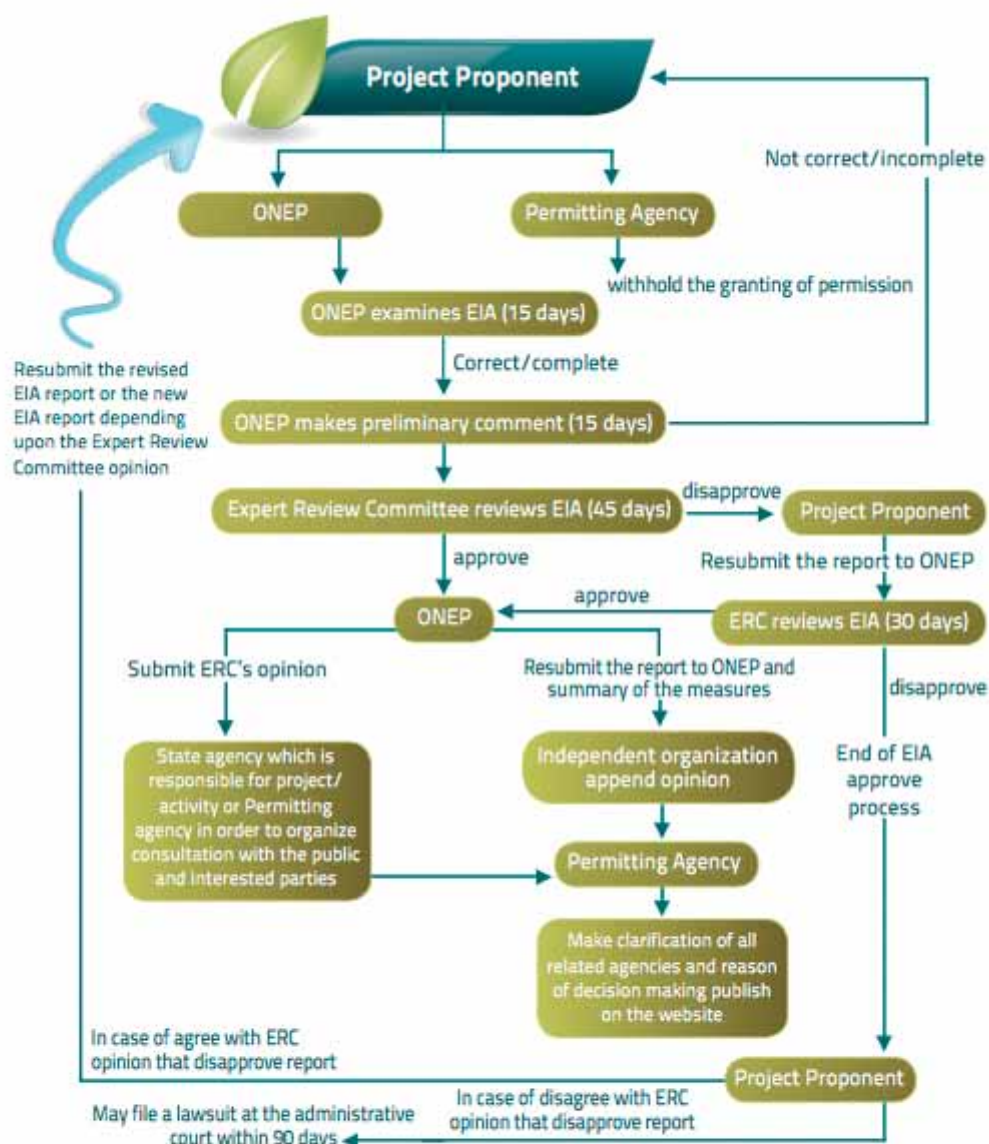


Figure 3 Approval process for projects or activities which may seriously affect community which respect to Environment, Natural Resources and Health and are required permission by law and projects or activities which are not required the approval of the cabinet

Source: ONEP (2012), p. 13.

However, information providing for the general public regarding EIA techniques and any relevant factors affecting environmental quality, display on the ONEP website (http://www.onep.go.th/eia/ENGLISH/eia_eng_index.htm), are limited.

EIA Practices in Thailand with Respect to Public Participation

It has been observed that with 35 years of EIA operation in Thailand, it is still regarded by industry as an undesirable burden on development. Consequently, there are many examples of attempts to minimize the perceived burden of EIA, including avoidance.

As noted above, the NEQA 1992 does not provide any significant rights for public participation and public consultation. The Thai Constitution 2007 gives greater weight on environmental decision-making to the community. Rights of a person to, receive information, explanations and reasons from government/state agencies before granting a license to undertake a project or activity and their right to express opinions for consideration (Section 57); rights to preserve and restore their customs and culture (Section 66); and rights to participate in the preservation and exploitation of natural resources and biodiversity, and in the protection, promotion and conservation of the quality of environment, are all stipulated in the previous Constitution. Furthermore, the rights of a community to take legal action against a government/state agency or enterprise are also stated in the Constitution.⁵⁸

In August 2008, ONEP developed a Guidelines for Public Participation in the EIA Process (in Thai), which sets out the guidelines as to how the public should participate and be heard before the proposed projects take place. ONEP also established an EIA Improvement Committee that is responsible for preparing further guidelines to identify mechanisms to improve the public participation process.

The Thailand Board of Investment produced an Investment Guide on Environmental Regulation in 2014 (BOI 2014) provides details on the types of projects required EIA and EHIA including the content of the relevant reports and the processes followed by ONEP. However it does not refer to any details on public participation.

It has been proposed that all stakeholders must have a chance to participate in the EIA process. Twenty groups of stakeholders were identified as follows:

- 1) Local communities which would be impacted;
- 2) Project owners;
- 3) Expert panels at the central government;
- 4) Local expert panels;
- 5) Regional and/or provincial natural resources;
- 6) Monitoring agencies;
- 7) Local authority for natural resources;
- 8) Local administrative offices;
- 9) Independent environmental organization;
- 10) Educational institutions;
- 11) Civil society organizations;
- 12) Media;
- 13) National Environmental Board;
- 14) ONEP;
- 15) EIA consultants;
- 16) Concerned citizens;
- 17) General public;
- 18) Regional government offices;
- 19) Permitting authorities; and
- 20) The Cabinet.

⁵⁸ The 2007 Constitution was abrogated on May 22, 2014.

The level of participation is divided into four levels for each type of stakeholder and at various steps in the EIA process (depending on the nature of the projects and public participation needs). The four levels are:

- 1) Informed/public disclosure;
- 2) Consulted/public hearing;
- 3) Involved in making decision/public committee; and
- 4) Voted/public consensus.⁵⁹

The Guidelines are not available in English and it is not clear how the details in the Guidelines are applied in specific cases in Thailand.

Vietnam

Overview

Vietnam is a civil code jurisdiction based on socialist legal theory and French civil law.⁶⁰ The Constitution of the Socialist Republic of Vietnam was adopted on November 28, 2013.⁶¹

Environmental regulation is relatively recent in Vietnam. The 1992 Constitution provided that the national's land, forests, wildlife, water, and natural resources belong to the people Vietnam and are to be managed by the government and the specific groups it may appoint.⁶²

The Law of Environmental Protection was introduced in 1994 and was updated and replaced by the Law on Environmental Protection 2005 (LEP 2005). More recently the Parliament passed the Law on Environmental Protection 2014 (LEP 2014), which updated and replaced the Law on Environment Protection 2005.

Vietnam also has a number of other laws relating to environmental protection including:

- Law on Land (2003);
- Law on Forestry Protection (2004);
- Law on Biodiversity (2008); and
- Law on Minerals (2010).

The Ministry of Natural Resources and Environment (MONRE) was established in 2002 to manage Vietnam's natural resources and environment.⁶³ The National Environmental Administration of MONRE helps to manage national environmental protection activities throughout Vietnam and there are Departments of Natural Resources and Environment for the provinces and the five cities under central government administration.⁶⁴

The Vietnam Environment Administration (VEA) was established in 2008. A new procedure regulates the function, tasks, mandates, and organization of the VEA.⁶⁵ The VEA performs the functions of assisting the Minister for Natural Resources and Environment in the execution of state management tasks regarding environmental protection including the compliance with and enforcement of the LEP 2014. The Environmental Police Agency was established in 2007 to conduct inspections and apply administrative sanctions for environmental violation.⁶⁶ Despite the extensiveness of Vietnam's environmental protection and natural resources management system, "in practice environmental policy is crippled by weak, inconsistent, and often arbitrary enforcement."⁶⁷

59. Pantumsinchai and Panswad (2003).

60. ABA (2014), p. 811.

61. <http://en.vietnamplus.vn/Home/The-Constitution-of-the-Socialist-Republic-of-Vietnam/2014/45126.vnplus>.

62. ABA (2014), p. 812.

63. ABA (2014), p. 812.

64. ABA (2014), p. 812.

65. Decision No. 25/2014/QDD- TTg dated March 25, 2014 of Prime Minister (effective on May 15, 2014).

66. ABA (2014), p. 812.

67. ABA (2014), p. 812.

The Constitution of Vietnam outlines the major elements of environmental protection in Vietnam. Relevant to the issues of public participation in EIAs are Articles 2 and 14 dealing with human rights and citizens' rights. Article 30 provides for a right to lodge complaints about illegal acts of agencies, organizations or individuals with competent agencies, organizations, or persons.

EIA Procedure

The amended Law on Environmental Protection 2014 (LEP 2014) requires EIAs to be prepared at the time of the project feasibility study. One important aspect of the EIA process in Vietnam is that MONRE is not involved in the screening and scoping phase and does not approve the TOR for the EIA. MONRE becomes involved in a proposed development project is when the EIA is submitted to it under Article 23.

The Decree Providing Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Commitment No. 29/2011/ND-CP⁶⁸ and Appendices I and II provide the list of projects requiring strategic environmental assessment (SEA) or EIA. This Decree replaced a number of decrees relating to the previous regime on EIA.

Large infrastructure development, in particular hydropower, mining, and economic land concessions, all would be covered, in theory, by the requirement to conduct SEA. In addition EIA would be required for projects falling into the following categories :

- 1) Projects in which investment is decided by the National Assembly or Prime Minister;
- 2) Hydropower project with a capacity of more than 1 MW;
- 3) Oil and gas projects;
- 4) Mineral exploitation with an annual volume above 50,000 m³; and
- 5) Projects involving relocation and resettlement of more the 300 houses.

Economic land concessions are not specifically listed in Appendix II. But projects that change the use of forest areas or areas under two rice crops per year with an area of 10–50 ha depending on type of forest will require an EIA. Investment projects not requiring an EIA require an environmental protection plan (EPP).⁶⁹

Section 3 of the LEP 2014 outlines the requirements for SEA, EIA, and EPP in Vietnam for designated projects. Article 19 provides that owners of projects must prepare EIA. These must be submitted to the competent state agencies for approval and must be formulated at the same time at the feasibility study reports of the projects (Figure 10). The contents of the EIA are outlined in Article 22. These are further detailed in Article 17 of the SEA/EIA Decree 2011.


Previously, Article 20.8 of the LEP 2005 required the EIA report to include the opinions of the commune/ward or township People's Committee and representatives of the "population communities" in the project location, including opinions against the project location or environmental protection and mitigation measures. However under the LEP 2014, consultation is now only required with "agencies, organizations and communities that are directly impacted by projects."⁷⁰

Once the EIA is submitted to MONRE, it is assessed either by Ministry staff or by a relevant provincial level committee. Article 25 of the LEP 2014 provides that the assessment must be undertaken within 20 days of the final modification of the EIA.

68. April 18, 2011.

69. LEP 2014, Article 29.

70. LEP 2014, Article 21.



Article 25 also makes clear that other investments licenses and construction and operation permits may be granted only after EIA reports have been approved, and Article 27 sets out the responsibilities of the project proponent to implement the environmental protection requirements in the EIA report.

Previously, projects were allowed to commence operation only after the local commune had been informed of the approval and the contents of the EIA, and the local population had been publically informed of environmental protection solutions and pollution discharge limits, and that the EIA report and conditions and environmental protection measures have been fully implemented.⁷¹ This has been removed from the requirements under the LEP 2014.

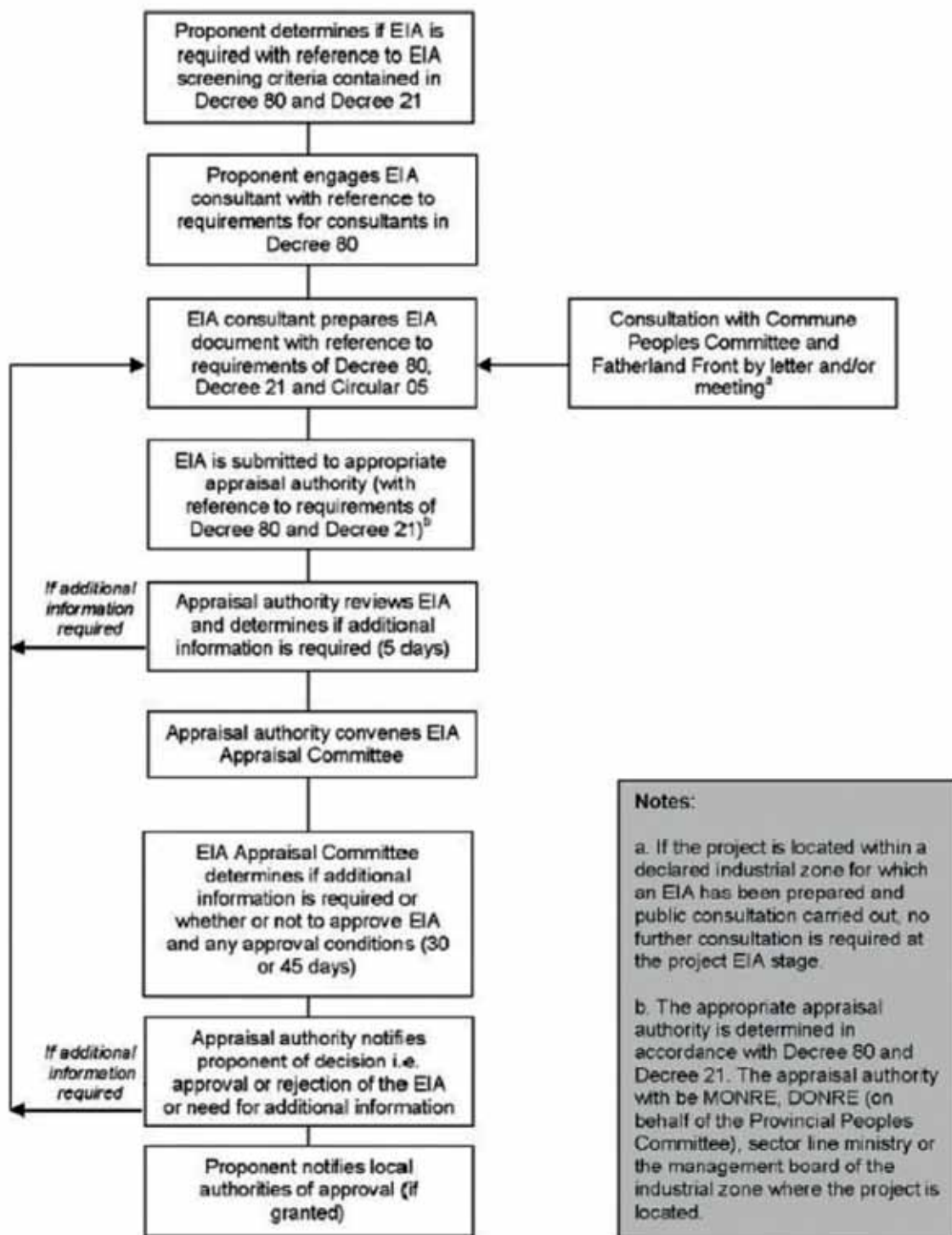
The EIA approving authorities are also required to notify the Commune and People's Committees of the EIA approval and the content of the approval. There is no specific requirement that these documents, or the EIA documents themselves are public documents. There is also a requirement that certain projects not requiring SEA or EIA are required to make written environment protection commitments.⁷²

With the adoption of the LEP 2005, EIA requirements at all stages of environmental management were established for the first time in Vietnam. Environmental management issues had to be addressed in EIA reports and the project proponent was required to prepare an Environmental Management and Monitoring Program (EMMP). This EMMP was required to document the elements of an environmental management plan including a budget for environmental management activities and requirements for institutional arrangements.

71. LEP 2005, Article 23.1.

72. LEP 2014, Articles 29 and 33.

Figure 10. EIA process in Vietnam



Source : Clausen (2011), p.138

EIA Practices in Vietnam with Respect to Public Participation

Article 21 of the LEP 2014 requires that project owners shall consult agencies, organizations and communities that are “directly impacted by projects.”⁷³ However there is no clear expression of the requirements for this consultation. Clausen et al. identified three major shortcomings in current EIA policy and practice relating to public participation in Vietnam.

Firstly, consultation requirements relate to contact with local authorities, namely the Commune Peoples Committee and Fatherland Front through letters and/or meetings. There is no requirement for open public involvement and no requirement or guidance provided on more effective consultation methods. While these bodies are considered by the Government to be representative of communities, the hierarchical political system in Vietnam ensures they are often under pressure from higher levels of government to give their agreement to projects. They therefore do not always accurately reflect the opinions and concerns of local communities, particularly disadvantaged or voiceless groups in Vietnamese society such as landless households or ethnic minority groups that can be the most significantly affected by projects. Secondly, requirements for the timing of consultation during the EIA process are still unclear; the proponent can effectively choose when to conduct consultation and in many instances this consultation is carried out at a point in the process when it is too late to have any significant input. Finally, despite a provision in the LEP 2005 that public involvement is required during EIA appraisal, the requirement for this involvement is limited to notification following the approval (or non-approval) of an EIA. There is no mechanism for the appraisal authority to receive the views of the public on the proposal during its appraisal.⁷⁴

There is no specific reference to public consultation in the Hydropower Decree 2008. Although Article 7.4 requires that the “detailed land-use master plans and plans must take into account opinion of dam owner and communities of lakeside communes, ensuring publicity, transparency and fairness.” Additionally the land-use master plans and plans must be publically available at the offices of the People’s Committee for public inspection.

The LEP 2014 provides that projects and activities required to undertake an EIA shall report their environmental information to environmental management agencies. Article 131 requires certain environmental information to be made public, including EIA reports, SEA reports and EPPs. However it is not clear if the draft EIAs and supporting information including EMPs are to be made available prior to approval of the project.

73. LEP 2014.

74. Clausen et al. (2011), p. 141.

IV. Comparative Analysis of EIA in Lower Mekong Countries

There are many similarities between EIA procedures and general approach to EIA and environmental assessment in the Lower Mekong countries. Some countries commence the EIA process at the screening stage. However it is recognized that including the community even earlier, at the project-feasibility or scoping stage, would provide even better results.

All five Lower Mekong countries provide for a system of screening, although the lists of projects vary between countries. All five countries also provide for at least two levels of assessment. This could be some type of IEE and an EIA (as in Cambodia, Lao PDR, and Myanmar). In Thailand there is the provision for EIA and Environmental and Health Impact Assessment (EHIA).

One other difference between the countries is also the level at which EIA is made law. In Cambodia EIA is currently a sub-decree, although a new draft EIA law is being developed. In Myanmar, the EIA is established by rule, one step below a law, and the details are contained in procedures that are a level below the status of a law. In Thailand, the law requires EIA but the details are in ONEP guidelines, similar to in Vietnam. In Lao PDR, a Ministerial Decree covers EIA, with details covered in guidelines.


One major weakness that can be identified is the need for EIA procedures to be elevated to legislation enacted by the Parliament. This will strengthen the status of EIA through the region.

Not all countries provide for scoping and none formally provide for public participation at the scoping stage in the substantive EIA law or regulation. In Cambodia this participation is done by the MoE in an informal manner. In Thailand, ONEP's guidelines provide for public participation. The ONEP guidelines derive their authority from provisions of the 2007 Constitution. Now that the Constitution has been abrogated, it is uncertain if those guidelines are legally enforceable.

An examination of the laws and regulations in each of the five countries also identifies a lack of clarity in three important aspects of public participation. The first aspect is who should be consulted (which people or communities). The second aspect is when those people should be consulted. The third aspect is what information should be provided to those people and how should it be provided.

Thailand provides the clearest guidelines on who should be consulted, while the Lao PDR EIA Guidelines 2012 provide the greatest details on who should be consulted and when, along with some guidance as to how this should be done.

All countries are weak in specifying clearly what information is to be available to the community or the public in general. While most countries require the approved EIA to be a public document, in some countries it is not clear if this includes the full documentation and conditions attached to the approval of the EIA (e.g., Cambodia and Vietnam).



The final observation to be made in the comparative assessment is that the emphasis of all countries is on the preparation and evaluation of the EIA. Only Lao PDR clearly extends the role of PAP and community participation to the monitoring and compliance stage of the project. This is a major area of weakness in current EIA practice in the region and one that should be addressed.

Table 2 provides an overview of the EIA laws in the region. It presents a multiplicity of laws, regulations and guidelines covering EIA. Although all the laws are available in English, some guidelines are only available in the national language (such as in Thailand). This may make it difficult for investors and EIA consultants to be certain of their obligations. There is sometimes a lack of clarity in what is required under national EIA legislation. In most cases, the national legislation does not clarify who is to be informed and consulted with by the EIA consultant and what information should be provided to stakeholders. Often, the right to access information is not specified by the EIA legislation and in some cases it is difficult to determine if the community can have access to the draft EIA, the final EIA, or the EMP.

Likewise it can be difficult to establish if the ECC or the EMP and project commitments are available to the community or are public documents. There is no doubt that the uncertainty of this makes it more difficult for communities and stakeholders to effectively engage in meaningful consultation.

Table 2. EIA laws in the region

Country	Environment legislation	Main EIA law	EIA preparation	Access to information	Public participation	EIA evaluation	Other relevant legislation
Cambodia	Environmental Protection and Natural Resources Management Law 1996	EIA Sub-Decree 1999	<p>Prakas on Guidelines for Conducting EIA Report (49 MoE, March 2000)</p> <p>Prakas (Declaration) on General Guidelines for Conducting Initial and Full Environmental Impact Assessment Reports (No. 376 BRK.BST 2009)</p> <p>Prakas on Registration of Consulting Firms for Studying and Preparing Environmental and Social Impact Assessment Report (No. 215 Brk MoE 2014)</p>			Prakas on Establishment of the Technical Working Group for Reviewing and Commenting on the EIA Report (No. 063 Pr.k MoE 2014).	
Lao PDR	Law on Environmental Protection 2012	<p>Ministerial Instruction on the Process of Environmental and Social Impact Assessment of the Investment Projects and Activities No. 8030/MONRE, 17 December 2013</p> <p>Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities No. 8029/MONRE, 17 December 2013</p>	Environmental Impact Guidelines 2012 MONRE				Prime Minister's Decree on Compensation and Resettlement of People Affected by Development Projects No. 192/PM

Table 2. EIA laws in the region, continued

Country	Environment legislation	Main EIA Law	EIA preparation	Access to information	Public participation	EIA evaluation	Other relevant legislation
Myanmar	Environmental Conservation Law 2012 Environmental Conservation Rules 2014	EIA Procedures (Draft)					Myanmar National Environment Policy 1994
Thailand	The Enhancement and Conservation of National Environmental Quality Act 2535 (1992)		Various sector Guidelines for projects. List of Projects Requiring EIA ONEP 2009		Guideline for Public Participation and Social Impact Assessment in EIA 2008	Guideline for Health Impact Assessment 2008	Prime Minister Office Rule on Public Hearing (2005)
Vietnam	Law on Environmental Protection 2014		Decree providing Strategic Environmental Assessment, Environmental Impact Assessment and Environmental Protection Commitment No. 29/2011/ND-CP				




Table 3 is an attempt, following the reviews of national EIA legislation and regulations and any available policies, to identify the range and scope of public participation that must be undertaken in the EIA process. It identifies five stages:

- 1) Screening;
- 2) Scoping;
- 3) EIA report preparation;
- 4) EIA report evaluation;
- 5) EMP/ESMMP preparation; and
- 6) Compliance and enforcement.

Table 3 is not designed to be comprehensive, rather to identify the nature and scope of public participation during each of these stages.

Table 4 looks at the specific regulatory provisions (including guidelines) dealing with the availability of information to concerned stakeholders. While there may be a legal right for a community to participate in the EIA process, this is not backed up by a clear provision that allows access to the information about the project. For example, in Vietnam there is a requirement that directly impacted communities should be consulted at the project preparation stage and yet the EIA itself may not be a public document, even after it is approved. It must be publicized at the Commune People's Committee but not to the general community. By comparison, the Myanmar draft EIA procedures require all these documents to be published on a publically accessible web-site.

Table 3. Public participation at stages of EIA

Country	Screening	Scoping (development of TOR)	EIA report preparation	EIA report evaluation	EMP/ESMMP preparation	Monitoring, compliance, and enforcement
Cambodia	All projects require IEIA first; then DEIA determines whether EIA needed. Currently introducing public participation at the screening stage by requiring a site visit with project proponent and local agencies and PAPs	No. Projects under \$2 million are determined at the Provincial level. Details of these projects are not provided to the MoE.	Sub-Decree "encourages" public participation. Under the Guidelines there are three levels of consultation - local, provincial and national. Yes	Declaration on General Guidelines for Developing Initial and Full EIA Reports (2009) describes that a public participation section of the IEIA/EIA should include provision of project information, feedback from public consultation with affected communities and other stakeholders.	No. Public participation "encouraged" during preparation	No, but MoE accepts written comments from stakeholders for consideration during Inter-Ministerial Review Meeting of EIA
Cambodia (draft EIA law)	Projects will require IEE or EIA based on screening list.	Scoping will be conducted with PAP. Projects under \$2 million are determined at the Provincial level. Details of these projects are not provided to the MoE.	Required under the law. IEE and EIA Report must include details of the process of consultation and views of PAP.	Consultation will be required under the law during the evaluation stage by MoE.	PAP will be involved in the development of EMP. Process of continual updating of EMP.	Right to report grievances. Some projects will have external environmental auditors.

Table 3. Public participation at stages of EIA, continued

Country	Screening	Scoping (development of TOR)	EIA report preparation	EIA report evaluation	EMP/ESMMP preparation	Monitoring, compliance, and enforcement
Lao PDR	Two categories of projects IEE or EIA.	Under the Ministerial Instruction 2013 there is no requirement for involvement with PAP. Prepare by project proponent.	Project proponent is to undertake consultation at Village, District and Provincial level. Project owner is responsible.	During the EIA review process there should be consultation at the appropriate level. Public is invited to participate in evaluation at public consultation meetings. However, EIA documents are often not available in Lao language (Executive Summary only) and not in ethnic languages.	ESMMP should include consultation with affected people.	Required to be established by project proponent. Specified right of PAP to participate in monitoring and ESMMP.
Myanmar	All projects must carry out IEE or EIA. MOECAP will determine level of screening.	Yes. Both IEE and EIA require consultation to the public and civil society.	Yes. Must consider views, concerns and perceptions of PAP and other stakeholders. Timely disclosure required.	Yes. Proponent must arrange meetings. Must be placed on web site within 10 days of lodgement with MOECAP.	Yes.	No. Project proponent must notify MOECAP of any breaches but not the community. Appeal process provided within MOECAP.
Thailand	Projects can require IEE, EIA or EHIA. No reference to public participation at screening stage	Yes. Public consultation required with PAP. But limited in are to 5 km from site.	ONEP requires two public participation meetings (scoping and draft EIA) for all projects requiring EIA. Must have 3 meetings or 4 meetings if there is an EHIA required.	Yes. If projects require EHIA then will be specific meeting conducted by ONEP.	Draft EIA/EHIA will include mitigation measures. EMP considered integral part of EIA, thus must be presented for review during public participation meetings.	Not required. No specific requirements stated, but access to project information should be provided throughout the EIA process
Vietnam	Listed projects must carry out EIA or develop environmental protection plans.	EIA conducted at "project preparation" stage. Consultation with directly impacted communities is required.	No clear requirements for consultation.	MONRE evaluation of EIA. Commune level may determine if public meeting is required.		Not required.

Table 4. Access to information at stages of EIA – Are documents available to concerned stakeholders?

Country	Screening	Scoping	Draft EIA Preparation	EIA Final Document	EMP Document	Approval Letter Public Document
Cambodia	Informal arrangements are in place.	Scoping is not referred to in the Sub-Decree. Informal arrangements have been made for on-site meetings.	Prakas require participation during the EIA preparation.	It is not clear if the draft EIA or EIA are public documents.	There is no specific reference to an EMP under the Sub-Decree.	There are no requirements that the IEE/EIA Approvals are public. There is no requirement that the EPA is made public.
Cambodia (draft EIA law)	Yes. Not clear at what stage this information is to be made available to the PAP.	Currently scoping is covered under an informal arrangement. The Law provides for a right for information to PAP.	Prakas will determine the details of public participation. The Law provides for a right of access to information.	Yes. Will be available together with EIA Approval Certificate.	EMP publically available. Annual Report will be publically available.	EIA and EMP will be publically available. EIA Approval letter will be publically available.

Table 4. Access to information at stages of EIA, continued

Country	Screening	Scoping	Draft EIA Preparation	EIA Final Document	EMP Document	Approval Letter Public Document
Lao PDR	Ministerial Instructions require certain information to be disclosed.	Is to be in Lao and local language. Scoping Report to be reviewed and approved by DEIA prior to start of study, however Scoping report not available to PAPs.	Yes. "Suitable information" is to be disclosed. Provided in Lao and English.	The EIA is to be provided to MONRE. This is to be disclosed by the Project Proponent.	The obligations and mitigation measures are to be disclosed to the public.	PAP may be involved in the monitoring activities. EIA Approval Certificate and conditions are not yet public documents.
Myanmar		Yes. Must disclose information and conduct meeting.	Yes. Must be placed on web site.	Yes. Must be placed on web site.	Yes. Must be placed on web site.	Yes. Also any breach report to be made public.
Thailand	Guidelines require public consultation depending on type of project.	Not clear. Public comments are to be received during Scoping to be used for consideration of the scope of EIA study.	Not clear but consultation requires provision of information.	Yes. Only after approval. EIA/EHIA is public document.	Not clear. EMP considered integral part of EIA. Both are presented on MONRE and PP websites.	Not clear.
Vietnam	PAP Commune	PAP	PAP Commune	Under Article 131, EIA report, EPPs and of inspection reports are to be "publicized". It is not clear when and how this should happen.	Yes. Only general references are made in the Law on EP.	Yes. Only general references are made in the Law on EP.

Gaps and Weaknesses in Public Participation in EIA

The implementation of EIAs in the Lower Mekong countries is very often too late, commencing when the major project decisions (including site, design, and construction preparation) already have been made, thereby rendering the EIA a mere formality.⁷⁵ EIAs also have been depicted as an exercise in rationalizing predetermined outcomes, rather than a means for providing independent and rigorous analysis upon which sound decisions are based.

One of the issues raised in EIA is the difficulty to obtain coordination between different government agencies and between different levels of government. Mostly major projects are assessed at a national level and require coordination between different ministries. In the cases of Cambodia, Thailand, and Vietnam, the authority bestowed upon the environment ministry as the responsible body for assessing and managing the EIA process often is trumped by more powerful, often sectoral, ministries such as the Ministry of Agriculture, Forestry, and Fisheries in Cambodia; the Ministry of Agriculture and Cooperatives in Thailand; and the Ministry of Planning and Investment in Vietnam.⁷⁶ Development-orientated bodies such as the Council for the Development of Cambodia or the Myanmar Investment Commission often operate in a manner that can reduce the ability of the environment ministries to promote best practice for EIA.

Looking at the EIA process, there are four particular stages where there is a need for public participation:

- 1) Screening/scoping;
- 2) Preparation of IEE/EIA report by the EIA consultant;
- 3) Evaluation of EIA report by the delegated authority (e.g. Ministry of Environment); and
- 4) Post-approval monitoring, compliance, and enforcement.

It is clear that if public participation and community involvement occur at the earliest stage in the EIA process, namely the screening/scoping stage, this will help to ensure that the views of the community and PAP are most strongly considered by the EIA consultant, the project proponent and the government. It would seem logical that community views may lead to more significant project modifications if expressed during the design and valuation stage.

Once extensive design and planning work has been undertaken, it may be more difficult to incorporate changes and alternatives and this will also increase the cost of the project.

Across the region there are some gaps and weaknesses in the process of public participation in EIA during the screening/scoping stage and the EIA preparation and evaluation stages. The following areas reflect the most significant weaknesses in the current EIA regimes in the region.

- Under existing law and regulations, public participation is mostly encouraged but not mandatory, thus in practice public participation is determined by the project proponent.
- Public participation provisions do not mention how the public should be informed about the EIA process, the venue at which the public should gain access to EIA reports, and at which stages of the EIA process the project developers should involve public participation.

⁷⁵ Li (2008), p. 7.

⁷⁶ Li (2008), p. 9.


- Guidelines on public consultation are too general. It is left relatively open as to what type of methodology and approach shall be used during consultations. Public participation of project affected populations (particularly minorities) can be impeded by:
 - Low integration of some ethnic minority groups into the mainstream society;
 - Lack of familiarity with aspects of development projects;
 - Lack of political representation of minority groups compared to majority communities; and
 - Low literacy among some vulnerable groups and ethnic minorities (language issues need to be addressed, especially consultations and reports of public meetings and comments in minority languages).
- Grievance mechanisms or procedures are often missing or not mandatory. There are generally no requirements for the establishment of a consultative committee for large projects.
- Although there may be legal provisions requiring public participation, the participation of NGOs may be discouraged or curtailed. The lack of local NGO activity means that public participation in the EIA process is limited to a large extent to local communities and PAP.
- Legal requirements for the incorporation of public comments and inputs to the EIA reports are not stated (and thus most probably not involved in deciding which mitigation measures should be selected).
- There is no legal requirement for EIA reports to provide reasons for approval or rejection of public comments (only to list comments as part of a public participation annex to the EIA report).
- Access to project information and EIA reports can be limited. Without clear laws and guidelines for public access to environmental information it is difficult to have effective public consultation.

The current assessment of public participation in the EIA process has focused on the stages of the screening/scoping of the project and the EIA report preparation and review process by the designated government entity as defined by laws, regulations, and declarations. But the EIA process does not end when the relevant ministry makes a decision regarding the adequacy and completeness of the EIA/EMP and issues (or declines to issue) an ECC to the project proponent. What remains to be addressed is the role and participation of the public in project monitoring during the construction, operation and closure stages of the concession agreement.

Current regulations and guidelines for public consultation and participation in the EIA process generally end when the ECC is approved. This is an outstanding weakness in EIA legislation and policy - the lack of attention to the involvement of the public and the role of civil society after EIA report approval when project activities have been authorized to begin in the implementation stage.

How, when and where public participation should be included in evaluating the adequacy and effectiveness of the implemented mitigation measures (to offset or minimize social and environmental impacts) is an important gap in the EIA process. This gap in the evaluation of the adequacy and effectiveness of implemented mitigation measures by the project proponent has yet to be addressed in any of the Lower Mekong countries.

The laws, regulations, and guidelines for public involvement in the EIA process must go further to include stakeholder inputs and consultations during the post-approval monitoring, compliance, and enforcement stage of project development.



There are three aspects of community participation in monitoring, compliance and enforcement. First, the revised EMP should take into account the concerns of the community and incorporate their views into the mitigation plan to reduce/minimize environmental and social impacts of the proposed development project to acceptable levels.

Secondly, the proposed monitoring plan should be developed to reflect design changes resulting from the EIA process and the relevant ministry should carry out compliance monitoring of what was implemented on the ground (comparing the implemented mitigation measures to what was shown in the agreed upon EMP) to verify that commitments made by the project proponent were indeed implemented.

Thirdly, project monitoring by the project proponent (primary) supported by compliance monitoring (secondary) involving local organizations and the community (stakeholders involved in compliance monitoring), and possibly by independent thirdparty monitors (tertiary) should verify the adequacy and effectiveness of the implemented mitigation measures. The project proponent should carry out changes if required as a consequence of issues identified by compliance monitoring.

It is suggested that public participation plays an integral and necessary role not only in project design, impact assessment, and development of alternative mitigation measures, but in the EMP (both the mitigation measures and the monitoring program), and in compliance monitoring of the adequacy and effectiveness of the implemented mitigation measures.

Recommendations for further involvement of civil society in the EIA monitoring, compliance, and enforcement process is a necessary follow-on step in the project implementation stage. Based on ongoing experiences of in Cambodia, Lao PDR, and Myanmar, it is believed that public involvement in the EIA process can be successfully extended by including NGOs and CSOs in project monitoring activities after the EIA is approved. CSOs are one among many stakeholders to be involved in public consultation and monitoring of proposed development and infrastructure projects. CSOs should become familiar with the proposed project documents - the EIA, EMP, social impact assessment and social development plan.⁷⁷ CSOs can also help to build trust in the EIA process by monitoring the EIA approval process at the government level.

Involving CSOs in evaluating the adequacy and effectiveness of mitigation measures committed to and implemented by the project proponent can further improve public participation in the EIA process. CSOs can be involved as project “monitors” and voice their findings and opinions under appropriate consultative mechanism or grievance procedures. This is similar to the role of “independent third party auditors” in monitoring projects on behalf of lending institutions. They check what is being implemented on the ground (the actual implementation of the project and the mitigation measures by the project proponent) and cross check against commitments agreed upon during the EIA process, including the approved EMP/ social development plan and other related resettlement and compensation agreements signed between the government, the project proponent, and PAP.

77. Several comments have been received supporting CSO involvement in the EIA process. Some people believe that CSOs can assist in representing the community, in providing baseline data, and in addressing impact evaluation issues. EIA consultants can consult with and use inputs from CSOs when developing the EIA study, evaluating project options, and considering alternative mitigation measures.

Overall Reflections for Improving Public Participation in EIA in Lower Mekong Countries

Early involvement of the community in environmental and social assessments of development projects has the potential to maximize the benefits of public participation. The earliest opportunity will most likely occur at the screening/scoping stage. Only in Cambodia is there public consultation at this stage. This is an informal process and not one made clear by law. One need is for the involvement of the community in the screening/scoping stage of the project. This would require legislative amendments to include scoping as part of the EIA process and to require the participation of the community and PAP.

All Lower Mekong countries have a screening process. Under the proposed EIA guidelines, the relevant ministry would also be involved in ensuring that the local communities and PAP are included in the decision to conduct an EIA for a particular project. One advantage of this process for Vietnam is that this would require MONRE to also become aware of potential development projects prior to the preparation of the EIA report.

The screening/scoping stage is also the time when appropriate TORs are developed for the EIA reports. These TORs should reference all relevant environmental and social impacts. Once again, the involvement of the communities in the development of these TORs can help ensure that the EIA report focuses on those issues that are likely to cause significant environmental and social impact.


All EIA systems provide for consultation with PAP and the wider community as part of the EIA preparation stage. The Thai and Lao PDR guidelines are the most comprehensive. This Report recommends that the Lao PDR EIA Guidelines 2012 be used as the basis for developing specific regional Guidelines for Public Participation in EIA for the four major stages of the EIA process,⁷⁸ specifically:

- 1) Screening/scoping;
- 2) Preparation of EIA report by the EIA consultant
- 3) Evaluation of EIA report by the delegated authority (e.g. Ministry of Environment); and
- 4) Post-approval monitoring, compliance, and enforcement.

However as part of the development of these regional Guidelines for Public Participation in EIA it is recommended that the Guidelines have a short, prescriptive format with a checklist to assist all stakeholders in improving public participation in the EIA process. Keeping the guidelines short will facilitate both translation and comprehension by PAP. Checklists will provide PAP and relevant government ministries with an effective management tool.

For example, the guidelines may provide details on the number of meetings to be held and whether the purpose of a meeting is to inform the community, receive comments from the community, respond to community concerns, or to inform the community of the final design of the project and the EMP. The Guidelines may also provide guidance on the notification time required before a meeting should be held, recommendations about methods of communicating with PAP and stakeholders and list the information that should be collected about the public consultation process itself.

78. The Thai ONEP Guidelines date from 2008. It was not been possible to source an English version of the Guidelines.



Additionally the Guidelines can also include a checklist on the information that has been provided to PAP and other stakeholders. Access to environmental information is a necessary prerequisite to effective public participation in EIA.⁷⁹ While all national EIA legislation provides for some access to information for PAP and other stakeholders, it is not always clear what information needs to be provided, in which form it should be provided, and when it is to be provided. The use of a checklist that applies to all Lower Mekong countries would provide clarity for project proponents, EIA consultants, other stakeholders and relevant ministries.

To ensure that these Guidelines are enforceable it may be necessary for some national EIA laws or regulations to be amended to allow for scoping within the EIA process. While all countries have formal screening, not all countries have formally included scoping in the EIA process (such as Cambodia, Myanmar, and Vietnam).


Additionally, apart from Lao PDR and Thailand, Lower Mekong countries do not have a formal regulatory requirement that PAP and other stakeholders are consulted or involved in the formulation of the EMP or EMMP. Changes to legislation or regulation should require that PAP and relevant stakeholders are involved in the process of finalizing the EMP and are involved in the monitoring and enforcement of the EMP and compliance with it and other commitments made by the project proponent.

The following recommendations reflect the need to clarify and strengthen public participation in development projects in line with best practices for EIA and based on international principles of EIA. The development of Guidelines for Public Participation in EIA that can be applied across the Lower Mekong region would have significant benefits to all stakeholders by providing clear, consistent, and applicable guidance for development across the region.

Key Recommendations

- 1) Amend EIA legislation to adopt public participation at the screening and scoping stage of projects to enable better considerations of alternative options, including the “no build” option.
- 2) Develop Guidelines for Public Participation in EIA that provides clear and prescriptive guidance for government, project proponents, EIA consultants, CSOs, and the communities on public participation in environmental assessment of projects.
- 3) Include in the Guidelines for Public Participation in EIA clear and prescriptive guidelines on the timing of public participation, the information that is to be made available to the public, the number and type of meetings to be held, and the reporting requirements.
- 4) Develop a simplified checklist to enable effective implementation of the Guideline for Public Participation in EIA by project proponents and EIA consultants. This can be developed for the four stages of the EIA process from screening/scoping to preparation, evaluation, and compliance/enforcement.
- 5) Amend EIA legislation to require project proponents to establish consultative committees during the EIA process with PAP to enable issues to be addressed during the EIA preparation, evaluation and implementation stages.

79. See for example UNECE (2000), p. 35.

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- 6) Amend EIA legislation to require project proponents to establish appropriate complaints and grievance mechanisms for major projects to assist in the resolution of conflicts between project proponents and PAP, including community participation.
 - 7) Engage NGOs and CSOs in post EIA approval project monitoring to assist in improving public participation in the implementation and monitoring of Environmental Management Plans (EMPs) and in improving compliance with and enforcement of the ECCs and other commitments made by the project proponent.

The above recommendations are based on the assessment of the EIA systems in Cambodia, Lao PDR, Myanmar, Thailand, and Vietnam. Because the systems in each country have many aspects in common, there are a number of ways that the Guidelines for Public Participation in EIA can contribute to meaningful stakeholder engagement.

Each country requires ministerial guidelines or regulations to implement its domestic EIA legislation.

Lao PDR has the most detailed public participation process in its EIA Guidelines 2012. This could be used as a model although it would be recommended that the procedures be simplified. A simplified checklist would assist project proponents and EIA consultants in fulfilling the obligations for stakeholder participation in EIA.

The recommendations above are in accordance with the Bangkok Declaration on the ASEAN Environment (1984). Through the Declaration, ASEAN Member States sought to:

[S] trengthen the use of EIA process and extended Cost-Benefit Analysis for minimizing the adverse effects and for ensuring proper consideration of environmental values in all projects and programmes under government that are likely to produce significant environmental impact and its gradual extension to the private sector including industry.

The promotion of EIA and public participation in environmental assessment also provides a clear signal of the commitment to the one of the aims of the ASEAN Charter :

To promote **sustainable development** so as to ensure the protection of the region's environment, the **sustainability of its natural resources**, the preservation of its cultural heritage and the high quality of life of its peoples.⁸⁰

80. ASEAN Charter Article 1(9), (emphasis added).

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Annex 1 : International and Regional EIA Frameworks

International EIA Law Framework

There is no single, unified body of international law or treaty governing EIA.¹ Principle 17 of the Rio Declaration² was a clear international statement on the importance of EIA (as a national instrument) as a way to assess the potential impacts of those projects that are likely to have a significant impact on the environment. Although most domestic EIA laws rely on the principles outlined in the Rio Declaration to assess impacts, it has been recognized that there are gaps between these laws and the practice of EIA.

The United Nations Economic Commission for Europe (UN ECE) has been at the forefront in developing mechanisms that both support and enhance the role of domestic EIA law as well as examining ways that EIA can assist in the regional context. The two most internationally recognized instruments relating to environmental assessment are the following:

- 1) The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention); and
- 2) The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention).

Each of these international instruments draws from the existing international environmental laws norms. Each of these instruments reflects the procedural nature of EIA.

The Convention of Environmental Impact Assessment in a Transboundary Context (Espoo Convention)

As a consequence of the adoption of EIA in most member states in Europe, in 1987 a Group of Experts from UN ECE elaborated on EIA in a transboundary context. The Convention was negotiated from 1988 to 1990 and the Convention was opened for ratification from September 3, 1991. The Convention entered into force on September 10, 1997. At present there are 44 parties to the Espoo Convention, including members of the European Union, the Russian Federation, and the United States.

It is important to note that the Espoo Convention is process-oriented. Under the Espoo Convention the Parties shall take “all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities.”³

The obligations under the Espoo Convention extend to an obligation to require project level EIA, notify potentially affected countries, provide access to information to potentially affected parties, and allow comments and be informed on the final decision with respect to the project.⁴ The Espoo Convention provides a list of activities in Appendix I that are covered by the Convention and a minimum list of information that should be included in the EIA in Appendix II.

The Espoo Convention is important as it is based on international environmental law norms and provides access to information and the right to participate and be informed of potential adverse impacts from activities having a transboundary impact.

1. Kersten (2009), p. 178.

2. All members of ASEAN except Brunei are signatories to the Rio Declaration.

3. Espoo Convention, Article 2.

4. Articles 3-6 of the Espoo Convention.

Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters (Aarhus Convention)

One of the most important elements of EIA is the need for effective public participation. In order to achieve effective public participation, there is a need for the community to have access to the information prepared by the project proponent and by government concerning the project and its potential impact. Principle 10 of the Rio Declaration reflects these fundamental requirements.

The Aarhus Convention was concluded as part of the UN ECE “Environment for Europe” process and entered into force on 30 October 2001.⁵ It has been recognized as having global significance for the promotion of environmental governance.⁶

The Aarhus Convention contains three main pillars:

- 1) The rights of the public to access information about the environment and development;
- 2) The requirement for public participation in environmental assessment of specific development projects;⁷ and
- 3) The rights for the public’s access to courts and tribunals for justice in environmental matters.⁸

As of 7 January 2014, there were 46 parties to the Convention, 33 parties to the Protocol on Pollutant Release and Transfer Registers and 27 parties to the amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs).⁹

The Preamble of the Convention referred to Principle 1 of the Stockholm Declaration on the Human Environment and Principle 10 of the Rio Declaration on Environment and Development. Principle 10 states: Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

5. <http://www.unece.org/env/pp/welcome.html>; and <http://europa.eu.int/comm/environment/aarhus/>.

6. D. Craig and M. Jeffrey, (2010), p. 105.

7. Annex 1 of the Aarhus Convention. These matters also include any activity not specifically covered in the Annex, where public participation is provided for under an EIA procedure in accordance with national legislation.

8. Aarhus Convention, Articles 4-9.

9. <http://www.unece.org/env/pp/ratification.html>.

Mekong Agreement 1995

The role of transboundary EIA (TbEIA) is particularly relevant for Lower Mekong countries. However, no existing EIA legislation in any of those countries refers to the role of TbEIA.¹⁰ The most relevant model for TbEIA is the Prior Notification, Prior Consultation and Agreement (PNPCA) provision in the Mekong River Agreement 1995.

The Agreement on Cooperation for the Sustainable Development of the Mekong River Basin was signed in Chiang Mai, Thailand on April 5, 1995 (The Mekong Agreement). The UN had established the Mekong Committee in 1959 but the Mekong Agreement reflected the decision by Cambodia, Lao PDR, Thailand and Vietnam to establish a regional framework for cooperation along the Mekong Basin.

From the outset, the Mekong Agreement was focused on sustainable development, use, conservation and management of the Mekong Basin.¹¹

Article 3. Protection of the Environment and Ecological Balance

To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

Article 4. Sovereign Equality and Territorial Integrity

To cooperate on the basis of sovereign equality and territorial integrity in the utilization and protection of the water resources of the Mekong River Basin.

The key to the success (and failures) of the Mekong Agreement has been the need for all parties to act cooperatively in matters that impinge on the right of each member State to use Mekong River resources. Additionally, the Mekong Agreement implicitly recognizes that there are many actions that will have a transboundary impact, not least hydropower but also shipping, irrigation, and fishing.

The Mekong Agreement established the Mekong River Commission (MRC) that included the Council, the Joint Committee and the Secretariat.¹² Since that time the work of the MRC has expanded to include significant programs to assess and research activities along the Mekong Basin. The MRC in 2011 adopted the Integrated Water and Related Resources Management-based Basin Development Strategy and its 2011-2015 Strategic Plan.

A key feature of the Mekong Agreement from a regional EIA perspective is the requirement for prior consultation. Prior consultation is defined in the Mekong Agreement:

Prior consultation: Timely **notification** plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion under Article 26, that would allow the other member riparians to discuss and evaluate the impact of the **Proposed use** upon their uses of water and any other affects, which is the basis for arriving at an agreement. **Prior consultation** is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights.¹³

10. The current draft EIA Law of Cambodia includes a limited and conditional requirement for TbEIA.

11. Preamble, Mekong Agreement.

12. Chapter 4, Mekong Agreement.

13. Chapter 2, Mekong Agreement.

Procedures for Notification, Prior Consultation and Agreement.

One of the key features of the Mekong Agreement, as mentioned above, is the requirement of prior consultation. This was further enhanced by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) that were adopted in 2003.

The PNPCA were adopted to promote better understanding and cooperation among the MRC member countries. The guiding principles of the PNPCA were:

- Sovereign equality and territorial integrity;
- Equitable and reasonable utilization;
- Respect for rights and legitimate interests;
- Good faith; and
- Transparency.¹⁴

The aim of PNPCA, similar in substance to the notification requirements under the Espoo Convention, was to provide other member countries with prior notification of development that would likely have a transboundary impact. The PNPCA would also allow the impacted party an opportunity to consider the information contained in the notification and to request further information or clarification. The time for prior consultation was set at six months with the possibility of extension.¹⁵ Approval was to be considered on a case-by-case basis.¹⁶

There was a role for both the MRC and the MRC Joint Committee to assist in the transmittal process and also to assist with the consultation process.¹⁷ The PNPCA process made good use of the existing institutional arrangements, including the National Mekong Committees established under the Mekong Agreement.

The value of the PNPCA process cannot be underestimated, even if it only applies for a limited range of projects and has been the subject of criticism.¹⁸ What is clear from the PNPCA and the Mekong Agreement is that member countries have agreed to allow prior notification and prior consultation for activities and projects that may have transboundary impacts. It also recognized that a secretariat body was necessary to assist in the process of notification and consultation.

Consideration of TbEIA by the MRC

Attempts have been made by the MRC to advance the idea of a TbEIA framework. In 1998 the MRC agreed to formulate and adopt a system for environmental assessment in a transboundary context.¹⁹ Following a report prepared by Environmental Resources Management (ERM) in April 2002, a guideline report was presented to the MRC.²⁰ The ERM report consisted of a Background Report and a Proposed System Report.

The Proposed System Report noted that the policy documents were “not intended to supersede or replace existing EIA requirements in each country” but were proposed as a complementary framework applicable to those projects that had the potential to cause transboundary impacts. The ERM Proposed System Report had four parts:

14. PNPCA, Article 3.

15. See PNPCA, Article 5.5.

16. PNPCA, Article 6.

17. PNPCA, Article 5.3.3.

18. PNPCA, Article 4.

19. King (2014).

20. ERM (2002).

- 1) Introduction to the context and use of the MRC's environmental assessment system;
- 2) Description of proposed environmental assessment system;
- 3) Generic guidelines on best practice in environmental assessment
- 4) Generic TOR for an environmental assessment study reflecting best practice.

The ERM Proposed System also had a number of elements:

- 1) Proposed EIA/strategic environmental assessment (SEA) system for the Lower Mekong basin;
- 2) Proposed policy on environmental assessment in a transboundary context;
- 3) Guidelines on strategic environmental assessment;
- 4) Guidelines on cumulative effects assessment;
- 5) Guidelines on public participation in environmental assessment;
- 6) Environmental impact statement review criteria;
- 7) Proposed sector guidelines to support environmental assessment studies; and
- 8) Proposed training program to support the EIA/SEA system.

As King (2014) noted, since the presentation of these comprehensive reports to the MRC in 2002, little action has been taken. In 2007 the Thai National Mekong Committee raised a number of concerns with the TbEIA framework.²¹ In 2009 the Environmental Law Institute conducted a further review²² and assessed the EIA/SEA proposed framework in the context of global best practice and provided a revised draft framework.²³ The MRC remained committed to the implementation of a TbEIA framework in the 2006–2010 Strategic Plan and the 2011–2015 Strategic Plan.

Since the 2009 review by the Environmental Law Institute, there has been no advancement on the adoption of the framework.

Asian Development Bank Safeguard Policy Statement

ADB formally introduced environmental assessment into its lending operations in 1979.²⁴ By the time the current Environment Policy was adopted in 2002, ADB had accumulated more than two decades of environmental assessment and management experience. During that period, the policy principles and scope of environmental safeguards evolved from an initial focus on undertaking technical assessment and mitigation measures to an emphasis on developing and implementing a comprehensive environmental management plan (EMP). Key elements of EMPs are mitigation measures, monitoring programs, cost estimates, budgets, and institutional arrangements for implementation. In addition, the environmental assessment process emphasizes public consultation, information disclosure, and consideration of alternatives. While procedural compliance has improved over time, the substantive aspects of compliance remain challenging, including the integration of findings and recommendations of environmental assessment into project design, borrower/client ownership of EMPs, and effective implementation of EMPs.²⁵

In 2009 the ADB finalized its Safeguard Policy Statement (SPS). This was the result of the amalgamation of three previous policies related to safeguards: the

21. King (2014), p. 2.

22. ELI (2009).

23. King (2014), p. 1.

24. This was done through a document entitled Environmental Considerations in ADB Operations.

25. ADB (2009), p. 6.

Environment Policy (2002); Involuntary Resettlement Policy (1995); and Indigenous Peoples Policy (1998). The objectives of ADB's safeguards are :

- 1) To avoid adverse impacts of projects on the environment and affected people, where possible;
- 2) To minimize, mitigate, and/or compensate for adverse project impacts on the environment and affected people when avoidance is not possible; and
- 3) To help borrowers/clients to strengthen their safeguard systems and develop the capacity to manage environmental and social risks.²⁶

The ADBSPS sets out the policy objectives, scope and triggers, and principles for three key safeguard areas:

- 1) Environment;
- 2) Involuntary resettlement; and
- 3) Indigenous people.²⁷


The ADB Environmental Safeguards Appendix 1 includes 11 statements of principle, some of which are relevant for EIA. Principle 5 relates directly to consultation with Project Affected People (PAP). Principle 6 requires public disclosure of the draft EIA prior to project approval. Specific provisions recognize the vulnerable position of indigenous people in the development process and thus the ADB requires further safeguards to protect their rights.

Some of the key points of the SPS include :

- Use a screening process for each proposed project, as early as possible.
- Conduct an environmental assessment for each proposed project including the assessment of potential transboundary and global impacts, including climate change. Use strategic environmental assessment where appropriate.
- Examine alternatives to the project's location, design, technology, and components and their potential environmental and social impacts and also consider the "no project" alternative.
- Prepare an EMP.
- Carry out meaningful consultation with affected people and facilitate their informed participation.
- Ensure women's participation in consultation.
- Involve stakeholders, including affected people and concerned NGOs, early in the project preparation process and ensure that their views and concerns are made known to and understood by decision makers and taken into account.
- Continue consultations with stakeholders throughout project implementation as necessary to address issues related to environmental assessment.
- Establish a grievance redress mechanism to receive and facilitate resolution of the affected people's concerns and grievances regarding the project's environmental performance.
- Disclose a draft environmental assessment (including the EMP) in a timely manner, before project appraisal, in an accessible place and in a form and language(s) understandable to affected people and other stakeholders. Disclose the final environmental assessment, and its updates if any, to affected people and other stakeholders.
- Implement the EMP and monitor its effectiveness.
- Do not implement project activities in areas of critical habitats.

26. ADB (2009), p. 14.

27. ADB (2009), p. 14.

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- Provide workers with safe and healthy working conditions and prevent accidents, injuries, and disease.
 - Establish preventive, emergency preparedness, and response measures to avoid, and where avoidance is not possible, to minimize, adverse impacts and risks to the health and safety of local communities.

The SPS provides for operation implementation. Based on the SPS, meaningful consultation is a process that:

- 1) Begins early in the project preparation stage and is carried out on an ongoing basis throughout the project cycle;
- 2) Provides timely disclosure of relevant and adequate information that is understandable and readily accessible to affected people;
- 3) Is undertaken in an atmosphere free of intimidation or coercion;
- 4) Is gender inclusive and responsive, and tailored to the needs of disadvantaged and vulnerable groups; and
- 5) Enables the incorporation of all relevant views of affected people and other stakeholders into decision-making, such as project design, mitigation measures, the sharing of development benefits and opportunities, and implementation issues.

ADB will require borrowers/clients to engage with communities, groups, or people affected by proposed projects, and with civil society through information disclosure, consultation, and informed participation in a manner commensurate with the risks to and impacts on affected communities.

Certain project circumstances may have particularly adverse impact on indigenous people, including projects with significant adverse environmental impact and projects requiring involuntary resettlement.

Additionally the SPS also requires the establishment through the EIA process of a “grievance redress mechanism.” The aim of this mechanism is to facilitate the resolution of the concerns and grievances of PAP regarding a project’s environmental and social performance.

The SPS is aimed at complementing and increasing the integrity of the national EIA regimes. In the case of the Lower Mekong countries, the ADB Safeguards Policy is more stringent than national policies, thus there is still work to do on projects funded by ADB in the Lower Mekong countries.

ASEAN

The ASEAN Charter, which came into force in December 2008, includes the following as one of its purposes:

To promote sustainable development so as to ensure the protection of the region's environment the sustainability of its natural resources, the presentation of its cultural heritage and the high quality of life of its people. (Emphasis added.)²⁸

The purposes of ASEAN also include:

- To enhance good governance and the rule of law;
- To create a single market and production base;²⁹
- To promote and protect human rights and fundamental freedoms;³⁰ and
- To promote a people-oriented ASEAN.³¹

Article 2 of the Charter also reaffirmed the Principles of ASEAN including, but not limited to, a shared commitment and collective responsibility, non-interference in the internal affairs of ASEAN Member States, respect for fundamental freedoms, the promotion and protection of human rights, the promotion of social justice, and the upholding of the UN Charter and international law.³²

Additionally, the Vision 2020 for the ASEAN Community is one that is “clean and green . . . with fully established mechanisms for sustainable development. . . .”

The recognition of EIA as a basis for sustainable development in ASEAN was further acknowledged in the Bangkok Declaration on the ASEAN Environment (1984).³³ Through the Declaration, ASEAN Member States sought:

[To] strengthen the use of EIA process and extended Cost-Benefit Analysis for minimizing the adverse effects and for ensuring proper consideration of environmental values in all projects and programmes under government that are likely to produce significant environmental impact and its gradual extension to the private sector including industry.³⁴

The Jakarta Resolution on Sustainable Development (1987), stated that “the sustainability of development requires that development processes and environmental management be conducted in an integral manner” and further noted that “the integration of environmental considerations into the development process requires that international and regional cooperation be further heightened and intensified.”³⁵ The Jakarta Resolution resolved that ASEAN Member States “adopt the principles of sustainable development to guide and to serve as an integrating factor in their common effort.”

The Manila Declaration on Intensifying ASEAN Minerals Cooperation, signed in Manila on 16 October 2008, recognized the importance of cooperation of the development of mining. The policy directions adopted for the minerals sector included to ensure the development of mineral resources to **“maximise the benefits to the community and the national economy”** and also to “encourage cooperation to development policy guidelines and standards for ASEAN Best Mining Practices **to promote environmentally and socially sustainable mineral development in the ASEAN Region”** (emphasis added). This is in line with the ASEAN Strategic Action Plans of the Environment that have been developed since 1978.

28. ASEAN Charter Article 1(9).

29. Article 1(5).

30. Article 1(7).

31. Article 1(13).

There have also been a number of high level accords and declarations signed by ASEAN Environment Ministers over the years. These include the Kuala Lumpur Accord on Environment and Development issued on 19 June 1990, the Singapore Resolution on Environment and Development on 18 February 1992, the Jakarta Declaration on Environment and Development on 18 September 1997, the Kota Kinabalu Resolution on the Environment on 7 October 2000 and the Yangon

Resolution on Sustainable Development on 18 December 2003. The Yangon Resolution also reiterated the strong commitment of the parties to meet the Millennium Development Goals.

The ASEAN Declaration of Environmental Sustainability, signed in Singapore on 20 November 2007 by the heads of government of the ASEAN Member States reiterated the commitment to an economically vibrant and environmentally friendly ASEAN Community so that “the present and future generation can enjoy a clean and sustainable environment”. There was a section on Environmental Protection and Management that referred to a number of mechanisms to promote sustainable practices.

Human rights commitments

The recent ASEAN Human Rights Declaration has a number of relevant principles that deal with rights to property and an adequate standard of living, including access to health care. Inter alia, these rights include:

- 28. Every person has the right to an adequate standard of living for himself or herself and his or her family including: ...;
- e. The right to safe drinking water and sanitation;
- f. The right to a safe, clean and sustainable environment.

Additionally while the right to development is recognized under the ASEAN Human Rights Declaration, it is constrained so that the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations.³⁶

Millennium Development Goals

ASEAN has also adopted a Roadmap for the Attainment of the Millennium Development Goals. Goal 7 deals with the environment, acknowledging that one of the purposes of ASEAN, as identified in Article 1 of the ASEAN Charter is to promote “sustainable development.” The Roadmap also proposes increasing engagement with civil society at A.3.1.

The Joint Declaration on the Attainment of the Millennium Development Goals in ASEAN was adopted in Cha-am, Thailand on March 1, 2009, and was “guided by the ASEAN Charter which aims to ensure sustainable development for the benefit of present and future generations”.

ASEAN has placed sustainable development as a core principle to alleviate poverty, provide environmental protection and create good development opportunities for its member countries. The gaps between principle and practice of sustainable development can be examined through a comparative analysis of EIA within Lower Mekong countries.

32. Article 2 (2).

33. Bangkok Declaration of the ASEAN Environment November 29, 1984; and Koh (2009), p. 657.

34. Koh (2009), p. 658.

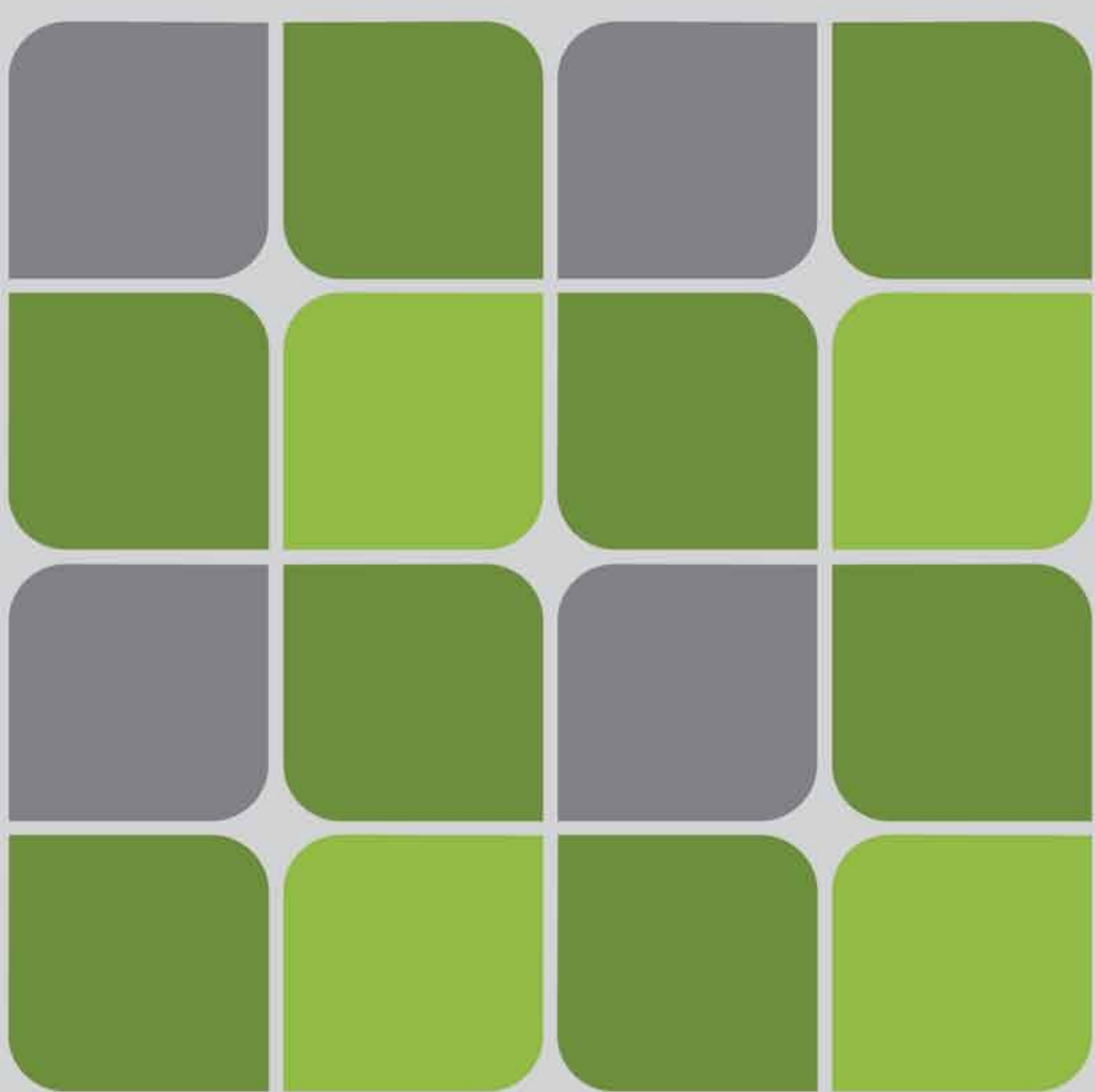
35. Koh (2009), p. 663.

36. ASEAN Human Rights Declaration, Article 35.



Mekong Partnership for the Environment is a four-year project led by Pact, an international non-governmental organization, along with consortium of local partners, including Internews, Stockholm Environment Institute, Wildlife Conservation Society, East West Management Institute, and others. We support practices that facilitate socially and environmentally responsible development decision-making processes in the Mekong region. We work with partners in Cambodia, China, Laos, Myanmar, Thailand and Vietnam.

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