

Why did Laos proceed with the Xayaburi Dam, in the face of strong opposition from neighboring countries?

New insight from the project's "power purchase agreement"

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Key findings

- In October 2011, the Thai government signed an agreement with the Xayaburi Power Company to purchase the project's electricity (the "power purchase agreement").
- The power purchase agreement is unbalanced. It heavily favors Thailand, while creating great risk for Laos. While Thai companies will earn most of the profit from the dam, the Lao government bears most of the risk in the deal.
- The power purchase agreement was a key factor in pushing Laos to continue construction on the dam, despite its promises to other members of the Mekong River Commission (MRC) to delay the project.

Background

In November 2012, the Lao government announced that it would proceed with the Xayaburi Dam. This was a controversial decision, especially because the Cambodian and Vietnamese governments had repeatedly raised concerns about the dam's transboundary impacts and asked for a delay in construction since April 2011.

What motivated the Lao government to proceed, despite the concerns of neighboring governments?

The Xayaburi Dam's Power Purchase Agreement (PPA) provides some insight. The PPA was signed on 29 October 2011 between the Electricity Generating Authority of Thailand (EGAT) and the Xayaburi Power Company Ltd (referred to as the "Generator" in the PPA). The Xayaburi Power Company Ltd is incorporated in Lao PDR, but is controlled by Thai company Ch. Karnchang. EGAT is a government-owned Thai utility. In the PPA, EGAT agrees to buy the dam's electricity.

Although the agreement is signed between EGAT and the Xayaburi Power Company, it is clear from the terms of the agreement that the Lao government bears significant risks. This is described in more detail on the next page.

The relationship between the Lao government and the Xayaburi Power Company is set forth in its Concession Agreement signed on 29 October 2010. This document is not publicly available, although it is well established that in the Concession Agreement, the Lao government gave the Xayaburi Power Company rights for 29 years to build, own, and transfer the dam. The Lao government and EGAT also signed an undertaking, which is attached as Schedule 24 of the PPA.

The signing of the PPA was particularly controversial, because it took place before the MRC consultation process between the Cambodian, Lao, Thai, and Vietnamese governments was resolved. At the time, the four Mekong River Commissions were in discussions about the project pursuant to the 1995 Mekong Agreement (which requires the four governments to undergo a prior consultation, evaluate the project's transboundary impacts, and seek agreement before proceeding with the project). In April 2011, the MRC's joint committee met to discuss the Xayaburi project. They were unable to reach agreement on how to proceed and announced that the decision would "be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project."¹ The Cambodian and Vietnamese governments were not informed when the signing of the PPA took place in October 2011.

In December 2011, the four governments agreed to conduct a joint study on the impacts of the dams on the Mekong River.² The public first became aware that the PPA had been signed on 20 February 2012 at a hearing on the Xayaburi Dam organized by the National Human Rights Commission of Thailand. There is no indication that the Cambodian and Vietnamese governments were aware of the PPA before this time or that they were informed when the PPA was signed. In mid-2012, both the Cambodian and Vietnamese governments indicated their belief that the Xayaburi Dam construction was delayed while the governments conducted the 2-3 year joint study agreed in December 2011.³ International Rivers conducted field visits to the dam site in 2011 and 2012 and determined that construction was never halted or delayed at any time.

Analysis of the PPA

At the request of International Rivers, energy expert Ashwini Chitnis of Prayas Energy in India carried out an independent analysis of the power purchase agreement. The full analysis and PPA are attached. Key findings of the analysis include:

1. The Xayaburi Power Company (the Generator) faces significant penalties for a delay in construction of the dam.

- Chitnis wrote: "one suspects from that the PPA that it will be a costly proposition to delay the actual construction and commissioning" (page 2)
- The PPA was signed on 29 October 2011. Financing needs to be secured for the project 6 months after this date. Construction needs to be finished 70 months after this date. Otherwise, penalties apply. (page 9, table 1)

¹ MRC Secretariat press release, 11 April 2011, "Lower Mekong countries take prior consultation on Xayaburi project to ministerial level," <http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level>.

² MRC Secretariat press release, 8 December 2011, "Further study on impact of Mekong mainstream development to be conducted, say Mekong countries," <http://www.mrcmekong.org/news-and-events/news/further-study-on-impact-of-mekong-mainstream-development-to-be-conducted-say-lower-mekong-countries>.

³ See Radio Free Asia, 1 May 2012, "Cambodia Lodges Dam Protest with Laos," <http://www.rfa.org/english/news/laos/xayaburi-05012012190456.html> ; Thanh Nien News, 24 Apr. 2012, "MRC Vietnam condemns Thai company's contract to build Xayaburi dam," <http://www.thanhniennews.com/2010/pages/20120424-mrc-vietnam-condemns-thai-firm-contract-to-build-xayaburi-dam.aspx>

- For every day that construction is delay, the Xayaburi Power Company must pay the Thai government USD\$30,000 per generator per day. The dam has 7 generators, so this payment could amount to \$210,000 per day. This amount continues to rise. If the dam is 6 months behind construction, the penalties can amount to \$45,000 per generator per day. (pages 21-22) [*Comment: Note that many scientists called for several years of delay to allow adequate time to complete the appropriate studies. The Vietnamese government called for a 10 year delay in April 2011. After the PPA was signed, such a delay became quite expensive for the project developer.*]

2. The Lao government is liable if the PPA is cancelled for political reasons attributable to Lao PDR.

- “It transpires from the PPA that the GOL, through its undertaking given to the Generator, bears risk of Generator event of default or termination on part of the Generator which can be attributed to a Lao Political Force Majeure as per the PPA. In such event, in case the Generator fails in meeting its financial obligations, GOL may have to pay for the termination amount or liquidated damages applicable under the given circumstances. Further, a Laos change of law can also constitute as a Lao Political Force Majeure event which prevents the Laos Government from legislating any change in operations of the project that might affect its performance.” (page 3)
- [*Comment: This would presumably apply to a situation where the Lao government changed its interpretation of its obligations under the 1995 Mekong Agreement. Perhaps this is why the Lao government refused to compromise on its position, despite requests from the Cambodian and Vietnamese governments to delay the project and conduct more impact studies.*]

3. The PPA heavily favors the interests of the Thai government over the Lao government.

- If the Generator defaults on the PPA, EGAT has significant discretion to step in and acquire the project’s assets and take ownership of the dam. The Lao government has agreed not to intervene in such a situation. (page 29)
- If there is a dispute over the PPA, the dispute resolution is held in Bangkok, in Thai language, and using Thai arbitration rules and Thai law. (page 2) As a result, it would be difficult for the Lao government to represent its own interests or the interests of the Lao people.
- The Generator is exempt from all Lao laws that are inconsistent with the project’s concession agreement. (page 28)
- [*Commentary: As a result, it is likely that the terms of the concession agreement would take precedence over any of Laos’ environmental or social laws and perhaps even its commitments under the 1995 Mekong Agreement.*]

4. However, it is not possible to know the full scale of the project's risks and benefits to the Lao government without seeing the Concession Agreement.

- The Concession Agreement contains more details about how much revenue the Lao government will earn in taxes and royalties from the project. This information is not included in the PPA. (page 3) However, the details of this agreement are not available to the public.
- [*Commentary: According to the Vientiane Times, the project will provide the Lao government with US\$3.9 billion over the 29 year concession period, including US\$1.897 billion in royalties and US\$637 million in taxes.*⁴]

Commentary by International Rivers

- The Power Purchase Agreement helps to explain why the Lao government refused to delay the Xayaburi Dam construction and properly address neighboring countries' concerns. The Lao government and the Xayaburi developers would lose a lot of money.
- However, the Lao government placed itself in this situation. It's irresponsible for the Lao and Thai governments to sign the PPA without first going through the Mekong River Commission process in good faith. This is a violation of international law and undermines regional cooperation.
- This also raises questions about the Thai government's role. It's important to remember that the Xayaburi Dam cannot be built without the Thai government's support. Why didn't the Thai government agree to amend the PPA and allow more time to study the dam's environmental impacts on Thai citizens?
- The Xayaburi developers have promised that they will re-design the dam so that it causes no environmental harm, but the PPA does not reflect this. For example, the Compagnie Nationale du Rhone advised the Xayaburi developers that in order to prevent Mekong sediment flows from being blocked by the dam, it would be necessary to shut down operations for an estimated 10 days each year to flush out the sediments. This would result in expensive losses of energy, but these costs are not accounted for in the PPA. As a result, the PPA's contractual obligations may prevent the Xayaburi developers from fulfilling their promise to mitigate the dam's harmful impacts.
- The PPA highlights the fundamental weakness of the Mekong River Commission. The real deals are being done by businessmen entirely independently of the diplomacy that is happening at the Mekong River Commission. Unless project developers agree to respect the MRC process, the Commission will become meaningless.
- The Lao government has turned the Mekong River into a commodity and sold part of it to a Thai company. As the Mekong River is shared by millions of people, the Lao government has no right to sell it.
- What happened with the Xayaburi Dam may now being repeated all over again with the Don Sahong Dam. According to a BCEL-KT Daily Report from 14 June 2013, a PPA agreement appears to have been signed to keep the electricity from the dam inside Laos, despite the fact that the dam has yet to undergo the MRC's prior consultation process.

⁴ Vientiane Times, 5 March 2013, "Xayaboury dam will drive economic growth in Laos: economist."