

# The Prevention and Resolution of International Conflicts over Transboundary Water Resources in the Mekong River Basin

Jo TORIYABE\*

## Introduction

The Mekong River begins in China (where it is called the Lancang), and flows through Myanmar, Laos, Thailand, Cambodia and Vietnam, before issuing in the South China Sea. It is the world's 12th-longest river, flowing almost 4,900 kilometers from its source on the Tibetan plateau in China's southwestern Qinghai province, 5,200 meters above sea level, and 72 million people depend on its resources for their livelihood.

The Mekong basin has two distinct parts. The upper part is shared by China (16%) and Myanmar (2%); and the lower by the four other riparian countries: Laos (35%), Thailand (18%), Cambodia (18%) and Vietnam (11%) (see Figure 1). This two-part division is politically significant in terms of river basin management: both China and Myanmar operate independently in development of the mainstream river, while the lower Mekong basin countries cooperate according to the 1995 Agreement on the Cooperation for

---

\* Lecturer, Faculty of Law, Setsunan University, Japan. E-mail: jo.toriyabe@law.setsunan.ac.jp This paper is a revised version of the one presented at an international conference from 12-14 December, 2019, at the Chatrium Hotel Riverside, in Bangkok, Thailand (International Conference on Policies, Laws and Regulations for Water Resources Management in Southeast Asia Countries), sponsored by the Konrad Adenauer Foundation of Germany and the Department of Water Resources of Thailand. The author wishes to express his heartfelt gratitude to Dr. Noriko Okubo, Professor at the Graduate School of Law and Politics, Osaka University. This study was supported by research grants from KWEF (the Kurita Water and Environment Foundation) in 2019 and the Asahi Glass Foundation in 2020. The responsibility for any errors belongs to the author.

Figure 1: Configuration of the Mekong River basin



**Source:** MRC, “Progress in Water Management at the River Basin Level: Mekong River Basin,” Presentation at 3rd WWF, INBO Official Session Otsu Prince Hotel, 20 March 2004, p. 9.

the Sustainable Development of the Mekong River Basin (hereinafter the “1995 Agreement”)<sup>1)</sup>. The management of this lower part of the basin is spearheaded by the Mekong River Commission (MRC)<sup>2)</sup>, which was established in the 1995 Agreement and comprises Thailand, Laos, Cambodia and Vietnam.

For years, China has been criticized for not joining the MRC, while unilaterally building dams on the most upstream section of the river; and its position appears, at last, to be gradually shifting in response. Since 2015, for example, China has become more closely involved in cross-border cooperation

<sup>1)</sup> Signed and entered into force on April 5, 1995, at Chiang Rai, Thailand, *UNTS*, Vol. 2069 (2002), p. 3.

in hydropower and water resource management in the Mekong River basin; and the Lancang-Mekong Cooperation (LMC) Mechanism is a newly established, China-led initiative for cooperation on the Mekong River<sup>3)</sup>. The LMC is thus emerging at a time when the status of the MRC as an existing transboundary water governance institution is in flux, while the Mekong riparian states are founding members of the new mechanism<sup>4)</sup>.

Due to the development of Chinese dams and the effects of severe drought in late 2015 and early 2016, the agricultural and fishery industries of Vietnam, Laos and Thailand were damaged, and the underground water near the Mekong Delta in Vietnam experienced seawater intrusion<sup>5)</sup>. At the request of downstream countries, China released more water from the Jinghong Dam to downstream rivers in March 2016<sup>6)</sup>.

According to the latest Mekong River Commission (MRC) analysis and available information, the 2019 drought has brought the Mekong water levels to their lowest point in living memory, or at least over the last 60 years, with most parts of the basin having experienced exceptionally low regional flow since June 2019<sup>7)</sup>. Such a situation could have devastating consequences for the river fish, as well as the tens of millions of people living and working along the river. The crisis began when critical monsoon rains, which usually begin in late May 2019 in the Mekong region, failed to arrive. Dry conditions, driven by the El Niño weather phenomenon and exacerbated

---

<sup>2)</sup> Cooperation in the Mekong river basin began in the middle of the 20th century with the formal signing of the Geneva Accords (1954), when the newly independent nations of Cambodia, Laos and Vietnam took their places on the world stage. In 1957, the United Nations-founded Mekong Committee (Committee for Coordination of Investigations of the Lower Mekong Basin) was established by Cambodia, Laos, Thailand and Vietnam during the 13th session of the United Nations Economic and Social Committee for Asia and the Pacific (ESCAP), to address the comprehensive development of water and related resources in the lower Mekong Basin. However, lack of stability in the region resulted in the interruption of the Mekong Committee sessions in the late 1970s. In response to Cambodia's absence, in 1977, Laos, Thailand and Vietnam adopted a new statute forming the basis of the Interim Mekong Committee. When Cambodia finally requested readmission in 1991, lengthy discussions began, which led to the eventual transformation of the Mekong Committee through the 1995 Agreement. *See* Food and Agriculture Organization of the United Nations, "Transboundary River Basin Overview – Mekong," *FAO AQUASTAT Reports* (2011), pp. 9-10. *See also* Greg Browder & Leonard Ortolano, "The Evolution of an International Water Resources Management Regime in the Mekong River Basin," *Natural Resources Journal*, Vol. 40 (2000), pp. 504-525.

by climate change, persisted well into July 2019. At that time, observers say, the situation was made worse by upstream hydropower dam operators in China and Laos withholding water for their own purposes; and China's decision to halve the water released from its Jinghong Dam for two weeks in July, for "grid maintenance," is likely a major contributor to 2019's historically low water levels in the Mekong River<sup>3)</sup>. Ultimately, the above situations suggest that even if cooperative arrangements are in place, disagreements over existing and planned transboundary hydropower developments are inevitable. Thus, the need to have effective dispute avoidance and dispute settlement mechanisms in place to resolve any differences will be an important factor in any future development.

However, the Mekong countries have different interests in exploiting

<sup>3)</sup> The main events relating to the development of cooperation in the LMC framework are as follows. The framework was established in November 2015, just one year after Chinese Premier Li Keqiang formally put forward the initiative at the 17th China-ASEAN Summit, held in Nay Pyi Taw, Myanmar, in November 2014. In March 2016, the first LMC leaders' meeting was held, and the Sanya Declaration was adopted. In December 2016, the second LMC foreign ministers' meeting was held in Siem Reap, Cambodia. In March 2017, the China Secretariat for the LMC was established in Beijing, China. In December 2017, the third LMC foreign ministers' meeting was held in Dali, Yunnan, China. In January 2018, the second LMC leaders' meeting was held in Phnom Penh, Cambodia, and the Phnom Penh Declaration and Five-Year Plan of Action on the LMC (2018-2020) were adopted. In December 2018, the fourth LMC foreign ministers' meeting was held in Luang, Prabang, Laos. In July 2019, the MRC Secretariat was granted observer status in the LMC Joint Working Group on Water Resources, and China and the MRC agreed to renew their agreement on the provision of hydrological information during the flood season. With the increased cooperation, China agreed to maintain the same period and frequency of hydrological data sharing. The sharing takes place twice a day over five months, from June 1st until October 31st, every year. The MRC and China signed the first data sharing agreement in 2002, and renewed it in 2008 and 2013. See David J. Devlaeminck, "Timeline of the Lancang-Mekong Cooperation (LMC) Mechanism," (2019), available at [https://www.academia.edu/36426349/Timeline\\_of\\_the\\_Lancang-Mekong\\_Cooperation\\_LMC\\_Mechanism\\_Last\\_Updated\\_August\\_2\\_2019\\_](https://www.academia.edu/36426349/Timeline_of_the_Lancang-Mekong_Cooperation_LMC_Mechanism_Last_Updated_August_2_2019_) (last access 21 December, 2019); MRC Website, MRC and China renew pact on water data provision and other cooperation initiatives, Vientiane, Laos, on 19 Jul 2019, available at <http://www.mrcmekong.org/news-and-events/news/mrc-and-china-renew-pact-on-water-data-provision-and-other-cooperation-initiatives/> (last access 21 December 2019). The LMC, however, originated with Thailand's proposal of the Conference on Sustainable Development in the Lancang-Mekong subregion, which aimed to establish means to address challenges, such as natural disasters, faced by all six Mekong riparian countries, and explore possible cooperation for sustainable development. Poowin Bunyavejchewin, "The Lancang-Mekong Cooperation (LMC) Viewed in Light of the Potential Regional Leader Theory," *Journal of Mekong Societies*, Vol. 12, No. 3 (2016), p. 55.

water resources; China and Laos, for example, typically pay far more attention to hydropower development than the lower riparian states. The MRC estimates that Laos will receive 70% of the export revenues (US\$2.6 billion per year) generated by the mainstream dams once all of them are operational<sup>9</sup>; while China, due to its current energy shortage, has an acute need of electricity for its own development<sup>10</sup>. Fisheries on the Mekong account for 12% of Cambodia's gross domestic product (GDP), and provide its people with a vital source of nutrition<sup>11</sup>; while the Vietnamese part of the Mekong Delta, the Cuu Long region, accounts for 33% of Vietnam's prosperous agricultural sector and 90% of its rice exports, which are the third largest in the world<sup>12</sup>. In a critical development, China has become the largest stakeholder in transboundary water issues, both through its control

---

<sup>4</sup> Until April 2015, the Greater Mekong Subregion (GMS) was the only Mekong forum to include all six riparians. The GMS was initiated by the Asian Development Bank in 1992, to integrate the Mekong region through the construction of power, transport and communication networks. The forum is attractive to China because it focuses on infrastructure development, improving power, transportation and communication networks between Yunnan Province and the Indochina states. It does not impose strict aquatic environmental standards or dam-building restrictions on its members, so China's sovereignty and freedom of action are not compromised. Elvira Bobekova, Scott Pearse-Smith & Isak Svensson, "Rivers of Peace Institutionalised Mekong River Cooperation and the East Asian Peace," *European Journal of East Asian Studies*, Vol. 12 (2013), p. 20; Selina Ho, "Big Brother, Little Brothers: Comparing China's and India's Transboundary River Policies," *Water Policy*, Vol. 18, No. 1 (2016), p. 38; Selina Ho, "China's Transboundary River Policies Towards Kazakhstan: Issue-linkages and Incentives for Cooperation," *Water International*, Vol. 42, No. 2 (2017), p. 146. The LMC's purview is much broader than the GMS, which has the same membership. Most striking is the inclusion of cooperation on water resources, an issue which has been far outside the remit of the GMS.

<sup>5</sup> King Wei, "Lancang-Mekong River Cooperation and Trans-Boundary Water Governance," *China Quarterly of International Strategic Studies*, Vol. 3, No. 3 (2017), p. 386.

<sup>6</sup> *Ibid.*

<sup>7</sup> MRC Website, *Mekong water levels reach low record*, Vientiane, Laos, on 18 July 2019, available at <http://www.mrcmekong.org/news-and-events/news/mekong-water-levels-reach-low-record/> (last access 20 January 2021).

<sup>8</sup> National Geographic Website, *Mekong River at its lowest in 100 years, threatening food supply*, on 31 July 2019, available at <https://www.nationalgeographic.com/environment/2019/07/mekong-river-lowest-levels-100-years-food-shortages/> (last access 20 January 2021).

<sup>9</sup> Wei, 2017, *supra* note 5, p. 388.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

of the upstream waters of key international basins, and through its economic, financial and political engagement, regarding water infrastructure, with the five other countries in the Mekong River basin. Even the parties subject to the 1995 Agreement, however, have found it difficult to reconcile their varying interests with respect to hydropower developments on the mainstream of the Mekong River, such as Laos's Xayaburi Hydroelectric Project on the lower Mekong (discussed below).

In light of the need for equitable and reasonable water sharing and water benefit sharing among all the Mekong basin countries, this article argues for and proposes a number of mechanisms requisite for establishing the rule of international law in the context of large-scale dam development in the Mekong mainstream, and suggests means of preventing and resolving international conflicts over transboundary water resources in the Mekong River basin. The rule of international law — that is, the rule of law at the international level — is a conceptual basis for proper governance of the international community. The objective of contemporary laws regarding international watercourses should be to relieve water stress among states that share such watercourses, and thereby enhance the water security of all riparian basin states. The rule of international law is fundamentally necessary to achieve this objective.

In order to help establish the rule of international law in the Mekong basin, this article will identify deficiencies in current management mechanisms such as the MRC and LMC, with respect to the development of large-scale dams along the Mekong River; and then present a model for achieving integrated water resource management throughout the basin, to overcome such deficiencies. Its central issues are examined primarily from two angles: the relationship between the countries in the lower Mekong River, and the relationship between the lower Mekong River countries and China, the most upstream country.

Structurally, the article first considers the political and economic implications for the region, of large-scale dam development in the Mekong River basin (see Section I A), and then reviews the transboundary water

---

<sup>12)</sup> *Ibid.*

resource management mechanisms related to dam development, having been established by the Mekong River basin countries (see I B). In addition, it identifies shortcomings in the current transboundary water resource management mechanisms in the Mekong River basin (see II). Finally it asks, if these mechanisms should not prove effective for sustainable development in the overall river basin, how may they be improved in accordance with the rule of international law (see III).

## **I. Development of Large-scale Dams on the Mekong River Mainstream and the Current State of MRC and LMC Management**

### **A. Background**

#### **1. Energy Demand in the Mekong River Basin**

The region's economic wealth and population, particularly in the urban centers, have grown dramatically in recent years; and this has been accompanied by a growing demand for electricity, especially in China, Thailand and Vietnam. China needs power to sustain its GDP growth, which remains above 6-7% per year; Thailand's government estimates that the country's electricity demands will double to 58,000 megawatts (MW) by 2021; and Vietnam's government estimates that its demand will rise from about 48,600 MW currently to 60,000 MW by 2020 and 129,500 MW by 2030. Laos also views hydropower as necessary for the development of its mineral deposits, and Cambodia's demand is driven in part by the need to provide more and cheaper energy for domestic consumption, and to satisfy the needs of nascent light industries such as garment manufacturing<sup>13)</sup>.

#### **2. Large-scale Dam Development in the Mekong River Mainstream**

China, the most upstream country on the Mekong River, has built, or plans to build, a host of large-scale dams for hydroelectricity and mega-water

---

<sup>13)</sup> *Ibid.*

diversion facilities, which has triggered anxiety and complaints from downstream countries, as well as worldwide criticism<sup>14</sup>). As shown in Figure 2, China currently operates a cascade of 10 dams on the stretch of the upper Mekong in Yunnan Province (at Nuozhadu, Xiaowan, Huangdeng, Jinghong, Manwan, Miaowei, Dachaoshan, Gongguoqiao, Wunonglong, Lidi), with a total installed capacity of 20,430 MW<sup>15</sup>; and if the hydropower-generation capacity of future dams (Gushui, Ru Mei, Tuoba, Banda, Dahuaqiao, Ganlanba, Cege, Yue Long) is considered, its hydropower output could increase by another 8,473MW<sup>16</sup>).

In the words of US Secretary of State, Mike Pompeo, China is taking control of the flow of Southeast Asia's most important river through a dam-building "spree," at the same time as water levels along the Mekong reach record lows<sup>17</sup>); and its upstream development of hydropower dams and other riverine infrastructure has been pursued with relative disregard for the less powerful downstream riparian states of Southeast Asia<sup>18</sup>). However, China has insisted on a positive interpretation of the impact of its dam construction, arguing that dams can release more water into the river during the dry season, and provide flood control during wet season<sup>19</sup>). Therefore, it claims that the dams will have little negative impact on the lower basin. In fact,

---

<sup>14</sup> China is quite clearly the most important upstream country for transboundary water in Asia. Its territory includes the 'Asian Water Towers' of the Tibetan-Qinghai Plateau, and 110 international rivers and lakes along its southwest, northwest and northeast borders; and it is the source of Asia's great rivers, which flow into 18 downstream countries. Owen McIntyre, "Benefit-sharing and Upstream/Downstream Cooperation for Ecological Protection of Transboundary Waters: Opportunities for China as an Upstream State," in Patricia Wouters, Huiping Chen & James. E. Nickum (eds.), *Transboundary Water Cooperation: Principles, Practice and Prospects for China and Its Neighbours* (Routledge, 2017), p. 197.

<sup>15</sup> See Mekong River Commission, *State of the Basin Report 2018* (MRC, 2019), p. 181.

<sup>16</sup> *Ibid.*

<sup>17</sup> South China Morning Post Website, *China 'taking control' of vital Mekong river through dam-building spree, Mike Pompeo warns*, on 2 August 2019, available at <https://www.scmp.com/news/china/article/3021062/china-taking-control-vital-mekong-river-through-dam-building-spreemike> (last access 15 December 2019).

<sup>18</sup> McIntyre, 2017, *supra* note 14, pp. 197-198.

<sup>19</sup> Selina Ho, "River Politics: China's Policies in the Mekong and the Brahmaputra in Comparative Perspective," *Journal of Contemporary China*, Vol. 23, No. 85 (2014), p. 9.



Figure 2: Mainstream dams in the Mekong River basin



**Source:** Stimson Center (<https://www.stimson.org/2020/mekong-mainstream-dams/>) (last access 30 November 2020)

however, China's dams are likely to have a significant negative impact on the downstream countries in numerous respects, including a drop in the water level, reduction of fisheries and crop production, and degradation of the ecosystems. A growing number of research papers have carefully assessed the possible impact of China's dams on downstream regions<sup>20</sup>, and increased tension can certainly be expected between China and the lower basin riparian states as China continues its cascade of hydropower dam construction on the upper mainstream. Among other concerns, there is a fear that the huge storage capacity of its mainstream dams will effectively give China unilateral control over the release of water to downstream nations<sup>21</sup>.

<sup>20</sup> E.g. Seungho Lee, "Benefit Sharing in the Mekong River Basin," in Patricia Wouters, Huiping Chen & James E. Nickum (eds.), *Transboundary Water Cooperation: Principles, Practice and Prospects for China and Its Neighbours* (Routledge, 2017), p. 309.

In light of the foregoing, we should be concerned that the results of MRC analysis have typically reflected China's position. A report by the MRC in 2017, for example, concluded that its dams do not adversely affect the water flow: rather than creating floods in the wet season and exacerbating drought in the dry season, the dams reduce the flow during the wet season and increase it during the dry season, as China has claimed<sup>22)</sup>.

Meanwhile, Laos, comparatively upstream in the lower Mekong River basin, completed construction and commenced commercial operation of its Xayaburi Dam in October 2019. The dam, roughly 350 kilometers upstream of Vientiane, has a total installed capacity of 1,285 MW and annual energy production of 7,406 gigawatt-hours<sup>23)</sup>. It is the first dam to be built in the mainstream of the lower reaches of the Mekong River, and this makes it subject to the 'prior consultation' requirement under the 1995 Agreement (see Section I B 1). Had the MRC failed to prevent Laos from proceeding with the planning and construction phase before the assessment of transboundary impacts of the dam had been completed, it would have demonstrated the institution's inability to manage its members (see Section II A 2). However, the problem was resolved in 2015, not through the MRC, but via the Thai Supreme Administrative Court<sup>24)</sup>.

### 3. China's Increased Investment in the Lower Mekong Basin Countries

Reconciling seemingly competing national interests will be key to addressing transboundary challenges in the Mekong River basin. Most notably, China plays a major role in the geopolitical landscape of the Mekong, not only as a powerful upstream state, but also by providing loans for and investing in major infrastructure projects downstream, which results in reluctance on the part of the recipients to openly challenge its upstream

<sup>21)</sup> Scott W.D. Pearse-Smith, "'Water War' in the Mekong Basin?" *Asia Pacific Viewpoint*, Vol. 53, No. 2 (2012), p. 153.

<sup>22)</sup> MRC, *State of the Basin Report 2018*, *supra* note 15, p. 174; MRC Website, *The effects of Chinese dams on water flows in the Lower Mekong Basin*, Vientiane, Laos, on 6 Jun 2017, available at <http://www.mrcmekong.org/news-and-events/news/the-effects-of-chinese-dams-on-water-flows-in-the-lower-mekong-basin/> (last access 20 January 2021).

<sup>23)</sup> Pt (Sole) Company Limited Website, available at <http://www.ptsole.com/xayaburi> (last access 15 December 2015).

activities on the Mekong<sup>25)</sup>.

From 2006 to 2011, for example, China invested over \$6.1 billion in the hydropower sectors of which three countries alone<sup>26)</sup>. According to Chinese government data, in 2015, China's total trade with Laos, Cambodia, Myanmar, Thailand and Vietnam reached US\$193.9 billion<sup>27)</sup>, and China is the most important donor, creditor and foreign investor in Laos and Cambodia. Its loans to Laos, for example, accounted for roughly 35% of that country's public debt in 2012<sup>28)</sup>, 44% by 2015<sup>29)</sup>, and 50% by 2018 when its public debt was estimated to represent roughly 68% of its GDP<sup>30)</sup>. Around half the

---

<sup>24)</sup> The Xayaburi dispute prompted a case to be lodged with a Thai administrative court by 30 villagers who might have been affected by the project. The case challenged the decision of the Thai government to approve the Power Purchase Agreement (PPA) between the Electricity Generating Authority of Thailand and the Xayaburi Power Company Limited. In August 2012, the group of 30 villagers filed a lawsuit in Thailand's Administrative Court against the relevant Thai government agencies. In February 2013, the Administrative Court of Thailand denied jurisdiction to hear the case because the plaintiffs could not be considered injured persons, and the court did not deem the conclusion of the PPA to be an administrative act. The plaintiffs filed an appeal in March 2013. In June 2014, the Thai Supreme Administrative Court accepted the case, stating, "evidence suggests that relevant authorities have failed to adequately listen to the opinions of the people and to comply with the PNPCA...". In October 2014, the villagers filed an injunction with the Administrative Court, requesting a halt to the construction of the dam while the Supreme Administrative Court ruled on the legality of the PPA. However, in December 2015, the Supreme Administrative Court dismissed the case on the basis that "the defendants did not neglect their duty," and that the PPA fulfilled the required notification and consultation procedures. See Business & Human Rights Resource Centre Website, *Xayaburi dam lawsuit (re Laos & Thailand)*, available at <https://www.business-humanrights.org/en/xayaburi-dam-lawsuit-re-laos-thailand> (last access 16 December 2019).

<sup>25)</sup> Bennett Bearden, Alistair Rieu-Clarke & Sokhem Pech, "Mekong Basin," in Flavia Rocha Loures & Alistair Rieu-Clarke (eds.), *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Routledge, 2013), pp. 182-183.

<sup>26)</sup> U.S. Energy Information Administration Website, *Chinese investments play large role in Southeast Asia hydroelectric growth*, on 16 August 2013, available at <https://www.eia.gov/todayinenergy/detail.php?id=12571#> (last access 16 December 2019).

<sup>27)</sup> Wang Yan, "Mekong countries look to bolster cooperation," *chinadialogue*, on 5 April 2018, available at <https://www.chinadialogue.net/article/show/single/en/10559-Mekong-countries-look-to-bolster-cooperation> (last access 23 December 2019).

<sup>28)</sup> ASEAN Today, *Why Laos' reliance on Chinese money could bankrupt the country*, on 22 February 2018, available at <https://www.aseantoday.com/2018/02/why-laos-reliance-on-chinese-money-could-bankrupt-the-country/?lang=ms> (last access 23 December 2019).

<sup>29)</sup> *Ibid.*

borrowed money is from China, and China has now edged out Thailand and Vietnam to become Laos's largest foreign investor, with accumulative Chinese investment in Laos standing at US \$5.1 billion as of January 2014<sup>31</sup>. In Cambodia, meanwhile, Chinese loans and grants amounted to US\$2.7 billion in 2012, making China Cambodia's second-largest donor after Japan<sup>32</sup>.

#### 4. Self-financing of the MRC

Established in the 1995 Agreement between the governments of Cambodia, Laos, Thailand and Vietnam, the MRC had a total annual budget of roughly US\$12.4 million in 2017, including both basket and earmarked funding<sup>33</sup>. Over the current 2016-2020 period, its total annual expenditures are forecast to decline to just under US\$11 million, of which approximately 38% is expected to be financed by the member countries, suggesting that the MRC is just on track to be self-financed by 2030<sup>34</sup>.

In January 2016, it was announced that the principally Western donor-funded MRC would have its budget cut by over half, to US\$53 million for the period 2016-2020, significantly reducing its capability<sup>35</sup>. This funding cut was partially the result of the donors' own reduced aid budgets, but was also based on doubts regarding the MRC's performance in facilitating the recent

<sup>30</sup> *Ibid.* In early 2017, the International Monetary Fund (IMF) increased Laos' risk of "external debt distress" from moderate to high. IMF, *Lao People's Democratic Republic*, on 6 January 2017, available at <https://www.imf.org/external/pubs/ft/dsa/pdf/2017/dsacr1753.pdf> (last access 23 December 2019).

<sup>31</sup> Ho, 2016, *supra* note 4, p. 37. In 2016, Cambodia saw the construction of six hydropower dams and all of them were built and financed entirely by Chinese companies. The ASEAN Post Website, *Cambodia's hydropower dilemma*, on 19 August 2018, available at <https://theaseanpost.com/article/cambodias-hydropower-dilemma> (last access 23 December 2019).

<sup>32</sup> *Ibid.*

<sup>33</sup> MRC, *State of the Basin Report 2018*, *supra* note 15, p.169.

<sup>34</sup> *Ibid.*

<sup>35</sup> Carl Middleton & Jeremy Allouche, "Watershed or Powershed? Critical Hydropolitics, China and the Lancang-Mekong Cooperation Framework" *International Spectator*, Vol. 51, No. 3 (2016), p. 113. Major donors included Denmark, Finland, Germany, Sweden, Belgium, Australia, the World Bank, the Netherlands, Japan, European Union, France and the United States. In particular, Denmark's government gave US\$86 million to the MRC over two decades, before ending its funding in 2015. Stephen Wright, "Mekong effort fails after years of lavish foreign funding," *The Associated Press*, on 19 October 2016, available at <https://apnews.com/31978ed8726449dca8ba47c62816137a> (last access 5 January 2020).

decision-making processes around the Xayaburi and Don Sahong mainstream dams<sup>36</sup>.

## 5. The Lancang-Mekong Cooperation (LMC) Mechanism

According to its website, the LMC mechanism is structured in terms of a “3 + 5 Cooperation Framework,” with three areas of cooperation (political and security issues; economic and sustainable development; and social, cultural and person-to-person exchanges), and five priorities (connectivity, production capacity, cross-border economic cooperation, water resources, agriculture and poverty reduction)<sup>37</sup>.

The LMC is especially significant because China has, for the first time, initiated a Mekong forum that includes all six riparian states. Moreover, the mechanism forms an integral part of China’s “One Belt, One Road” initiative, a development strategy that focuses on connectivity and infrastructure development among the Eurasian countries<sup>38</sup>.

The LMC was established when the MRC was suffering from the aforementioned budgetary constraints, which provided a golden opportunity to demonstrate the importance of the mechanism<sup>39</sup>. While only around 16% of the Mekong’s total annual flow originates in China, this volume provides China with further political power in the Mekong River basin, and a potential bargaining tool in negotiations with the other riparian states<sup>40</sup>.

---

<sup>36</sup> Middleton & Allouche, 2016, *supra* note 35, p. 113.

<sup>37</sup> LMC Website, *3 + 5 Cooperation Framework*, on 14 December 2017, available at [http://www.lmcchina.org/eng/zyjz\\_3/35hz/t1519481.htm](http://www.lmcchina.org/eng/zyjz_3/35hz/t1519481.htm) (last access 21 December 2019).

<sup>38</sup> Ho, 2016, *supra* note 4, p. 38.

<sup>39</sup> Imad Antoine Ibrahim, “Water Governance in the Mekong after the Watercourses Convention 35th ratification: Multilateral or Bilateral Approach?” *International Journal of Water Resources Development*, Vol. 36, No. 1 (2020), p. 205.

<sup>40</sup> Pearse-Smith, 2012, *supra* note 21, p. 153.

## B. The Current State of Transboundary Water Resource Management Mechanisms in the Mekong River Basin

### 1. The Relationship Between the Countries in the Lower Mekong River — Structure and Form of the MRC

#### (1) What is the MRC?

The MRC's organizational structure consists of three permanent bodies; the Council, the Joint Committee and the Secretariat. The highest tier, which is the decision-making body, is the Council, which meets once a year and consists of one member from each country at the ministerial or cabinet level<sup>41</sup>. The Council makes policy decisions, and provides other necessary guidance concerning the promotion, support, cooperation and coordination of joint activities and programmes to implement the 1995 Agreement<sup>42</sup>. It has overall governance of the MRC.

The Joint Committee (JC) consists of one member from each country at no less than the Head of Department level<sup>43</sup>. It is responsible for the implementation of the policies and decisions of the Council, and supervises the activities of the MRC Secretariat<sup>44</sup>. This body functions as a board of management.

The Secretariat is the operational arm of the MRC<sup>45</sup>, providing technical and administrative services to the JC and the Council<sup>46</sup>, under the direction of a Chief Executive Officer (CEO) who is appointed by the Council<sup>47</sup>. Under the supervision of the JC, the CEO is responsible for the day-to-day operations of around 155 professional and general support staff<sup>48</sup>. In 2009 it was decided that the Secretariat would be permanently co-hosted in two locations, in

<sup>41</sup> 1995 Agreement, *supra* note 1, Article 15.

<sup>42</sup> *Ibid.*, Article 18.

<sup>43</sup> *Ibid.*, Article 21.

<sup>44</sup> *Ibid.*, Article 24.

<sup>45</sup> *Ibid.*, Article 30.

<sup>46</sup> *Ibid.*, Article 28.

<sup>47</sup> *Ibid.*, Article 31.

Vientiane (Laos) and Phnom Penh (Cambodia). The Assistant CEO is of the same nationality as the JC Chair, and serves a one-year term. The main national counterparts for MRC activities in the four member countries are the National Mekong Committees (NMCs), coordinating bodies linking the MRC to the national governments.

The MRC has developed procedures for information sharing and generating mutual agreements on projects that may affect the Mekong River resources. Based on Article 25 of the 1995 Agreement<sup>49)</sup>, the following five rules of procedure have been adopted: (i) Procedures for Data and Information Exchange and Sharing (PDIES) (approved in 2001); (ii) Procedures for Water Use Monitoring (PWUM) (approved in 2003); (iii) Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved in 2003); (iv) Procedures for the Maintenance of Flows on the Mainstream (PMFM) (approved in 2006); (v) Procedures for Water Quality (PWQ) (approved in 2007)<sup>50)</sup>. Of chief importance is the PNPCA, which builds on the 1995 Agreement, to set out in detail the procedures that parties must follow to communicate the potential impacts of proposed uses of the Mekong basin, as well as the responsibilities of the various agencies in this process.

While Article 39 of the 1995 Agreement allows China and Myanmar to become full members, the latter have thus far participated only as “dialogue partners” in the work of the MRC<sup>51)</sup>. The MRC and China did sign agreements in 2002, 2008 and 2013, on the provision of hydrological information on the section of the Mekong River in China’s territory<sup>52)</sup>; and on July 19, 2019,

<sup>48)</sup> FAO, 2011, *supra* note 2, p. 10; Richard Kyle Paisley, Riley T. Denoon, Theresa Etmanski & Patrick Weiler, *Transboundary Waters, Infrastructure Development and Public Private Partnership: Through the Prism of the Nam Thuen 2 and Xayaburi Hydropower Projects* (Brill, 2017), p. 31.

<sup>49)</sup> Article 25 provides that: “The Joint Committee shall propose its own Rules of Procedures to be approved by the Council.” 1995 Agreement, *supra* note 1, Article 25.

<sup>50)</sup> See the MRC website for details of the five procedures, available at <http://www.mrcmekong.org/about-mrc/mandate/> (last access 5 January 2020). Noteworthy, however, is that all the above-mentioned procedures are external to the 1995 Agreement, and it is questionable whether they are legally binding. This article considers them to be legally binding for the time being.

<sup>51)</sup> Patricia Wouters & Huiping Chen, “China’s ‘Soft-Path’ to Transboundary Water Cooperation Examined in the Light of Two UN Global Water Conventions – Exploring the ‘Chinese Way’” *Journal of Water Law*, Vol. 22 (2013), p. 239.

China agreed to continue sharing hydrological data with the MRC, which will contribute to better river monitoring and flood forecasting in the Mekong countries. However, China has adamantly refused to join the MRC, primarily because it does not want to be subject to the MRC's procedures on aquatic environmental issues and restrictions on dam building<sup>53)</sup>, fearings that multilateralism will encroach on its sovereign rights and freedom of action in managing a key natural resource<sup>54)</sup>.

## (2) Enforcement Mechanism — How Do the 1995 Agreement (Article 5) and PNPCA Work?

The PNPCA requirements cover five possible situations, depending on a combination of the following three water-use factors: the type of river (mainstream or tributary), the season (dry or wet) and the scope of water use (inter-basin or intra-basin): (i) if dam development with inter-basin diversion is to be carried out on the mainstream during the dry season, the consent of potentially affected states is required; (ii) if dam development with intra-basin diversion is to be carried out on the mainstream during the dry season, the planning state is required to conduct prior consultation with the potentially affected states; (iii) if dam development with inter-basin diversion is to be carried out on the mainstream during the wet season, the planning state is required to conduct prior consultation with the potentially affected states; (iv) if dam development with intra-basin diversion is to be carried out on the mainstream during the wet season, mere notification to potentially affected states is sufficient; (v) if dam development is carried out on a tributary, mere notification to potentially affected states is sufficient (see Figure 3). As we can see, dry-season water use is subject to more demanding supervision than wet-season use; and inter-basin diversion, where water is diverted from the Mekong basin to another river basin, is subject to a more

---











<sup>52)</sup> MRC Website, *MRC and China renew pact on water data provision and other cooperation initiatives*, Vientiane, Laos, on 19 July 2019, available at <http://www.mrcmekong.org/news-and-events/news/mrc-and-china-renew-pact-on-water-data-provision-and-other-cooperation-initiatives/> (last access 17 December 2019).

<sup>53)</sup> Ho, 2014, *supra* note 19, p. 8.

<sup>54)</sup> *Ibid.*, p. 3.



**Figure 3: Procedural obligations binding lower Mekong basin countries**

Type of River	Season	Scope of water-use	Required procedure
 Mainstream	 Dry	Inter-basin (from the Mekong basin to another basin)	 Specific Agreement
		Intra-basin (within the Mekong basin)	 Prior Consultation
	 Wet	Inter-basin (from the Mekong basin to another basin)	 Prior Consultation
		Intra-basin (within the Mekong basin)	 Notification
 Tributary	 Both	Both inter and intra-basin	 Notification

**Source:** MRC Website, available at <http://www.mrcmekong.org/assets/Publications/PNPCA-brochure-11th-design-final.pdf> (last access 16 December 2019)

through process than intra-basin water use. The construction of mainstream dams without proper adherence to the prior-consultation requirement has therefore put the credibility of the MRC to the test, and has increased the risk of conflict in the region<sup>55</sup>.

Notification means that any country proposing a project must provide details of the project to the other member countries before commencement of the project. Prior Consultation refers to a six-month process of technical evaluation and formal consultations, where notified member states have an opportunity to assess potential transboundary impacts on ecosystems and livelihoods, and recommend measures to address issues of concern, before water is used. Specific Agreement means that thorough consultation and negotiation must be conducted to achieve a consensus among all the member states, on the terms and conditions of any proposed project, prior to the proposed water use. Since 1998, there have been 49 Notifications, 4 Prior Consultations, and no Specific Agreements<sup>56</sup>; but since 2012, Laos is the only country to have given notification of any projects for Prior Consultation under the PNPCA<sup>57</sup>.

<sup>55</sup> MRC Website, *Procedures for Notification, Prior Consultation and Agreement (PNPCA)*, p. 3, available at <http://www.mrcmekong.org/assets/Publications/PNPCA-brochure-11th-design-final.pdf> (last access 16 December 2019).

<sup>56</sup> MRC, *State of the Basin Report 2018*, *supra* note 15, p. 166.

<sup>57</sup> *Ibid.*

## 2. The Relationship Between the Lower Mekong River Countries and China — the Establishment of a New Cooperation Mechanism (LMC)

While the LMC mechanism is far from being a river basin organization (an entity established to manage water resources straddling different countries that share one river), it is notable that China has been the driving force behind an initiative that explicitly includes water issues within its remit<sup>58</sup>. China has long held the position that building water infrastructure on international rivers is not a multilateral issue<sup>59</sup>. Although some of the watercourses at issue are shared between several countries, the water treaties signed by China are primarily bilateral in nature<sup>60</sup>. Effectively, China seeks to protect its interests by conducting direct negotiations with the individual states with whom it shares surface water<sup>61</sup>. It should be noted that, strictly speaking, the current LMC is also not a multilateral framework, but only a bilateral one between China and the lower Mekong River countries.

China's active support for establishment of the LMC likely reflects at least the following three aims: to expand its market in order to address its excessive capacity issues and internationalize the Yuan<sup>62</sup>; to improve its increasingly negative public image in Southeast Asia<sup>63</sup>; and as a countermove to the Lower Mekong Initiative (LMI) established by the US in July 2009<sup>64</sup>, because China fears the US could use the water disputes in the Mekong River to drive a wedge between China and its neighbors<sup>65</sup>. In this sense, the LMC is China's response to the LMI and an attempt to exercise benevolent

---

<sup>58</sup> Hongzhon Zhang & Mingjiang Li, "China and Global Water Governance: New Developments," in Hongzhon Zhang & Mingjiang Li (eds.), *China and Transboundary Water Politics in Asia* (Routledge, 2018), p. 227.

<sup>59</sup> Ibrahim, 2020, *supra* note 39, p. 204.

<sup>60</sup> *E.g.* the 1994 Agreement on Protection and Utilization of Border Waters (with Mongolia), the 2001 Cooperation Agreement on the Utilization and Protection of Transboundary Rivers (with Kazakhstan), and the 2008 Agreement on Reasonable Utilization and Protection of Transboundary Waters (with Russia). *See also* Yu Su, "Contemporary Legal Analysis of China's Transboundary Water Regimes: International Law in Practice," in Patricia Wouters, Huiping Chen & James E. Nickum (eds.), *Transboundary Water Cooperation: Principles, Practice and Prospects for China and Its Neighbours* (Routledge, 2017), pp. 161, 167-168.

<sup>61</sup> Ibrahim, 2020, *supra* note 39, p. 204.

leadership in the Mekong region.

---

<sup>62)</sup> Patricia Wouters argues that China imposes constraints on itself with respect to its riparian neighbors because it observes “limited territorial sovereignty,” which “means that national sovereign interests and actions are prescribed and circumscribed through rules of international law, both substantive and procedural”. Patricia Wouters, “The Yin and Yang of International Water Law: China’s Transboundary Water Practice and the Changing Contours of State Sovereignty,” *Review of European, Comparative and International Environmental Law*, Vol. 23, No. 1 (2014), p. 73. Wouters also argues that “From an international legal perspective, China’s approach to dealing with its riparian neighbors is based on dialogue, consultation and peaceful negotiations, and crafted around the notion of restricted territorial sovereignty”. *Ibid.*, p. 72. According to this argument, China faces an “upstream dilemma”: how to meet its domestic water needs while taking into account the needs of neighboring countries in line with its policy of good neighborliness. See Ho, 2017, *supra* note 4, p. 147. However, China has demonstrated that it is not averse to using water as a political weapon to control and force compliance on its downstream neighbors. For instance, Article 10 of the 2013 MOU on sharing hydrological information between India and China states that India must pay RMB 850,000 to compensate China for this data provision. Yet China provides the data free of cost to Bangladesh, as mentioned in Article 4 of the 2008 MOU on the Provision of Hydrological Information of the Yarlung Zangbo/Brahmaputra River in Flood Season. Anamika Barua, Sumit Vij & Mirza Zulfiqur Rahman, “Powering or Sharing Water in the Brahmaputra River Basin,” *International Journal of Water Resources Development*, Vol. 34, No. 5 (2018), p. 837. This illustrates how China’s diplomatic strategy varies according to the country it is dealing with.

<sup>63)</sup> In early 2010, China was confronted with unparalleled criticism of its dam building, after record low water levels in the Mekong led to smaller fish catches, less water for irrigated agriculture, livestock and drinking, and suspended river transportation affecting trade and tourism. The media and NGOs blamed the operators of the large reservoir behind China’s Xiaowan dam for aggravating severe drought conditions at the time. As a result, China had to switch to a mode of “damage control” in order to calm the waves. China took unprecedented steps by sharing dry-season hydrological data from two of its mainstream dams (Manwan and Jinghong) during the crisis, and invited Mekong country representatives to visit the Jinghong dam for a tour inspection. Sebastian Biba, “China drives water cooperation with Mekong countries,” *chinadialogue*, on 1 February 2016, available at <https://www.chinadialogue.net/article/show/single/en/8577-China-drives-water-cooperation-with-Mekong-countries> (last access 23 December 2019). See also Sebastian Biba, *China’s Hydro-politics in the Mekong: Conflict and Cooperation in Light of Securitization Theory* (Routledge, 2018), pp. 96-161.

<sup>64)</sup> See Pich Charadine, “Cambodia in the Context of Mekong-Lancang Cooperation (MLC): Progress and Ways Forward,” *Working Paper* (2018), p. 15. In 2009, the US launched the LMI, a multinational partnership including Cambodia, Laos, Myanmar, Thailand and Vietnam, to create integrated sub-regional cooperation. The Initiative has six pillars: agriculture and food security, connectivity, education, energy security environment and water and health. Wei, 2017, *supra* note 5, p. 389.

<sup>65)</sup> Zhang & Li, 2018, *supra* note 58, p. 228.

## II. Problems with the Existing Transboundary Water Resource Management Mechanisms in the Mekong River Basin

### A. The Relationship Between the Countries in the Lower Mekong River — Problems with the MRC

#### I. Limited Membership of the MRC Framework

China and Myanmar, the two upstream riparians, are only affiliated with the MRC as dialogue partners, and their contribution to the institution has been minor. Although the 1995 Agreement has a provision for extending the Commission to include these countries<sup>66)</sup>, and MRC member states have expressed their desire for China and Myanmar to become full-fledged members, the two countries have yet to show interest in doing so. According to China, the 1995 Agreement only imposes obligations on the upstream countries [e.g. notification and prior consultation (Chapter II), maintenance of flows on the mainstream (Article 6), prevention of harmful effects (Article 7) and state responsibility for damages (Article 8)], and fails to acknowledge the benefits provided by the upstream dams to the downstream regions (e.g. reduction of flood damage during the wet season and maintenance of flows by periodic dam water discharge during the dry season). Further, Myanmar has little interests in regional water resource management, because the Mekong River only touches a minor part of an inaccessible region of this country.

Due to China and Myanmar's comparative non-participation in the MRC, its authority is limited in three critical respects: firstly, without the two countries, the MRC has no legitimacy to manage the entire Mekong basin; secondly, the two countries have no obligation to adhere to the MRC's procedures of cooperation in the management of the river basin areas within their territories; and thirdly, if China's dams were to create negative externalities for the downstream countries, the latter would have little means to influence China's dam management through the MRC. Therefore,

<sup>66)</sup> 1995 Agreement, *supra* note 1, Article 39.

as long as China, and to a lesser extent Myanmar, does not become a member of the MRC, the ability to generate cooperation in the overall basin by means of the MRC is severely restricted.

## **2. Weakness of the MRC's Enforcement Mechanism**

The 1995 Agreement is less binding than the previous regimes. The 1957 Agreement and the 1975 Joint Declaration of the Mekong Committee, which was the MRC's predecessor, both contained explicit veto rights and prior notification principles enabling riparian states to block unilateral action, which were removed in drafting the 1995 Agreement. As aforementioned, a member state must simply notify the others of activities in the tributaries within its territory; and for mainstream projects, prior consultation with other member states is required as a basis for arriving at an agreement, but consensus is not mandatory. Therefore, the MRC has effectively no instruments to enforce the 1995 Agreement if one of the members should pursue unilateral action.

## **3. Weakness of the MRC's Dispute Resolution Mechanism**

The dispute resolution procedures in the 1995 Agreement are as follows. First, the MRC is responsible in the first instance for addressing any disagreements, where applicable, via the Council or the JC<sup>67</sup>. If the MRC cannot resolve the dispute at this stage, the issue is referred to the respective governments, to be resolved diplomatically<sup>68</sup>. If this also proves unsatisfactory, the countries may refer the issue to a third party, such as international organization, international professional group or individual for mediation<sup>69</sup>. Finally, the countries may appeal to the principles of international law<sup>70</sup>. In sum, then, the MRC in fact has no ultimate legitimacy or power to resolve conflicts.

In contrast, the Convention on the Law of the Non-navigational Uses of

---

<sup>67</sup> *Ibid.*, Article 34.

<sup>68</sup> *Ibid.*, Article 35.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

International Watercourses<sup>71)</sup> (hereinafter the “1997 UN Watercourses Convention”), has a specific provision in Article 33 that grant compulsory jurisdiction to a “Fact-finding Commission”<sup>72)</sup>, whose review is initiated by the referral of one of the concerned parties. The 1997 UN Watercourses Convention may provide a means for concerned parties to collaborate and engage in joint fact-finding, hopefully for leading to recommendations more likely to be accepted by stakeholders and stakeholder groups in both parties, even if total consensus cannot be reached<sup>73)</sup>.

#### 4. Was International Law Powerless in the Case of the Xayaburi Dam Construction?

##### (I) Violation of the Obligation to Provide Prior Notification in “Timely” Fashion

One of the first issues raised by the Xayaburi Dam project concerned the timing of the notification. The 1995 Agreement stipulates that such notification should be “timely,” in order to “allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other effects”<sup>74)</sup>. PNPCA 4.5 stipulates that “Notification of proposed use shall be transmitted to the MRC JC in a *timely manner prior to implementation*” (emphasis added), while PNPCA 5.2.1 provides that “In

<sup>71)</sup> Adopted by the General Assembly of the United Nations on 21 May, 1997, entered into force on 17 August, 2014, UN Doc. A/RES/51/229. Vietnam played a crucial role in 2014, as the 35th state to ratify the Convention, which allowed the latter to come into force, as 35 ratifications were required before it became binding. Several scholars have claimed that the provisions on prior notification of planned measures in the convention are more detailed and stricter than the ones in the 1995 Mekong Agreement, meaning that the 1997 UN Watercourses Convention would assist in the implementation and interpretation of similar provisions in the 1995 Mekong Agreement. In addition, it has been suggested that Vietnam ratified the 1997 UN Watercourses Convention as a way of dealing with the challenges of governance of transboundary waters and holistic management of the river’s water, in view of the lack of substantive and procedural frameworks in the 1995 Mekong Agreement. Ibrahim, 2020, *supra* note 39, pp. 205-206.

<sup>72)</sup> 1997 UN Watercourses Convention, *supra* note 71, Article 33(3).

<sup>73)</sup> Jacob D. Petersen-Perlman, Jennifer C. Veilleux & Aaron T. Wolf, “International Water Conflict and Cooperation: Challenges and Opportunities,” *Water International*, Vol. 42, No. 2 (2017), p. 111.

<sup>74)</sup> 1995 Agreement, *supra* note 1, Chapter. II.

addition to the data and information required for Notification, the notifying State shall *timely* provide the MRC JC with available and additional technical data and information on its proposed use of waters for an evaluation of impacts by the other riparian States...” (emphasis added). The PNPCA guidelines state that the “[t]ime of submission [to MRC JC] should be flexible, acknowledging that the MRC Secretariat requests up to one month in advance of intended implementation to allow for internal processing and distribution of the planned project to other member states”<sup>75</sup>). The PNPCA guidelines also elaborate on the timing of notification, by suggesting that in actual practice it is likely that projects for proposed water use falling within the “prior consultation” category would be submitted two-six months in advance of the intended start-up date, because they are long-term, large-scale projects requiring considerable technical, economic, social and impact analyses<sup>76</sup>).

In terms of the above, Laos did not provide neighboring governments with an opportunity to evaluate transboundary impacts, and did not assess them itself before commencing the prior consultation on 20 September, 2010<sup>77</sup>). Therefore, Laos violated Chapter II of the 1995 Agreement and PNPCA 5.2.1. Support for such a conclusion may be seen in the Pulp Mills Case between Argentina and Uruguay, which was decided by the International Court of Justice (ICJ) in 2010<sup>78</sup>). The ICJ held that the initial requirement to inform should be satisfied “at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental

---

<sup>75</sup>) MRC, Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement, done on 31 August 2005, in Vientiane, Laos, p. 3, I. A. 1., available at <http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf> (last access 25 January 2020).

<sup>76</sup>) *Ibid.*

<sup>77</sup>) On 20 September, the Laos government submitted the Xayaburi Dam to the PNPCA process. Documentation included the feasibility study, and environmental and social impact assessments, but no assessment of the dam’s potential transboundary impact. Kirk Herbertson, “Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement,” *International Rivers*, on 13 January, 2013, p. 19, available at [https://www.internationalrivers.org/sites/default/files/attached-files/intl\\_rivers\\_analysis\\_of\\_mekong\\_agreement\\_january\\_2013.pdf](https://www.internationalrivers.org/sites/default/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf) (last access 3 January 2020).

<sup>78</sup>) *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April, 2010, *ICJ Reports* 2010.

authorization and before the granting of that authorization”<sup>79)</sup>. The ICJ also observed that “the information provided will not necessarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources;”<sup>80)</sup> and stated that “notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it”<sup>81)</sup>.

## (2) Violation of the Obligation to Suspend Construction Works During the Prior Consultation Period

According to PNPCA 5.4.3<sup>82)</sup>, Laos was obliged to suspend the project during the prior consultation period. However, Laos and the developers involved began construction of the Xayaburi Dam in late 2010, before the MRC governments had even met to discuss the project. Because the Laos government issued a statement on 19 November 2012 that “the first stage of construction has begun in late 2010 and is currently on going which includes preparatory infrastructure works, right bank coffer dams, navigation locks, spillway, sediment flushing outlets, and an intermediate block”<sup>83)</sup>. On 19 April, 2011, Cambodia and Vietnam requested a delay in the project, so that further transboundary studies could be carried out<sup>84)</sup>; however, the Laos government claimed that the PNPCA consultation process for the Xayaburi Dam automatically ended on 22 April, 2011<sup>85)</sup>.

Laos asserted that, under the 1995 Agreement, “preparatory work” was allowed<sup>86)</sup>. However, it should not be overlooked that the ICJ held, in the Pulp Mill Case, that, “this notification must take place before the State concerned

---

<sup>79)</sup> *Ibid.*, para. 105.

<sup>80)</sup> *Ibid.*

<sup>81)</sup> *Ibid.*, para. 120.

<sup>82)</sup> PNPCA 5.4.3 provides that: “...The notifying State(s) shall not implement the proposed use without providing the opportunity of the other member States to discuss and evaluate the proposed use...”

<sup>83)</sup> Qi Gao, *A Procedural Framework for Transboundary Water Management in the Mekong River Basin: Shared Mekong for a Common Future* (Brill Nijhoff, 2014), p. 115.

<sup>84)</sup> Herbertson, 2013, *supra* note 77, p. 20.

<sup>85)</sup> *Ibid.*



decides on the environmental viability of the plan, taking due account of the environmental impact assessment”<sup>87</sup>, and “Uruguay was not entitled, for the duration of the period of consultation and negotiation..., either to construct or authorize the construction of the planned mills and the port terminal.”<sup>88</sup> Indeed, while the Judge Greenwood, as a separate opinion in the Pulp Mill Case, stated that “engaging in preliminary steps such as clearing vegetation from a proposed site, levelling the land or preparing foundations is unlikely in itself to have any adverse impact on navigation, the régime of the river or the quality of its waters”<sup>89</sup>, there is no doubt that the Xayaburi project went beyond such preparatory work. In light of the above, Laos clearly violated PNPCA 5.4.3.

### (3) Violation of the Obligation to Accept a Request for Extension of the Prior Consultation Period

To avoid a situation where the prior consultation is left open indefinitely, the PNPCA procedures mandate a specific timeframe: “The timeframe for Prior Consultation shall be six months from the date of receiving documents on Prior Consultation. If necessary, an extended period shall be permitted by the decision of the MRC JC.”<sup>90</sup> This language originates directly from the UN International Law Commission’s 1994 commentary on the international law of watercourses, and is also part of the 1997 UN Watercourses Convention<sup>91</sup>. In sum, if a six-month timeframe is inadequate, downstream governments have a right to extend the consultations for a limited period of time.

However, as aforementioned, Laos claimed that the prior consultation

---

<sup>86</sup> A Bangkok Post investigation revealed that the Laos government had already begun implementing the project. The investigation revealed that access roads were constructed and villagers had received as little as US\$15 in compensation and were being resettled. *Ibid.*

<sup>87</sup> Pulp Mills Case, 2010, *supra* note 78, para. 120.

<sup>88</sup> *Ibid.*, para. 143.

<sup>89</sup> *Ibid.*, Separate opinion of Judge Greenwood, para. 14.

<sup>90</sup> PNPCA 5.5.

<sup>91</sup> UN Doc. A/49/10 (*Report of the International Law Commission on the work of its forty-sixth session, 2 May 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10*), p. 113, Article 13(b); 1997 UN Watercourses Convention, *supra* note 71, Article 13.

ended automatically after six months. During this initial six-month period, Laos failed to provide the information that the other governments needed in order to evaluate the project's impacts, and this undermined the primary purpose of the prior consultation. As a result, Laos violated PNPCA 5.5.2.

#### (4) Inadequate response of the MRC to Laos' Violation of International Law in the Construction of the Xayaburi Dam

In light of the Laos government's violation of international law, the Xayaburi experience raised the question whether the MRC can be an effective entity for management of the Mekong River going forward; and this has reduced enthusiasm for the institution in recent years, leading to donor disengagement and significant cuts to the MRC's budget. Therefore, analysis of the Xayaburi Dam project shows that both the design and implementation of the MRC's prior consultation process should be improved. The need to strengthen this process is particularly pressing in light of the numerous plans to further exploit the hydropower potential of the Mekong River and its tributaries.

### **B. The Relationship Between the Lower Mekong River Countries and China — China's Bilateral Approach to Transboundary Water Issues**

Compared to the cooperation in the lower Mekong region (for all its weaknesses), China's record on prior notification and consultation for proposed projects on transboundary rivers is abysmal. In particular, the other riparian states have never been formally notified of China's dam cascade plan on the upper basin of the Mekong River. China is a party to some 50 treaties governing or related to its shared transboundary water resources, with many of these concerning its borders (China has boundary agreements with 12 of its 14 neighbors)<sup>92)</sup>, but all its transboundary water-related agreements are bilateral, despite the fact that many relate to multi-state basins; for example, the Heilongjiang/Amur and Kherlen Rivers are

<sup>92)</sup> Wouters & Chen, 2013, *supra* note 51, pp. 245-247.

shared between China, Russia and Mongolia; the Tumen River is shared, between China, Russia and North Korea; and the Irtysh River, in the northern part of the country, is shared by China, Kazakhstan and Russia<sup>93</sup>. China's traditional bilateral approach on transboundary water domain reflects a profound unwillingness to sign onto multilateral legal commitments.

Instead, China has established a number of joint commissions responsible for environmental and water cooperation with its neighbors, all at a bilateral level. These include the Sino-Kazakh Joint Commission on the Use and Protection of Transboundary Rivers, the Sino-Kazakh Commission on Cooperation in the Field of Environmental Protection, the Sino-Mongolian Joint Commission on Transboundary Waters and the Sino-Russian Joint Commission on the Reasonable Utilization and Protection of Transboundary Waters<sup>94</sup>. These joint commissions have similar remits, which usually include information exchange, water quality monitoring, joint scientific research and emergency response cooperation<sup>95</sup>.

Currently the LMC is far from a multilateral cooperation system for achieving integrated water management in the Mekong basin. It is likely that China is merely using it as means and tools for establishing a new economic zone of influence, as part of the broader economic and diplomatic zone envisaged by its Belt and Road Initiative. In light of China's bilateralism, it is feared that the LMC, in reality, is likely to reflect China's uniformly bilateral approach, with China as the overwhelming presence, instead of reflecting a multilateral approach the limits Chinese hegemony. Given the current state of the 1995 Agreement and China's very limited acceptance of multilateral cooperation, constructing and strengthening of multilateral cooperative mechanism would appear to be a more effective way forward in the Mekong River region.

---

<sup>93</sup> *Ibid.*, p. 232.

<sup>94</sup> *Ibid.*, p. 238.

<sup>95</sup> *Ibid.*

### III. The Need to Reform the Existing Transboundary Mechanisms of Water Resource Management in the Mekong River Basin in Accordance with the Rule of International Law

#### A. Two Requirements for Reform

##### I. Documentation of Customary and Evolving International Law

Two specific initiatives would enable the MRC and LMC to better manage the Mekong River basin. The first is the documentation of customary and evolving international law. It is important that the substantive obligations and procedures of customary international law on the use of international rivers are legally binding. Document-based lawmaking is of particular importance in this context because in general terms, laws not written on paper, such as customary international law, are less likely to be implemented by countries than those articulated in formal legal documents. In particular, it is important to document the procedural obligations of customary international law. The recent development of transboundary environmental impact assessment (TbEIA) is particularly noteworthy<sup>96</sup>. TbEIA refers to procedures for evaluating the likely impact of proposed activities on the environment of other countries<sup>97</sup>, and is usually undertaken by the project planning state.

TbEIA obligations are subdivided into four sequential phases: (i) the obligation to determine whether it is necessary to conduct TbEIA<sup>98</sup>; (ii) the obligation to conduct TbEIA (including the obligation to notify and consult in good faith with the potentially affected states in conformity with due diligence obligation<sup>99</sup>); (iii) a final decision regarding TbEIA, by the project planning state; (iv) the obligation to continuously monitor conditions<sup>100</sup> after structures such as dams has been completed and put into operation, and/or

---

<sup>96</sup> E.g. Mari Koyano, "The Significance of Procedural Obligations in International Environmental Law: Sovereignty and International Co-operation," *Japanese Yearbook of International Law*, Vol. 54 (2011), p. 98.

<sup>97</sup> E.g. Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law and the Environment*, 3rd ed. (Oxford University Press, 2008), p. 164.

water diversions are completed<sup>101</sup>). These obligations should be documented by all the countries in the Mekong basin. There is evidence of documentation

<sup>98</sup>) The ICJ held that “to fulfill its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential to adversely affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which triggers the requirement to carry out an environmental impact assessment.” *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, *ICJ Reports* 2015, para. 104. In other words, a project planning state need not necessarily perform TbEIA for every project. Prior to conducting TbEIA, the planning state must determine that one is needed. In this obligation, the planning state will only be required to perform TbEIA if it determines that its proposed project could have an adverse effect on the environment of another state. In this case, it has the obligation to perform TbEIA, as set forth in (ii) above.

<sup>99</sup>) In the Pulp Mills Case, the ICJ found that there is a practice, “which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law, to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on shared resource.” Pulp Mills Case, 2010, *supra* note 78, para. 204. This view has been overwhelmingly supported by subsequent international cases and subsequent scholarly opinion. Specifically, the ICJ’s judgment in the Pulp Mills Case seems to have persuaded legal scholars. *E.g.* Nicolas C. Bremer, “Transboundary Environmental Impact Assessment of Large Dams in the Euphrates-Tigris Region: An Analysis of International Law Binding Iran, Iraq, Syria and Turkey,” *Review of European Community & International Environmental Law (RECIEL)*, Vol. 25, No. 1 (2016), pp. 99-100. The ICJ considered international law defining the content of TbEIA in the Pulp Mills Case. While the court found that states are generally free in determining the scope of TbEIA through domestic legislation, it noted that in doing so, a state, must have “regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as the need to exercise due diligence in conducting such an assessment.” Pulp Mills Case, 2010, *supra* note 78, para. 205. An important question that arises in this context is whether the EIA must necessarily involve consultation with potentially affected populations. While some maintain that states may be obligated by international law to provide for foreign public participation in EIA, legal scholars generally do not consider states to be obligated to allow the participation of foreign populations. The question arose in the Pulp Mills Case, but the court merely concluded that no legal duty to consult the affected populations existed for Uruguay on the basis of the “instruments invoked by Argentina,” and that, in any event, a consultation had taken place. *Ibid.*, paras. 216, 219. This conclusion does not settle the issue, however, because the court avoided the question whether an obligation to consult the public exists in customary international law. Pierre-Marie Dupuy & Jorge E. Viñuales, *International Environmental Law*, 2nd ed. (Cambridge University Press, 2018), p. 80.

<sup>100</sup>) Monitoring entails the measurement, assessment, and analysis of the impact of the activities. Exchange of information entails the mutual distribution of relevant scientific or technical data and information that may include the outcome of monitoring. Koyano, 2011, *supra* note 96, p. 101.

of TbEIA obligations among the lower Mekong countries<sup>102</sup>, but no procedural obligations between China and the lower Mekong countries have thus far been documented.

## 2. Reforming the LMC and MRC as Existing Cooperation Mechanisms

The second reform initiative involves restructuring the existing management mechanisms for water resource to strengthen their authority. The 1995 Agreement only provides a mechanism for dialogue; the existing methods remain unable to resolve conflicts. In order, therefore, to effectively implement procedural and substantive obligations, the existing mechanisms must be reformed in the manner detailed below. In the Gabčíkovo-Nagymaros Case, where the states were mandated to find a negotiated solution, the court went on to state that the “[r]e-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources”<sup>103</sup>. This raises the question of how these mechanisms should be designed.

---

<sup>101</sup> As an example, in the Pulp Mills Case, the ICJ held that “once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.” Pulp Mills Case, 2010, *supra* note 78, para. 205. This requirement builds upon Vice-President Weeramantry’s statements in the Gabčíkovo-Nagymaros Case regarding the need for continuous EIA. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports 1997*, Separate Opinion of Vice-President Weeramantry, pp. 20-21. ICJ also held that “if the circumstances so require, Costa Rica will have to consult in good faith with Nicaragua, which is sovereign over the San Juan River, to determine the appropriate measures to prevent significant transboundary harm or minimize the risk thereof.” *Certain Activities and Construction of a Road Case*, 2015, *supra* note 98, para. 173.

<sup>102</sup> See MRC, *Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin (Working Document)*, Vientiane, Laos, on 25 September 2018, available at <http://www.mrcmekong.org/assets/Publications/TbEIA-Guidelines-Final-version-25-9-2018.pdf> (last access 18 December 2019). The adoption of this document was postponed because the Laos and Thai governments disapproved. Laos and Thailand suggested that the current draft guidelines should be considered as a “working document” that can be further amended based on experience gained from its practical application. *Ibid.*

<sup>103</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, *ICJ Reports 1997*, para. 147.

## B. How Should the Existing Mechanisms be Reformed?

### I. Three Perspectives

In order to achieve a cooperative management mechanism, the 1997 UN Watercourses Convention merely recommends the establishment of “joint mechanisms or commissions”<sup>104</sup>, whereas other treaties such as the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter the “1992 UNECE Watercourses Convention”)<sup>105</sup> require their establishment. Joint mechanisms are useful vehicles for coordinated management because they provide platforms for regular interaction, information exchange and decision-making among basin states<sup>106</sup>.

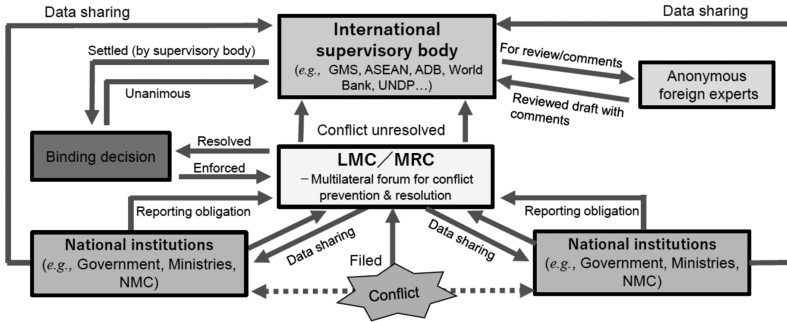
There are three distinct aspects to reforming the existing mechanisms in the Mekong basin (see Figure 4). First, information on dams and water levels should be regularly exchanged through a multilateral forum for conflict prevention and resolution (hereinafter “Phase I”). Inevitably, procedural obligations are closely linked to the establishment of cooperative institutional mechanisms, through which the formal exchange of environmental information and inter-state dialogue can take place, and by which detailed procedural rules on such exchange can be developed and implemented. The Mekong River is no exception: a mechanism is needed for the basin governments and ministries to regularly exchange information through a combined forum. In the lower Mekong River region, the NMCs should periodically exchange such information through the MRC; and at the same time, the LMC can function as a broader forum for achieving integrated management of the entire Mekong River basin.

<sup>104</sup> 1997 UN Watercourses Convention, *supra* note 71, Article 8(2).

<sup>105</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, done at Helsinki, on 17 March 1992, entered into force 6 October 1996, *ILM*, Vol. 31 (1992), p. 1312, Article 9(2).

<sup>106</sup> Christina Leb, “The Significance of the Duty to Cooperate for Transboundary Water Resources Management under International Water Law,” in Alistair Rieu-Clarke, Andrew Allan & Sarah Hendry (eds.), *Routledge Handbook of Water Law and Policy* (Routledge, 2017), p. 255.

**Figure 4: Proposed institutional design for the Mekong River basin**



Source: Author

Second, there should be a multilateral forum in which all basin countries participate, and any country should be able to bring a dispute with another country to the forum for a legally-binding decision (hereinafter “Phase II”). In the case of the Mekong River, the LMC already offers a forum in which all basin countries can participate. All basin countries should submit a report to the LMC (and the MRC in the case of the lower Mekong River basin) on the current status of their water management, and the LMC should review the reports in light of information from citizens and NGOs, and order basin countries to make improvements as necessary. Additionally, in the event of a disagreement (that is, conflict) between national institutions regarding the fulfillment of the various obligations above (see Section III A 1), the LMC should be empowered to make legally binding decisions if there is a request from any country.

Finally, an international supervisory body should be established to monitor the implementation of decisions made by the multilateral forum (hereinafter “Phase III”). In addition, this body should have the authority of an institution of appeal, if it is dissatisfied with the decision by the multilateral forum. In the case of the Mekong River, for example, the Association of Southeast Asian Nations (ASEAN), the Greater Mekong Subregion (GMS), major multilateral development banks such as the Asian Development Bank (ADB) and World Bank, the United Nations Development Programme (UNDP), and the International Union for Conservation of Nature (IUCN) would be



appropriate as such a supervisory body<sup>107</sup>.

It is important that all basin countries agree to certain restrictions on sovereignty. The strong institutional capacity in the proposed Mekong River basin design is expected to restrain any hegemon from acting unilaterally, thanks to its enforcement and conflict resolution mechanisms.

In fact, Phase I is already underway. Data and information exchange, basin-wide monitoring, and joint assessment on Mekong water and related resources are among the main element to benefit from the new partnership between the MRC Secretariat and the LMC Water Center<sup>108</sup>. As an initial step, both sides (i.e., the upper and lower riparian states) agreed to conduct a joint study on the 2019 drought and low-flow situation in the overall Mekong River basin, including both the lower and upper part in China where the Mekong is known as Lancang<sup>109</sup>. The joint study, planned for January to September 2020, aimed to identify the causes and impacts of the drought and low-flow conditions in 2019<sup>110</sup>. Though the study will likely touch on sensitive issues, such as water quality and China's upstream dam construction, the agreement also highlights the potential for increased cooperation throughout the basin and strengthening engagement with China.

## 2. How Can China's Cooperation be Obtained?

In the Mekong River basin, however, neither Phase II nor III is yet underway. Is it possible to institutionalize these Phases in the overall basin and establish the rule of international law? Where mutual benefits have been identified, states have agreed to subject themselves to specific obligations in order to achieve favorable outcomes through coordination and cooperation in the management and development of shared water resources<sup>111</sup>. In the

<sup>107</sup> See also Muhammad Uzair Qamar, Muhammad Azmat & Pierluigi Claps, "Pitfalls in Transboundary Indus Water Treaty: A Perspective to Prevent Unattended Threats to the Global Security," *npj Clean Water*, Vol. 2, No. 22 (2019), p. 3.

<sup>108</sup> MRC Website, *MRC Secretariat, LMC Water Center ink first MOU for better upper-lower Mekong management* (Vientiane, Laos, on 18 December 2019), available at <http://www.mrcmekong.org/news-and-events/news/mrc-secretariat-lmc-water-center-ink-first-mou-for-better-upper-lower-mekong-management/> (last access 20 December 2019).

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

Gabčikovo-Nagymaros case, for example, the ICJ considered the delicate balance between economic utilization and environmental protection, and recommended that dams “could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.”<sup>112)</sup>

In this respect, it is noteworthy that China has accepted “limited sovereignty” in its evolving water governance agreements with downstream Kazakhstan. In 2001, China and Kazakhstan signed a landmark agreement on the use and protection of transboundary rivers<sup>113)</sup>, which in turn led to the establishment, in 2003, of the Sino-Kazakh Joint Commission on the Use and Protection of Transboundary Rivers<sup>114)</sup>; and both countries have continued to take steps to enter a new stage of common water governance. In early 2011, China finalized an agreement on water quality protection along shared rivers with Kazakhstan<sup>115)</sup>; and in April 2011, the two countries launched the long-awaited China-Kazakhstan Friendship Joint Water Diversion Project on the Khorgos River, a 150-kilometre long tributary of the Ili and a border river between the countries<sup>116)</sup>. Under the agreement, each side is allotted 50% of the diverted water<sup>117)</sup>.

It is entirely unclear, however, whether China’s cooperation with Kazakhstan will be reflected in its dealings with the lower Mekong River countries; beyond the reasons discussed above, there is a critical difference between water diversion and dam-building. The former is typically unfair

---

<sup>111)</sup> Leb, 2017, *supra* note 106, p. 254.

<sup>112)</sup> Gabčikovo-Nagymaros Case, 1997, *supra* note 103, para. 146.

<sup>113)</sup> Agreement between the Government of the Republic of Kazakhstan and the Government of the People’s Republic of China on Cooperation in the Use and Protection of Transboundary Rivers, Astana, on 12 September 2001, Article 8, available at [http://www.cawater-info.net/library/eng/1/kazakhstan\\_china.pdf](http://www.cawater-info.net/library/eng/1/kazakhstan_china.pdf) (last access 24 December 2019).

<sup>114)</sup> Ho, 2017, *supra* note 4, pp. 145-146.

<sup>115)</sup> Sebastian Biba, “China cooperates with Central Asia over shared rivers,” *chinadialogue*, on 24 February 2014, available at <https://www.chinadialogue.net/article/show/single/en/6741-China-cooperates-with-Central-Asia-over-shared-rivers>. (last access 24 December 2019).

<sup>116)</sup> *Ibid.* Zhanguai Zhou & Ruolin Wang, “Sino-Kazakh transboundary water cooperation: History, current status, and future priorities,” in Hongzhou Zhang & Mingjiang Li (eds.), *China and Transboundary Water Politics in Asia* (Routledge, 2018), p. 198.

because it deprives downstream countries of water; but in the latter case China need not feel compelled to justify its action because the same amount of water will continue to flow downstream<sup>118</sup>.

Nevertheless, the progress of cooperation between China and Kazakhstan on water resource management suggests that linkages between water governance and broader political, strategic and economic issues have incentivized China, as the upstream riparian, to cooperate with Kazakhstan, a weaker downstream neighbor<sup>119</sup>. China, it seems, has determined that the benefits of cooperation are greater than the benefits of non-cooperation, when the distribution of the net benefits is perceived to be fair.

Such linkages seem clearly to be incentives for China's relatively higher level of cooperation in the case of Kazakhstan. Therefore, issue-linkages would appear to be of critical importance in any attempt to establish the rule of international law in dealings with China regarding the water resources in the upper Mekong River, including the establishment of the above-mentioned water resource management institutional design (see Figure 4). China's proven behavior regarding de facto cooperation strongly suggests that shared interests — such as trade and investment opportunities, and political interest in cooperation with downstream countries — help to promote mutually beneficial cooperative arrangements.

## Conclusion

Ultimately, the most important factor in the management of transboundary water resources in the Mekong River basin is the promotion of public

---

<sup>117</sup> Since diplomatic relations were established in 1992, the Kazakh government has tried to nudge China to begin negotiations on the management of shared water resources. These efforts met with little success until the late 1990s. China's decision to come to the negotiating table in May 1999 suggested that China's cooperation on transboundary waters was a quid pro quo for Kazakhstan's support in the mid-to-late 1990s for China's campaign against Uighur separatists, as well as its facilitation of Chinese access to its energy resources. Ho, 2017, *supra* note 4, p. 151.

<sup>118</sup> Biba, 2014, *supra* note 115.

<sup>119</sup> Selina Ho, "Sharing Rivers: China & Kazakhstan," *China Water Risk (CWR)*, on 18 May 2017, available at <http://www.chinawaterrisk.org/opinions/sharing-rivers-china-kazakhstan/> (last access 24 December 2019).

participation. The participation of stakeholders, such as citizens, non-governmental organizations (NGOs) and companies, in the mechanism will help to protect the Mekong River and its residents from irresponsible dam development and other water-related malgovernance<sup>120)</sup>.

Public participation can be broadly understood as an institutionalized form of involvement on behalf of the basin stakeholders, including basin communities and NGOs as well as private businesses, in the management and decision-making process of river basin organizations. The benefits of public participation may be summarized in terms of three broad sets of anticipated outcomes: ensuring greater “efficiency and effectiveness” in policies and project outcomes; increasing the “empowerment” of individuals, especially those in marginalized groups; and increasing the “legitimacy” of governance measures<sup>121)</sup>.

However, such public participation has yet to be codified in internationally binding water law. For example, the 1997 UN Watercourses Convention contains no explicit obligations for public participation. In contrast, however, an increasing number of regional water conventions includes provisions for public involvement. The 1992 UNECE Watercourses Convention, for example, requires that “information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures, is made available to the public”<sup>122)</sup>; and the Aarhus Convention, launched by the UNECE in 1998, requires public access to information, decision-making, and justice on matters of national, regional, and transboundary issues including water, though limited to a specific list of activities.

The construction and operation of large upstream dams in the Mekong

---

<sup>120)</sup> The idea of increased public participation in environmental issues has been affirmed in Principle 10 of the Rio Declaration. This formulation suggests that public participation is important not only as a distributive instrument (weighing the interests at stake), but also, to some extent, as an instrument of prevention, through the democratic control of decision-making in environmental matters. Dupuy & Viñuales, 2018, *supra* note 99, p. 86.

<sup>121)</sup> Sabine Schulze, “Public Participation in the Governance of Transboundary Water Resources – Mechanisms Provided by River Basin Organizations,” *Centre international de formation européenne*, No. 365 (2012), p. 51.

<sup>122)</sup> 1992 UNECE Watercourses Convention, *supra* note 105, Article 16.

basin are posing unprecedented risks to the downstream region. Establishing the rule of international law is too late after the river has dried up, with its serious consequences for civil society. In order to achieve sustainable development of the Mekong River basin, there is an urgent need to establish a method of public participation in the decision-making process; in effect, to establish the “rule of international law with public participation”.