

Transboundary Waters Governance Through the Prism of the Mekong River Basin

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Abstract

The Mekong River Basin covers 795,000 km² through six countries—China, Myanmar, and the so-called four lower riparians (Lao PDR, Thailand, Cambodia and Viet Nam). The Mekong is the twelfth longest river in the world (4,350 km) and ranks tenth in terms of total volume (475 billion m³/year). This chapter critically reviews the principles of international water law and policy through the prism of transboundary waters governance in the Mekong in a context that emphasizes developments over the past four decades. The effort is to identify and analyze key events in the interactive processes that have led to the evolution of Mekong transboundary waters governance. International drainage basins in general have certain characteristics that make their successful conservation and management especially challenging, the most notable of which may be the tendency for regional politics to exacerbate the already difficult task of understanding and managing complex natural systems. Considering the lack of other multilateral bodies operating in the South East Asia Region, and the breadth and importance of the issues under discussion, the fact that the four lower Mekong riparians were even able to reach consensus, in the form of the 1995 Mekong Agreement establishing the Mekong River Commission (MRC), and in such a relatively short period of time was a remarkable achievement. Credit for this was due to (1) a highly experienced international legal advisor that facilitated negotiations and helped the parties find common ground; (2) delegations that had a strong grasp of international law which served as an important starting point for negotiations; and (3) the best alternative to a negotiated agreement ('BATNA') for each country was seemingly less palatable than what could be gained through agreement. Since inception the MRC has had many notable successes. Only time will tell whether the MRC can continue to strike a sustainable balance between conservation and development while being increasingly challenged by China and Myanmar continuing to decline membership in the MRC.

[a]Introduction

The objective of this chapter is to critically review transboundary waters governance in the Mekong River Basin in a context that emphasizes developments over the past four decades.¹ A mere snapshot of governance in the Mekong is inadequate to understand the flow of decisions over time, and a treatment of Mekong governance solely in terms of black letter rules and doctrines, divorced from the

social processes that gives them meaning, is misleading. Thus, the effort here is to identify and analyze key events in the interactive processes that have led to the evolution of Mekong River Basin governance.

Covering about half of Earth's surface, 276 watercourses connect territories of two or more countries (Global Environment Facility, 2013). There are also untold numbers of shared aquifers. International drainage basins² have certain characteristics that make their management especially challenging, the most notable of which is the tendency for regional politics to exacerbate the already difficult task of understanding and managing complex natural systems.

Management of international drainage basins is further complicated by the fragmented and underdeveloped nature of international water law. Like international law in general, international water law may take either of two general forms: treaty law or customary international law. The foundational treaty in international water law is the *1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses* ("*Watercourses Convention*") (Bearden, 2010). Although the *Watercourses Convention* entered into force on 17 August 2014, it is of limited application. However, the *Watercourses Convention* does reflect the fundamental rules of customary international law applicable in the field (McCaffrey, 2001). These fundamental rules, historically articulated in the 1966 Helsinki Rules,³ have also been reinforced by the judgment of the International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (I.C.J. Reports 1997).

The basic rules that form the foundation of international water law are:⁴

- States agree to use an international watercourse in a way that is 'equitable and reasonable' vis-à-vis other states that are sharing the watercourse;

- States agree to take ‘all appropriate measures’ to prevent ‘significant harm’ to co-riparian states;
- States agree to provide ‘prior and timely notification’ to other international watercourse states concerning any ‘new use or change in existing uses’ of an international watercourse, together with relevant technical information, and that it ‘consult’ with the other international watercourse states; and
- States agree to protect ecosystems of international watercourses. (This rule is emerging and does not yet rise to the same level of recognition as the three other basic rules.)

The experience of the Mekong River Basin states provides a fitting illustration of how these principles have coalesced in practice.

[a]Physical Characteristics

The Mekong River Basin covers 795,000 km² through six countries—China, Myanmar, Lao PDR, Thailand, Cambodia and Viet Nam. The Mekong River is the twelfth longest river in the world (4,350 km) and ranks tenth in terms of total volume (475 billion m³/year). The Mekong is dominated mostly by a monsoon climate with distinct wet and dry seasons. Most of the total flow volume is delivered to the Mekong from tributaries in the Lower Mekong Basin, with upstream China contributing to over 24% of the total flow from snow melt in the dry-season. (Mekong River Commission, 2015).

As a result of longstanding regional conflict and various geopolitical barriers, and in spite of 37 years of investigations and planning by the riparian countries, no structures had been built on the Lower Mekong mainstream at the time the 1995 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (the ‘*Mekong Agreement*’) was negotiated. China, which contributes 16% of the overall Mekong River flow volume and in which nearly half of the river’s length is located, completed its first dam on the river in the year the *Mekong Agreement* was signed.

Since that point, China has completed another three of the 20-plus dams it has planned for the Lancang and Upper Mekong. These hydropower dams have the ability to regulate flows in the wet season and increase river flows during the dry season downstream.

[a]Historical Context

The *Mekong Agreement* is a treaty among Cambodia, Lao PDR, Thailand and Viet Nam, who are described as the 'Lower Mekong River Basin States' (LMRBS), to provide a framework for cooperation in the sustainable development, utilization, conservation and management of the Mekong River Basin waters and related resources. The four parties have all signed and ratified the *Mekong Agreement*, which entered into force on 5 April 1995.

Remains one of the few legally binding treaties in Southeast Asia (Bearden, 2010), the *Mekong Agreement* was the outcome of 37 years of regional and supra-regional efforts to cooperatively manage the Mekong River (Öjendal and Jensen, 2012). Throughout this period, extensive planning and feasibility studies were undertaken at considerable cost by the international community. The Lower Mekong became an area of significant interest at the height of the Cold War. This drove investment from the 'Western World' in order to support regional cooperation and development in a strategy to halt the expansion of communist influence in the region.

The early years of the Committee for Coordination of Investigations of the Lower Mekong (*Mekong Committee*, established by statute in 1957 by the lower Mekong riparians), which was authorized to "promote, coordinate, supervise, and control the planning and investigation of water resources development projects in the Lower Mekong Basin", led to the development of a network of hydrologic and meteorological monitoring stations for data collection on the mainstream (Molle et al, 2009).

When the Pol Pot regime came to power in 1975, Cambodia withdrew cooperative efforts to manage the Mekong. With the lack of a representative government in Cambodia, The *Mekong Committee* became a three-member (Lao PDR, Thailand and Viet Nam) "Interim Committee" in 1978 (Hirsch and Jensen, 2006).

Upon Cambodia's reengagement in 1991, the LMRBS set upon a course that, after 21 months of negotiations, produced the *Mekong Agreement*, which established the Mekong River Commission (MRC) as its regional management body. The MRC was established as the organization responsible for coordinating water resources development in relation to the natural resources and environmental protection in the Lower Mekong River Basin (LMRB) (Browder, 1998). The MRC thus became the replacement mechanism for both the previously established *Mekong Committee* and *Interim Mekong Committee*.

[a]Socio-Political Context

As a result of extensive planning and feasibility studies conducted during the early stages of the *Mekong Committee*, the potential benefits of a Mekong Basin-wide agreement were reasonably clear for the LMRBS. Each party had distinct issues that could only be resolved through cooperative development of the LMRB. In brief, Thailand and Viet Nam were interested in reaching agreement on water allocation to promote the larger goal of regional cooperation and solidarity after the Cold War ended in the early 1990s. After decades of regional ideological discord and war, Thailand and Viet Nam did not want water disputes to threaten a more general accord in the region. Moreover, it was recognized that reservoirs in China (which in 1995 were already either under construction or in the advanced planning stage) could significantly increase Mekong flows in the dry season. Considering that water scarcity in the dry season is one of the major water related challenges in the Mekong, the

projected increase of flows from the Chinese dams was the catalyst for negotiations of how to share the increased dry season water. In addition, international development agencies were willing to continue funding and providing technical services to the LMRBS to cooperate in managing and developing their common water resources to the MRC. Such assistance was particularly important to Cambodia and Laos PDR, the two least developed states of the group.

[a]Environmental Context

Each of the four countries in the LMRB faced issues regarding inconsistent seasonal water flows on the Mekong in the pre-*Mekong Agreement* stage. Thus, Viet Nam's highest priority was to protect the Mekong Delta, the country's 'Rice Bowl.' The considerable expansion of rice farming over the latter half of the 20th century in Viet Nam required a significant amount of water to be diverted from the Mekong for irrigation purposes. While easily accomplished during the wet season, the Viet Nameese needed to maintain at least the existing dry season flows into the Delta to prevent saltwater intrusion and to provide for irrigation. Viet Nam was therefore in favor of dams on the Mekong mainstream if they regulated flows to provide more water availability during the dry season as well as to reduce damaging flooding in the wet season.⁵

For its part, Thailand wanted to ensure access to its share of the Mekong's water. Thailand had plans to expand irrigation to its poor northeastern Issan province through the Khong-Chi-Mun project. Thailand also wanted to divert water from the Mekong into the Chao Phraya Basin in central Thailand. The country's major policy issue was that it did not want these projects, nor any other projects, subjected to prior agreement through the *Mekong Committee*, which Thailand believed would be unduly burdensome.

Laos PDR's major water concern was to maintain the Mekong in a natural state as a navigable river. Because it was a landlocked country without sufficient land transportation infrastructure—and all major urban centres are located on the Mekong—ensuring a navigable river was vital to Laos PDR. The hydroelectric potential and related revenue that could be generated on the Mekong was also a primary interest to the Laotian government.

Finally, Cambodia's priority was to ensure protection of the Tonle Sap, also known as the Great Lake.⁶ Cambodia was concerned that upstream water projects, such as dams in China, Laos PDR and Thailand, would damage the Tonle Sap, which is both central to Cambodian culture as well as of major environmental importance because it represents one of the largest wetland biodiversity reservoirs in Southeast Asia and is among the most productive fishing grounds in the world.

[a]Development of the Mekong Agreement

Once Cambodia could again participate in efforts to cooperate on multilateral Mekong issues, how this new cooperative platform would operate became a threshold issue. According to Browder,

When Cambodia's readmission threatened to reactivate the Mekong Committee's constitutional framework—which required approval by the Mekong Committee for all proposed projects—the Thai government called for negotiations to restructure the Mekong regime (Browder, 1998, p117).

Thailand at this time was lobbying for a new, less stringent system of rules regarding prior notification. This contentious issue resulted in Thailand cancelling a Mekong meeting in Chang Rai in early 1992, when the other participant states proposed rules that would require prior agreement on development (as had been the case under the protocols of the IMC).

In addition, issues over which countries would be involved in the meetings became contentious. For example, Thai delegates were interested in the inclusion of their Chinese and Myanmar counterparts in negotiations. This was opposed by Viet Nam, which wanted a constitution for Mekong River management to be agreed upon by the four downstream countries before moving to management discussions with Myanmar and China, the two countries in the upper reaches of the Mekong River Basin.

The role of the incumbent in the Secretariat office became an issue, as the Thai delegation believed the incumbent was biased in favour of the LMRBS (Browder, 1998). The Secretariat favoured a form of increased cooperation among the four states, which would involve limiting each country's sovereignty over their respective portions of the Mekong. The Secretariat was excluded from the negotiations and reactivation of the *Mekong Committee* came to a standstill.

The United Nations Development Programme (UNDP) was heavily invested in a Southeast Asia regional management project and was committed to its success. To save the stalled negotiations, the UNDP provided neutral assistance in facilitating a solution to the impasse among the parties by proposing an informal consultation, which took place in Hong Kong in October 1992 (Radosevich, 2009). The success of that meeting led to an historic follow up meeting in Kuala Lumpur later that mid-December. At this meeting, the four parties drafted the key points that formed the basis for a future framework for Mekong cooperation, which was officially expressed in a Communiqué and Guidelines after a meeting of the Mekong Working Group (MWG)-I in Hanoi in February 1993. The UNDP agreed to provide technical and financial assistance in formulating a new agreement, and a noted international water law expert was selected by the four countries as the Senior Advisor for negotiating and drafting the document to be approved by the four participating LMRBS.

This ‘mandate’ of the MWG served to guide the preparation of the draft *Mekong Agreement* among the parties, along with the various subsequent papers and discussions. The Guidelines contained many important provisions of common interest and mutual acceptance to the parties. Recognizing that ‘certain elements of cooperation already exist’ that may need redefining, six elements for the future framework of coordination were set out: (1) a set of principles for the sustainable utilization of water resources of the Mekong River system; (2) an institutional structure and mechanism for coordination; (3) a definition of the functions and responsibilities of the structure and mechanism; (4) the legal basis for the governance and financial operation of the structure and mechanism; (5) future memberships of the structure; and (6) management of the structure (Radosevich, 2009).

In October 1992, the LMRBS decided against including China and Myanmar in the negotiations.

However, the four lower riparians did agree to negotiate a new framework of cooperation that would be conducive to eventual Chinese and Myanmar (Burmese) participation (Browder, 1998).

The negotiation and drafting of the new agreement took nearly two years. There were moments when it was unclear whether an agreement would be realized. However, each participant country recognized that the best alternative to a negotiated agreement was far less desirable than reaching a formal agreement. This scenario likely encouraged the four countries to make the necessary concessions in order to reach mutual consensus for a cooperative framework on the Mekong.

[a]Absentee Riparian Countries and Organizations

China and Myanmar, whose territories are included in the Upper Mekong Basin, are not parties to the *Mekong Agreement*. In 1996, as provided for in the *Mekong Agreement* and explained below, China and Myanmar became official ‘Dialogue Partners.’ Accordingly, they may send representatives to a

special one-day annual fall meeting of the MRC Joint Committee (JC). Should China and Myanmar become parties to the *1995 Agreement* - which many believe is necessary for the *1995 Agreement* to fully realize its purpose and set goals (Wolf & Newton, 2007; Backer 2007) - they have the potential to do so. The *Mekong Agreement* (art. 39) provides for the addition of new parties: '[a]ny other riparian State, accepting the rights and obligations under this Agreement, may become a party with the consent of the parties.'

In addition to Member States and Dialogue Partners, some international organizations have the right to attend and participate in JC and Council meetings. The Asian Development Bank, the Association of Southeast Asian Nations, the International Union for Conservation of Nature, the UNDP, the United Nations Economic and Social Commission for Asia and the Pacific, the World Bank and the World Wildlife Fund all possess observer status. Donors have the opportunity of dialoguing with the MRC through the Donor Consultative Group (DCG), established by the MRC to facilitate donor interactions and coordination.

[a]The Negotiation Process

The negotiations that led to the *Mekong Agreement* were guided by the principles of customary international water law and the rights and needs of each of the four riparian countries. The four countries established a Mekong Working Group (MWG) of five representatives from each country (including at least one from each country's respective Ministry of Foreign Affairs). The MWG would hold five 'formal' meetings ('flags, neckties, seating arrangements and minutes kept') and two 'informal' ('no flags, no ties and no minutes') technical drafting group meetings that would prove crucial to the success of the process (Radosevich, 2009).

The MWGs needed to negotiate a new international framework that would protect the fundamental water resource interests of each Member State. This meant that no party should benefit at the expense of another, meaning that all parties ‘win’ or at least do not ‘lose’ by cooperating.

[a]Main Issues that Arose in the Negotiations

[b]Compensation

The first major issue that arose in the negotiations was with respect to art. 8 in the draft agreement and compensation for damages. The Thai delegation was primarily concerned with the use of the term ‘compensation’ because such a term would trigger the need for parliamentary approval and ratification. Instead, the Thai delegation suggested that the document should use the term ‘responsibility for damages.’ The other three country delegations were opposed to Thailand’s proposal, but were persuaded that the phrase would in essence mean the same thing. Thus, the terminology suggested by Thailand was adopted.

[b]Dispute Resolution

The second major issue in the negotiations focused on the *Mekong Agreement*’s dispute resolution mechanisms. Lao PDR officials proposed that the disputes that remained unresolved through either the MRC or by the respective governments should be referred to the International Court of Justice (ICJ) or to binding arbitration. The Thai government was opposed to this proposal, viewing it as a restriction on their bargaining power vis-à-vis Thai developmental goals. The matter was resolved in art. 35, where without naming the ICJ, if the parties could not resolve the matter through their governments, they would proceed according to the principles of international law, i.e., through the United Nations system and the ICJ.

[b]Minimum Flows

Article 6 of the *Mekong Agreement* would cover several issues related to water levels throughout the year. Provision A of art. 6 mandates a minimum level of natural dry season flow. The Cambodian delegation was able to ensure agreement on an acceptable natural reverse wet season flow (in Provision B) that would be sufficient to sustain Tonle Sap through the dry season until the flow would reverse to the Mekong River. The parties were unable to come to an agreement on a formula to set the minimum flow during the dry season, so the issue was tabled to be determined by the MRC at a later date.

The minimum dry and wet seasons flows in the agreement would address the Viet Nameese concerns about saltwater intrusion, the Laotian concerns about navigability in the summer and the Cambodian concerns about maintain water levels in Tonle Sap. The Thai government was willing to make concessions in order to foster greater regional cooperation and goodwill. Thai representatives also realized that the forthcoming Chinese dams would increase the amount of flow in the dry season, thus making it a more palatable concession for Thailand.

[b]Power to Review

The most difficult issue to resolve in the negotiations related to the power to review proposed water uses (art. 5). Laos PDR, Cambodia and Viet Nam were in favor of a system wherein mainstream projects and diversions of water from the Mekong would be subject to prior agreement by the MRC, as had been the case during the IMC era. However, Thailand was adamantly opposed to other states having veto power over its proposed projects in the Mekong, and accordingly made this issue the primary concern of their delegation. The Thai delegation favoured instead the approach incorporated in

the *International Law Commission (ILC) Draft Articles on the Watercourses Convention*, which required states to notify and consult with states that potentially could be harmed by a proposed project, and if necessary, to negotiate an agreement with the party/parties. The Thai delegation was further interested in the *ILC Rules* because it would be more palatable for the Chinese to join the MRC, which the Thai delegation keenly favoured.

In order to make progress on this issue, the Vietnamese delegation proposed a conceptual framework matrix for art. 5. Cambodia was successful in getting the Tonle Sap classified as a tributary, which did not concern the Upper Riparian states considering its downstream position. Viet Nam knew that it was of crucial concern, but its delegation was preoccupied with what it perceived to be more immediate projects in Thailand.

The intent of prior consultation and agreement were not difficult to reach consensus on. However, the intent of notification was disputed between Thailand, who wanted the provision to include ‘without any discussion necessary,’ and Viet Nam, which found this troubling. In the absence of consensus, this section of the definition was eventually left out of the *Mekong Agreement*.

Throughout negotiations, Thailand wanted to forgo the requirement of prior agreement in dry season flows, as opposed to the other three states, who were in favor of requiring such an agreement. After a number of negotiating sessions on this issue, the sides were nearing agreement until a Thai newspaper article mentioned a Thai Cabinet plan to draw water out of the Mekong for use in Thailand without the approval of the other states. This caused a stir in Viet Nam, who emboldened their demands, and caused a slight impasse in negotiations. Nonetheless, Laotian, Cambodian and Viet Nameese delegations were subsequently able to come to a consensus on a proposal that satisfied the Thai

delegation. The agreement satisfied the Thai delegation because it would not threaten proposed Thai projects, and it limited the scenarios where prior agreement was required before a project could proceed. For the LMRBS, it ensured that projects which threatened their interests at the most vulnerable time (i.e., during the dry season) needed prior agreement.⁷

[a]Key Factors Leading to Successful Negotiations

The historical relationships among the LMRBS were a major factor in the successful outcome of the negotiations that produced the *Mekong Agreement*. The participant countries had nearly 37 years of interaction, which evolved into what was recognized as the ‘Spirit of Mekong Cooperation.’ (Radosevich, 2009). This experience helped to create a strong desire and sense of commitment among the countries to continue their joint efforts to reach an agreement. The LMRBS also had the benefit of shared data and information, collected over the course of the life of the MC and IMC.

The *ILC Draft Articles*, the *Helsinki Rules*, various other international water treaties, and customary international law provided a solid legal foundation that was influential throughout the course of the negotiations. This platform became a fall back position when the parties could not come to an agreement on particular issues. Reliance on these international legal norms was aided by the fact that some members of the MWG had received training on international law through their participation in a Legal Studies Group in the Mekong Secretariat. Other key members of the MWG were active members of the ILC’s Working Group for the formulation of the *Watercourses Convention* and the Senior Advisor for the negotiations was a recognized international water law expert.

Several negotiation approaches were utilized to help develop consensus in the negotiations. For example, in order to disengage the participants from their beliefs and perceptions, a ‘one-nation basin’ scenario was adopted as a hypothetical theoretical framework. Under this scenario, the LMRB was

assumed to be one nation and discussions were to be conducted within a shared nation framework.

Each participant alternated roles with other representatives in the discussions to create greater empathy at the negotiating table in an effort to work toward an optimum and equitable solution to the utilization and protection of the water and related resources. National boundaries were subsequently overlain in a later scenario to adjust interests. This process helped the participants to better understand each other's interests and concerns (Radosevich, 2009).

Another useful negotiating approach utilized by the parties, to their great advantage, was to discuss and evaluate various options about the kind of agreement and institution that they believed would be most suitable, and then proceed to the second stage of discussions about the options relating to the range of objectives, principles, specific issues and processes that would be included in the agreement, and ultimately implemented by the established organization. The shared objective in these negotiations was to seek the highest common mutually acceptable option.

[a]Key Elements of the Mekong Agreement⁸

[b] Dispute Resolution

The *Mekong Agreement* provides four steps for resolving disputes. The MRC has responsibility for addressing any disagreement first, pursuant to arts 18.C and 24.F. If the MRC cannot resolve the dispute at this stage, the issue is to be referred to the respective governments, to be resolved diplomatically (art. 35). If this also proves unsatisfactory, countries may refer the issue to a third party for mediation, such as an international organization, an international professional group or an individual. Finally, countries may refer to international law principles (art. 35).

[b] Financing

The MRC's budget consists of contributions from Member States on an equal basis (art. 14), though this refers primarily to the administrative costs for running the MRC. The MRC relies heavily on international donors to fund its projects. Development Partners have pledged more than US\$20 million for the 2016– 2020 Strategic Planning period for the MRC (Mekong River Commission, 2015). In recognition of this essential donor involvement, art. 41 of the *Mekong Agreement* specifically acknowledges the contributions of the United Nations and the international community, and expresses the desire to continue these relationships.

[b] Data and Information Exchange

Data and information exchange among the LMRBS had been ongoing for 40 years in the lead up to the MRC. However, the *Mekong Agreement* served to cement this process. The responsibilities related to data and information sharing, exchange and harmonization were split among members of the JC and the Secretariat. The JC is to 'regularly obtain, update and exchange information and data necessary to implement this Agreement' and to 'conduct appropriate studies and assessments for the protection of the environment and maintenance of the ecological balance of the Mekong River Basin' (art. 24). The Secretariat is directed to '[m]aintain databases of information as directed' (art. 30). In this sense the *Mekong Agreement* only calls for data collection in the most general terms. There remains room for improvement, especially with regard to forecasting models (Schmeier, 2011).

[b] Flexibility

Designing a flexible agreement was seen as imperative to those involved in the negotiations. Thus, the purpose of the MRC was to establish a cooperative institutional framework that would be robust enough to make operational decisions under a variety of future conditions. Conscious of the need to

maintain ecological integrity as well as to ensure territorial sovereignty, the provisions of the Mekong Agreement that concern the use of Mekong River waters offer considerable flexibility for varying objectives, while maintaining the protection for the fundamental interests of the LMRBS through its procedural requirements (Schmeier, 2011). For example, art. 5 of the *Mekong Agreement*, which refers to ‘reasonable and equitable utilization’ of the Mekong, prescribes a dynamic operational decision-making process rather than a static legal agreement. Countries are to provide notification⁹ or prior consultation¹⁰ to the JC of an intended use for the Mekong and its tributaries depending on the season/use, or to come to a prior agreement if such a proposed use is within the most sensitive scenarios. This kind of prior consultation enables all parties to assess and mitigate, or to minimize the harmful effects of each other’s actions. Though this mechanism places some constraints on individual country behavior, it is a useful compromise that reflects both sovereign interests and hydrological perspectives.

Of particular importance is the recognition by the parties, throughout the *Mekong Agreement*, that the use of waters governed by the *Mekong Agreement* excludes natural domestic and minor uses of water that do not have a significant impact upon the mainstream flows. This eliminates the doubts and anxieties about unreasonable restrictions of the *Mekong Agreement* upon riparian rights and normal uses by domestic inhabitants.

The approach of art. 5 of the *Mekong Agreement* is based upon the universally accepted reasonable and equitable utilization doctrine and the need to maintain certain flows on the mainstream as provided in art. 6. The purpose of this legal framework is to provide a realistic means for cooperation by all riparians who are provided with the practical opportunity to maximize options for trade-offs, exchanges or releases from other sources (i.e., lower tributaries from the same riparian country) to

protect the flow levels, while optimizing the sharing and use of waters during the two seasonal variations. This also takes inter-basin impacts on the basin of origin into consideration. In theory, it provides certainty, security and flexibility to all riparians under what may be termed a ‘super-fairness’ doctrine. Article 37 provides that the *Mekong Agreement* may be ‘amended, modified, superseded or terminated’ by mutual agreement of all parties, thereby contemplating and allowing for flexibility in the *Mekong Agreement* to address future needs.

[a]Implementation and Monitoring

[b]Structure of the MRC

There are three organs of the MRC: the Council, the JC, and the Secretariat. The Council meets once annually and is responsible for overall MRC governance. It consists of one member from the ministerial or cabinet level from each Member State. The JC is responsible for the implementation of Council decisions and policies, and it functions as a management board. The JC is comprised of one person appointed by each country who is recruited from a rank that is no less than a Head of Department level. The Secretariat provides technical, logistic and administrative assistance to the other MRC organs, and is directed by a Chief Executive Officer (CEO), appointed by the Council. The MRC CEO is responsible for day-to-day MRC operations.

Other functional entities supplement the work of the three main MRC bodies but are not structures of the MRC. The National Mekong Committees (NMCs) coordinate activities at national levels, and link the MRC Secretariat to national ministries and agencies. As mentioned, China and Myanmar are Dialogue Partners to the MRC. China currently provides water level data during flood season from stations located within its boundaries on the Upper Mekong. The DCG provides funding for MRC

activities and programmes within the Mekong. It meets with the MRC following Council meetings to discuss strategies and donor harmonization.

[b]Monitoring Mechanisms

As the main operational organ of the MRC, the JC is responsible for the implementation of the *Mekong Agreement* and the Basin Development Plan (BDP), including periodic ongoing assessments of their successes. Article 26 of the *Mekong Agreement* requires the JC to prepare rules for, inter alia, improving monitoring mechanisms for intra-basin use and diversions from the mainstream. In 2003, MRC countries agreed to a new Procedure for Water Use Monitoring, which is intended to provide an adaptive and comprehensive framework for the implementation of water use and diversion monitoring.¹¹ It defines the roles of the JC, the Secretariat, and the NMCs within this new Monitoring System. A set of guidelines on Implementation of the Procedures for Water Use Monitoring, developed by a technical committee, provides further input into the operation of the Monitoring System. These procedures are supplemented by Guidelines that form the internal rules of the MRC to implement Article 26. However, some critics view the precise legal statuses of these procedures and guidelines to be unclear, which has weakened their influence on state behaviour (Hirsch & Jensen, 2006).

[a]Assessment of the Mekong Agreement

[b]Implementation

Three months after the draft *Mekong Agreement* had been finalized, all four countries had ratified. However, in contrast to the relatively rapid rate at which the *Mekong Agreement* was ratified, the MRC has attracted criticism from some parties because implementation of MRC activities began slowly. The BDP, the main vehicle through which activities in the Mekong are planned and carried out in the

Mekong Agreement, did not commence operation until 2001.¹² Many critics also see the MRC as reactive rather than proactive in its approach, particularly with respect to economic development. As a result, there is a perception that the work of the MRC has not necessarily resulted in sufficient tangible benefits for the Member States.

[b] Monitoring

The MRC performs a fair amount of environmental monitoring on the Mekong. The MRC routinely monitors water quality and also publishes annual flood reports that provide hydrological statistics for the flood seasons as well as analysis and recommendations for disaster management. The MRC monitors the successes of the BDP and Strategic Plan through regular reports. In addition to the more general Annual Reports, the MRC publishes yearly Work Programmes, which are used for both monitoring and planning purposes (Mekong River Commission, 2015). Monitoring of project progress is done through regular meetings that are held by the JC, as well as through consultations with stakeholders, technical experts and donors.

The data and information sharing system is widely considered to be the most effective output of the MRC and the expansion of the system into the Chinese portions of the Mekong will further build upon this success.

[b]Stakeholder Involvement

While the MRC processes are open to external participation, MRC engagement with NGOs and other stakeholders could be considerably improved. Several factors have impeded effective stakeholder involvement in MRC processes. Out of respect for national sovereignty, the NMCs operate autonomously from the MRC. Since each member country allows varying degrees of domestic political

freedom, the MRC is powerless to ensure sufficient stakeholder involvement in its activities to satisfy the aspirations of some of its NGO critics.

The nature of external stakeholder involvement within MRC processes is also unclear. MRC documentation is predominately in English, which has meant that much of this reporting output is inaccessible to local stakeholders. This has resulted in significant pressure from a number of NGOs and donor organizations to improve the reporting system. In response, the MRC has enacted formal mechanisms of participation within its governance practices and decision-making institutions (Sneddon and Fox, 2006). The MRC has improved its accessibility to the public through regional Stakeholder Consultation forums on Hydropower and the BDP.

Though China and Myanmar remain Dialogue Partners rather than MRC members, they have increased their level of technical cooperation with the MRC, and have continued to attend all major MRC regional meetings. China continues to provide flood data to the MRC during the rainy seasons, and is a full participant in the MRC Strategic Environmental Assessment of the Mainstream Dams. As China continues to alter the flow of the Mekong through its development of new hydroelectric dams, it is crucial to work in cooperation with the MRC for the overall success of the region.

[b]Sustainability of Financing

The MRC's reliance on external donors weakens its capacities in several ways, including slowed implementation of the *Mekong Agreement*. For example, after the MRC was established in 1995, it identified the creation of the BDP a top priority. However, the MRC was unable to obtain sufficient funding for initiating the BDP from outside donors until 2001. Furthermore, most external partners donate funds for specific projects, rather than ongoing operational funding. This has created the

impression that the MRC is merely a vehicle for managing external donor grants rather than a multilateral political water governance organization.

At times donors have held views that conflict with those of the MRC regarding the future role of the MRC in the Mekong. Conflict in particular has arisen over the primary objectives of the MRC. Donors have been primarily focused on the sustainable management of the MRB, which has conflicted with Member State priorities to develop more hydropower and a de-emphasis on the negative ecological effects that such power generation may create. The concern is that the strong donor presence in the MRC's work may encourage a weaker commitment from riparian countries.

[a]Summary

Although the MRC appears to have made progress with respect to many objectives, it has nevertheless been criticized by both Member States and the international community for not being sufficiently effective. Member States find the work of the MRC to be lacking in tangible results, particularly with respect to economic development and the BDP. Since the formation of the MRC, the BDP has become the centrepiece to the MRC's work and is seen by both the Mekong governments and international donors as a 'primary rationale for the institutional existence of the MRC' (Sneddon and Fox, 2006). However, many critics deem progress on the BDP to be very slow, and that the BDP is not aligned well enough with the actual needs and aspirations of the Member States. The MRC itself noted that delays in the BDP's development might have contributed to perceptions that the MRC procedures are restraining rather than facilitating mechanisms. In particular, the BDP has experienced difficulty in anticipating and guiding the discussion on mainstream dams, an area that has become a focal point of the MRC efforts at present.

One source of the difficulty in the operation of the MRC is its institutional structure, which often pits the interests of donors in the Secretariat against those of the Member States in the Council. Generally speaking, the Secretariat has served as a liaising body between the MRC and donor countries, and in the minds of critics, too often the work of the Secretariat has reflected the policies of donor organizations, whereas the work of the JC and Council has represented the interests of the member countries. When the donors approach the Secretariat with their project assistance plans (that the JC and Council might not agree with), the Secretariat is put into the position wherein it must convince the JC and the Council that donor priorities for project funding will not trump Member State economic development goals, particularly those involving the development of more hydroelectric dams. International donors, while not always possessing a unified perspective, have not necessarily been opposed to the further construction of dams. However, they have been adamant that these dams be built in conformance with recommendations of the World Commission on Dams. The different viewpoints on priorities in development may lead to high profile disagreements. The controversy surrounding the Nam Theun 2 Dam project has prominently illustrated this internal conflict (Hensengerth, 2009).

One of the major successes of the MRC has been the development of the Water Utilization Programme (WUP), which gives effect to the water allocation framework of the original agreement. Since 2000, this Global Environment Facility (GEF)-funded program has been a key contributor to the success of the organization. Project activities of this program have included basin modeling and knowledge base programs, environmental and transboundary analyses, rules for water utilization and management, and institutional strengthening (Mekong River Commission, 2015). Some of the accomplishments from this programming include: (1) the ability to assess impacts of proposed developments, to monitor, tailor and minimize negative impacts and ensure more consistent dry season flow (in dam

development); (2) good working relationships developed through the experiential learning-based drafting processes of several of the main water utilization and technical guidelines (i.e., data and information sharing); and (3) spurring of institutional growth of various multilateral working groups that are needed to implement the procedures developed under the plan.

As the WUP illustrates, the MRC's major strength has been its abilities to generate shared data and information regarding the Mekong. This includes information about water quality and flow monitoring as well as a flood forecasting system, development scenarios, technical directions for scenario analysis, a comprehensive hydropower database, and other technical databases (Mekong River Commission, 2015). The improvement in water monitoring has increased environmental awareness within agencies and local authorities in the Region. For example, the Fisheries Programme of the MRC has conducted extensive research that is providing valuable information that needs to be considered in the planning of future developments. This shared information flowing from the work of the MRC is the essential basis to build science-based fishery management plans needed for effective management of this resource on which so many people in the basin are dependent. The approach has been to coordinate the programs of each Member State to help them implement sustainable fisheries management and development at the local, national and regional levels (Mekong River Commission, 2015).

[a]Conclusions

In the 37 years prior to the *Mekong Agreement*, the LMRBS were able to cooperate to varying degrees on the management of the Mekong. This history served to facilitate negotiations of the MRC. In addition to this 'Mekong Spirit' (of cooperation), the negotiations leading to the *Mekong Agreement* were assisted by: (1) a highly experienced UNDP consultant that facilitated negotiations and helped the parties to find common ground; (2) delegations that had a strong grasp of international law which

served as an important starting point for negotiations; and (3) the best alternative to a negotiated agreement ('BATNA') for each country was less palatable than what could be gained through agreement. As a result of these factors, the countries were willing to make the necessary concessions to accommodate each delegation's primary interests and eventually reach agreement. Considering the lack of other multilateral bodies operating in the Region, and the breadth and importance of the issues in discussion, the four countries were able to reach consensus in a remarkably short amount of time. While the *Mekong Agreement* was critical to provide a legal and institutional framework to facilitate development in the Basin, it is the actual programs developed through this framework that will be the real determinant of the success of the *Mekong Agreement*. Some of the major successes of the MRC have been in the areas of fisheries, navigation, flood management, and especially the Water Utilization Programme. Major conflicts have occasionally presented themselves between the respective national governments, who have been pursuing large-scale hydroelectric development, and the donors, who appear to be more concerned with the ecological issues arising from these proposed projects. There has also been a relative dearth of public participation in the functioning of the MRC, and this absence of consultation has become an area of particular focus for improvement by the MRC. This issue is especially concerning when considering the segments of society that have the most to lose from large scale hydroelectric development are often the ones with no say in these matters.

One of the biggest remaining concerns for the MRC is that China and Myanmar, the two riparian countries in the upper reaches of the Mekong, are not members of the MRC. In spite of an increasing amount of information being shared between the MRC and these two official Dialogue Partners, more cooperation is needed to manage the Mekong more effectively. With facilitative support from regional organizations, the LMRBS entered into a cooperative dialogue with the two upstream riparians, China

and Myanmar – The Great Mekong Subregion Economic Cooperation Program Strategic Framework (Leb, 2013).

As China is exhibiting a growing interest in engaging as a responsible citizen in the international community, it is reasonable to predict China will increase its participation in the MRC. However, China will need to be persuaded that the MRC will be sensitive to the best interests of all the riparian countries (including China) in the way that the MRC facilitates the management and development of the Mekong (Lee, 2015).

A major obstacle to embracing this more inclusive view of the role of China and Myanmar in the work of the MRC is the objections being voiced by the donor countries that have supported the MRC in the early stages of its life. Over time the MRC may need to become more independent of the influences from outside the region in order to do a better job performing its optimal future role inside the Region.

There is no doubt that the LMRBS could all benefit from increased cooperation with China, especially in relation to the potential changes in climate and the increased dry season flows that the Chinese dams may provide for their downstream neighbours.¹³ The institutional memory of how the four original members of the MRC forged the *Mekong Agreement* might provide some key lessons about how to proceed with an increased role for China and/or Myanmar in the work, and ultimately the membership and governance of the MRC.

¹ This chapter draws on hitherto unpublished research conducted by the Global Transboundary International Waters Initiative at the University of British Columbia in Vancouver, Canada pursuant to a grant from the Global Environment Facility (GEF). The assistance of Maaria Curlier and Theresa Etmanski in helping to produce the case study upon which this chapter is based is gratefully acknowledged. This case study was peer reviewed by well-known Mekong experts George Radosevich, Olivier Cogels, John Dore, John Metzger and Pech Sokhem whose advice and assistance is also gratefully acknowledged.

² The terms ‘international drainage basin’, ‘international river’ and ‘international watercourse’ are used synonymously throughout this chapter. Not all academic scholars necessarily agree that the terms may be so used interchangeably.

³ The Helsinki Rules (Campioni Consolidation) and the Commentary to the Helsinki Rules on the Uses of the Waters of International Rivers, ILA Report of the 52nd Conference, Helsinki 1966, at 484, 484-505 (1966, 1987): Arts. J-XI, 4. Coming from the non-governmental International Law Association (ILA), the Helsinki Rules, a predecessor to the 1997 UN Watercourses Convention, are not intergovernmentally authoritative, technically speaking. However, they very much reflect many years of research by a representative body of renowned international law experts, and therefore come easily within the terms of Article 38(i)(d) of the Statute of the International Court of Justice.

⁴ These rules are generally utilized by international organizations. For example, the World Bank has a number of documents reflecting these principles: Bank Operational Policies (OP 7.50): Projects on International Waterways; Bank Procedures (BP 7.50): Projects on International Waterways; Bank Good Practices (GP 7.50): Projects on International Waterways.

⁵ Viet Nam’s stance in regards to dams has since changed. At the time of writing, Viet Nam was in favor of imposing a ten-year moratorium on mainstream dams.

⁶ The Tonle Sap Lake and River is a tributary to the Mekong mainstream, and during the wet season, high water flows actually reverse the direction of the river to fill the Lake where it is stored until the dry season, when the river flow is again reversed. In this process, the Lake expands in area by a multiple of five, from 2,000 sq. km to 10,000 sq. km., and temporarily stores 15-20% of the Mekong’s annual flow of 475 billion cubic metres.

⁷ Inter-basin use involves the transfer of water out of the Mekong River Basin into another river basin, while intra-basin implies that the water is used within the Mekong River Basin.

⁸ See *International Waters: Review of Legal and Institutional Frameworks*, UNDP-GEF INTERNATIONAL WATERS PROJECT, (Apr. 5, 2011), available at <http://iwlearn.net/publications/misc/governing-marine-protected-areas-getting-the-balance-right-main-report-lower-resolution-2mb>.

⁹ Ch II Definitions of Terms, defines Notification as: ‘Timely providing information by a riparian to the Joint Committee on its proposed use of water according to the format, content and procedures set forth in the Rules for Water Utilization and Inter-Basin Diversions under Article 26.’

¹⁰ Ch II *Definitions of Terms*, defines Prior Consultation as: ‘timely notification plus additional data and information to the Joint Committee...that would allow the other member riparians to discuss and evaluate the impacts of the proposed use...Prior consultation is neither a right to veto...nor the unilateral right to use water by any riparian without taking into account the other riparians’ rights.’

¹¹ Ch II *Procedures for Water Use Monitoring*.

¹² The Final Report of the BDP Phase 1 project noted that decision-making processes turned out to be ‘lengthier than originally anticipated’, which was a factor contributing to the plan’s extension.

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