

Towards Better Cooperation: Legal Analysis on Coping with Climate Change in the Mekong River Basin

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Abstract: Mekong River is facing the severe Challenges of Climate Change, but the legal regime of the Mekong River has some deficiencies in terms of cooperation scope, substantive rules and procedural rules to adapt to Climate Change, such as lacking a basin-wide, and legally binding agreement, lacking enough Climate Change adaptative clauses in the agreement and basin-wide dispute resolution mechanism. Thus, this paper claims that riparian states should incorporate all procedure rules into the 1995 Mekong River, revise substantive rules in the 1995 Mekong River, negotiate a MOU on water allocation provisions between all riparian states, and enhance cooperation under LMC.

Keywords: Climate Change, Adaptation, Mekong River Basin, Mekong River Commission, Upstream States.

1. Introduction

Climate Change is regarded as one of the most existential challenges we face nowadays. According to the Sixth Assessment Report issued by Intergovernmental Panel on Climate Change, Global Greenhouse Gas emissions in 2030 committed under Paris Agreement would likely make warming exceed 1.5°C during the 21st century, and would be harder to make the warming below 2°C if more proactive actions are not taken.[1] Thus, we could foresee that Climate Change in the near future will greatly affect human survival. More extreme weather and sea level rise could be detected, and natural disasters will be more frequent. Mekong River Basin is expected to be increasingly vulnerable to Climate Change and the passive consequence induced by Climate Change.[2] At present, there are two ways to cope with Climate Change, namely mitigation and adaptation. Mitigation mainly refers to limiting Greenhouse Gas emissions under the mechanism of the Paris Agreement in which every contracting party commits its nationally determined contribution, to mitigate the impact of Climate Change. All riparian states of the Mekong River Basin are contracting parties of the Paris Agreement. Naturally, they all made commitments under Paris Agreement. However, the aim of adaptation is to enhance resilience to the consequence of Climate Change so that natural disasters and extreme weather could be better monitored and prevented. Since mitigation measures are implemented mainly at the national level, this paper does not purport to explore how to realize the emission reduction target, but rather how Mekong riparian countries can cooperate better to adapt to Climate Change and mitigate its adverse effects.

Although Climate Change and its consequence are not very certain in the future, the Mekong River Commission (MRC) is sparing no efforts to adapt to Climate Change. It launched the Climate Change and Adaptation Initiative (CCAI) in 2007 which aims to improve understanding of the status and impacts of climate change and support to implement the adaptation measures, in 2011 led to the development of the Mekong Climate Change Adaptation Strategy and Action Plan (MASAP).[3] The MASAP, positioned as an action plan, lists 7 basin-wide strategic priorities, which contribute to

adapting to Climate Change.[4] Although some substantive rules in the legally binding 1995 Mekong River Treaty and 5 procedure rules beyond the treaty do not explicitly refer to Climate Change, nor do they provide the institution with mechanisms to deal with such change. However, they indirectly provide a starting point for adaptive management.[5] But it is far from enough. As we all know, China and Myanmar, as the upstream states, did not accede to the 1995 Mekong River Treaty and naturally were not the member states of MRC. Therefore, there is a question: without China and Myanmar as member states, how could MRC work effectively to cope with Climate Change in the Mekong River Basin?

There are a few papers directly relevant to the Climate Change problem in the Mekong River Basin in the field of international law. Susanne Schmeier points out several key points regarding the contribution of the MRC to increasing resilience to environmental and human-caused change in the Mekong River Basin, including provisions in the 1995 Mekong Treaty and Procedures that provide clarifications on water resources use and management and a starting point for adaptive management.[6] Besides, this paper mentions that mechanisms beyond law are equally important.[7] Furthermore, most papers concentrate on a general field or other particular river basins. There is a consensus that we need flexibility in freshwater treaty regimes to achieve adaptive management.[8] Mechanisms that could ensure flexibility in the agreement include flexible allocation, formalized communication, and broadening the scope of cooperation.[9] In order to avoid breaching the principle of the equitable and reasonable use of water, there even is an obligation to adapt transboundary water agreements to climate change in an upstream-downstream context with only upstream states joining in the water allocation agreement[10], but in practice, issues of sovereignty, water stress, power asymmetry, optimistic water scenarios and the nature of the treaties as “package deals” impede riparians from adopting these flexible provisions in a treaty,[11] and others provide regional example or experience to cope with climate change,[12] such as Guadiana basin, the legal framework in Guadiana River contains flexible provisions including the requirement for periodic update of the historical mean precipitation values,

the requirement to update the flow regime of the rivers, and cancellation of minimum flow requirements under special circumstances. Besides, in the context of limited cooperation, explore possible multilateral and bilateral water regulatory mechanisms regarding India and China to adapt to Climate Change.[13] Although these papers give us an insight into the possible solutions to tackle with climate change problem on the whole or in regional practice, they do not specifically touch upon the abovementioned question. Thus, exploring the answer to this question could identify the status quo of the basin-wide regulatory mechanism of MRC and perfect this mechanism.

2. Adaptive Legal Framework of MRC to Cope with Climate Change

The adaptive legal framework of MRC is comprehensive, as mentioned above, the 1995 Agreement and 5 procedures do not contain literally adaptive rules, but the core of these rules embodies the adaptive spirits. Provisions in the Agreement and procedures provide the starting point to adapt the Climate Change. And soft initiatives and action strategies under MRC in some aspects guide states to implement adaptive measures in the national dimension and coordinate in the transboundary dimension.

2.1. Adaptation in the 1995 Mekong Treaty and Procedure Rules

The adaptability of a treaty is mainly reflected in the fact that it is flexible enough to deal with the uncertainty of the consequences of climate change. It means that although there exist variabilities in objective conditions induced by Climate Change, this treaty can still apply to the new situation by flexible principles or periodical amendment. Thus, the factors that affect the flexibility of treaties will be dug into.

First, the Broader the cooperative scope, the more flexible the treaty. Water quantity, water quality, navigation, fisheries, surface water, and aquifers are highly variable, so the single manageable issue in treaties is far from enough to cope with Climate Change and the conflict resulting from Climate Change.[14] In transboundary basins, cooperation enables more effective adaptability to variable conditions.[15] The cooperative scope in the 1995 Mekong Agreement is relatively broad compared to the Danube River Protection Convention which is only limited to water quality problems.[16] The fields of cooperation contain sustainable development, utilization, management, and conservation of water and related resources in the Mekong River Basin, which not only involves water quality problems but also water quantity, navigation and other issues.[17] Since the provision in the 1995 Mekong River does not explicitly mention groundwater, there is a doubt that this agreement applies to groundwater. But considering the interconnectivity between surface water and underground water is encompassed in the term “basin”,[18] and the necessity to incorporate groundwater into the agreement to cope with Climate Change, it is of great importance to interpret relevant provisions discreetly. Furthermore, although the 1995 Mekong Agreement mentions the terms “Mekong River Basin”, “all riparian States”, “basin-wide” and “at the basin level”, [19] they may not truly refer to a basin-wide approach, the contracting parties of this agreement are all geographically disadvantaged states-downstream states.[20] While China and Myanmar as upstream states are not the parties to this

agreement, they are only dialogue partners of MRC. Therefore, these terms are possibly intended to refer to project management and implementation. In this situation, it is hard to achieve basin-wide management, and this is the crux of the Mekong River Basin to fight against Climate Change.

Climate Change is expected to affect water flows, cause floods or droughts, and salinization in Mekong Delta. Thus, in terms of the substantive rules of the 1995 Mekong Agreement, it is necessary to examine the flexibility of the principles regarding water utilization and water quantity. Considering the relatively abundant amount of water in the Mekong River, the Agreement does not have a water-sharing clause. But as the impacts of Climate Change intensify and cause more frequent droughts and floods, there is a need to consider the inclusion of water-sharing provisions in the agreement or conclude a new water allocation agreement in a percentage way to allocate water flows rather than fixed water flows. Likewise, it is impossible to achieve the goal without the involvement of upstreaming states. This present agreement only provides reasonable and equitable use of water under the prerequisite of prior notification and consultation,[21] while the factors and considerations to decide how could be regarded as reasonable and equitable are not mentioned in this Agreement. This agreement further requires contracting parties to maintain water flows in the mainstream with different criteria in dry, wet and flood seasons.[22] Besides, floods resulting from Climate Change may flood contaminated areas, when the flood waters recede, the river is also polluted. Thankfully, the 1995 Mekong Agreement has provided an obligation to prevent and cease harmful effects.[23]

In order to promptly conclude the 1995 Mekong Agreement, the contracting parties adopt the strategy in which they captured what they could agree upon in the agreement and then concluded provisions concerning other issues out of the agreement.[24] Thus, the 1995 Mekong Agreement does not contain procedure rules, the procedure rules all exist without legal binding out of the agreement.[25] The exchange of data and information is beneficial for preventing floods and droughts induced by Climate Change. There are a lot of monitoring stations in the Mekong River to warn and forecast floods and droughts, inter alia, a monitoring station is in Jinghong, Yunnan Province.[26] The downstream states in the Mekong River which lack a basin-wide cooperative mechanism, with the help of data provided by China, have a certain adaptive capacity to cope with floods and droughts.

2.2. CCAI and MASAP

In order to respond to the call of Member States to cooperate to cope with Climate Change in Lower Mekong Basin, the MRC established the CCAI in 2009.[27] This initiative aims to understand and reduce the impacts of Climate Change and build the capacity of Member States to adapt to the Consequence of Climate Change.[28] MASAP is a part of CCAI, whose purposes are to build awareness of Climate Change and its consequence and support the resilience of Member States in the Lower Mekong Basin. It identifies and determines 7 priority actions to cope with Climate Change from the perspective of cooperation, adaptivity and gender.[29] The natures of these two documents are political commitments, compared to the 1995 Mekong Agreement, they even lack concrete implementing steps and the measures and actions in them have a soft character. But they are not meaningless to some degree, they

may be seen as an interpretation and implementation of the 1995 Mekong Agreement.[30] Meanwhile, the CCAI and MASAP are guidelines to adapt to Climate Change in the Lower Mekong River in the context of agreement without explicit clauses.

From the above discussion, we could know that the 1995 Mekong River does not include explicit provisions about Climate Change, as well as 5 procedure rules. But they all embody some adaptation thoughts in their provisions. The CCAI and MASAP, although explicitly express how to adapt to Climate Change, are soft guidelines without legal binding. And the most important thing is that they all function in the Lower Mekong River rather than the whole basin. Of course, China and Myanmar who do not join the 1995 Mekong Agreement have their own considerations. However, as the geographically disadvantaged states, it will be difficult for Lower Mekong River States to deal with the uncertain impacts of Climate Change in lacking upstream states. Thus, returning to the previous question, without China and Myanmar, MRC may be adaptive to Climate Change in some places, but not all. The answer to the question of how to work effectively to cope with Climate Change cannot be answered without China and Myanmar.

3. Climate Change in Soft Instrument under Lancang-Mekong Cooperation

Lancang-Mekong Cooperation (LMC) is one branch of the Belt and Road Initiative (BRI), which mostly focus on economic cooperation and infrastructure construction. This means LMC is not limited to transboundary water cooperation. In this regard, Lancang-Mekong is only a geographical concept that contains the area of Lancang-Mekong River flows and the whole territory of relevant riparian states under this mechanism, and water resource is only one of the priority areas under the “5+3” cooperation framework.[31] Therefore this platform is radically distinctive from MRC which is specialized in the management of the Lower Mekong River. As BRI, a soft path was adopted by this mechanism to organize a cooperative framework and establish a dialogue platform.[32] The imminent character of the LMC is that all the instruments are Memorandums, statements or action plans. However, these soft instruments are different from simple policy statements. It is similar to the law but has no legal binding itself.[33] These soft instruments, on the one hand, can facilitate the formation of general practice and provide evidence of *opinio juris*. [34] On the other hand, they could bridge the gap caused by do not have a legally binding agreement.[35] At present, upstream states – China and Myanmar do not take part in the 1995 Mekong Agreement. Thus, there is a gap in basin-wide cooperation, so LMC may to some degree bridge the gap in the legal framework, but to what extent this soft path can work effectively to cope with Climate Change is still a problem waiting to explore.

In fact, Climate Change has always been an inseparable topic of LMC. Since this mechanism was established, the term “Climate Change” has appeared in the MOUs, action plans and joint statements several times. These soft instruments affirm more than one time that the riparian states are facing emerging challenges- uncertainties brought by climate change, and frequent occurrences of floods and droughts, thus they demand improving the capacity of water governance of nations and sub-regional institutions.[36] LMC

mechanism is more concerned with procedure requirements, so they mention and highly praise China for sharing year-round hydrological information about the Lancang River as a result of signing a Memorandum of Understanding (MOU) under the Joint Working Group on Lancang-Mekong Water Resources Cooperation on the Provision of Hydrological Information of the Lancang River throughout the year by China to the Other Five Member Countries.[37] water IWRM and Climate Change Adaptation as a cooperation field was provided in the Five-year Action Plan on Lancang-Mekong Water Resource Cooperation (2018-2022), which provides again Member States will advance IWRM, improve water governance capacity, strengthen exchanges on water resources strategies and plans, and jointly analyze the impacts of Climate Change on water resources, so as to raise adaptation capacity against Climate Change.[38] Specifically, the Five-year Plan of Action on Lancang-Mekong Cooperation provides that promoting technical cooperation and exchanges on water management, developing and improving the water quality monitoring system, and deepening Lancang-Mekong river flood and drought disaster emergency management in the Mekong River Basin.[39]

Moreover, these soft instruments do not miss the substantive rules of obligation to cooperate, since the topic and title of all these soft instruments focus on cooperation, even the mechanism is Lancang-Mekong Cooperation. The general obligation to cooperation requires exploring suitable cooperative mechanisms and cooperating upon good faith, territorial integrity, and sovereign independence.[40] Although this obligation to cooperate in these soft instruments is not legally binding and the scope of cooperation is not very certain. It even cannot be strictly classified as an obligation, and these plans and MOUs only give a general direction to make efforts. As CCAI and MASAP, they can be seen as the guidelines for dealing with Climate Change between the upper and lower Mekong River riparian states. But it is regrettable that disputes cannot be resolved according to these soft instruments.

In practice, riparian states made some progress in coping with the Consequences of Climate Change through the LMC mechanism. China and other riparian states established the Lancang-Mekong Water Resources Cooperation Information Sharing Platform in 2020.[41] It provides real-time hydrological data in Yunjinghong and Manan stations and gives notifications of hydropower station operational information.[42] This measure is beneficial for floods and droughts monitoring and prevention. Moreover, the Ministerial Meeting of Lancang-Mekong Water Resources Cooperation was convened, to conduct practical cooperation on flood prevention, disaster mitigation, and technology promotion.[43] This is a good beginning, but it is still unclear how this mechanism will keep moving forward when it encounters more obvious challenges.[44] the momentum of the cooperation of this mechanism is questionable due to the lack of a legally binding agreement. Meanwhile, the principle of *pacta sunt servanda* does not apply in this situation. Soft cooperation makes those who do not want to bind by an agreement participate in the mechanism, but it has also been widely criticized for its lack of a well-developed system and legally binding agreement. Obviously, LMC has not overcome this barrier at present.

4. Deficiencies of Cooperation on Climate Change in the Mekong River Basin

MRC has done a lot to adapt to Climate Change. Without China and Myanmar participating in the MRC, riparian states are trying to conceive a new platform to get them together, namely LMC, to cope with Climate Change. However, we cannot say this new platform has worked effectively to adapt to Climate Change. There still are considerable flaws in the management process of the Mekong River.

4.1. Lacking a Basin-wide, and Legally Binding Agreement

Comprehensive cooperation and a basin-wide resilience management regime are indispensable for adapting to Climate Change.[45] Obviously, the Mekong River lacks these two components, since China and Myanmar do not adopt the 1995 Mekong River Agreement and there is no sign indicating that all riparian states are willing to draft a new agreement to adapt to the Challenges. We may predict that China why was not willing to take part in this agreement through the statement of China in the process of voting against the draft of the UNWC during the meeting of the UNGA. In this statement, the representative of China expressed that the draft convention does not affirm the principle of territorial sovereignty, there is an obvious imbalance of rights and obligations between upstream states and downstream states, and China favors consultation rather than compulsory fact-finding to solve conflicts.[456] Despite the 1995 Mekong River Agreement has included sovereign equality and territorial integrity, and does not adopt compulsory dispute resolution.[47] Considering the 1995 Mekong River Agreement was drafted with reference to the ILC draft of UNWC,[48] They are highly similar in substantive rules. Thus, China, as an upstream state, may also think that there is an obvious imbalance of rights and obligations between upstream states and downstream states in this agreement. Besides, China does not want any third parties to interfere in the process of dispute resolution.[49] While the 1995 Mekong River Agreement incorporates mediation as a dispute resolution mechanism.[50] In general, China prefers concluding bilateral agreements and soft instruments to manage its transboundary rivers.[51] As for Myanmar, the Mekong River only flows 1 percent of the territory of Myanmar, so Myanmar has no incentive to adopt the 1995 Mekong River Agreement.[52] Therefore, it is difficult for the Mekong River Basin to have a basin-wide, and legally binding agreement.

4.2. Lacking Enough Climate Change Adaptative Clauses in Agreement

Even though China and Myanmar eventually agree to join the 1995 Mekong River Agreement or conclude a new agreement. It is still not enough, since the agreement has included enough Climate Change adaptative clauses. We have discussed above that although the agreement indicates a few flexibilities in some clauses, these flexibilities are very limited. First, the agreement does not take account into the water allocation problem, or even though the water allocation problem is not so urgent, the procedure of periodical review of the clauses shall be provided in this agreement. Second, the procedure rules are not included in the agreement which results in the obligation to provide information and data, prior notification and consultation becoming moral or political

duties rather than legal obligations. Third, floods in wet seasons are very common in the Mekong River Basin.[53] However, the 1995 Mekong River Agreement only simply mentions cooperation in flood control. As for how to cooperate in flood control is included in another strategy instrument which is not legally binding. In fact, there are few agreements explicitly mentioning Climate Change. UNWC, UNECE Water Convention, and regional transboundary agreements-Danube River Protection Convention, Convention on the Protection of the Rhine and Indus River Treaty all do not mention Climate Change and explicitly point out the adaptative way to cope with Climate Change. It means that the direct inclusion of Climate Change, due to its variability, is not the mainstream way. However, an adaptive legal framework is necessary for the Mekong River Basin to better adapt to Climate Change. Thus, the 1995 Mekong River Agreement should be enhanced in this aspect.

4.3. Lacking Basin-wide Dispute Resolution Mechanism

Leaving aside the dispute mechanisms in the 1995 Mekong River Agreement, the Mekong River Basin does not have a dispute resolution mechanism that includes all riparian countries. Meanwhile, LMC as the only mechanism covering all riparian states is a dialogue platform, which has no dispute-resolution function. In fact, disputes in the Mekong River Basin are not uncommon. Although the water of the Mekong River is comparatively abundant, with the dramatic increase in water demand and the construction of a large number of dams due to the economic development of the riparian countries, there are also a lot of controversies among the riparian countries.[54] Besides, the US is deeply involved in monitoring the Mekong River, and it ever alleged that China 'hoarded' water in its 11 dams in the upper Mekong River Basin, but this argument was refuted by China.[55] Untrust and suspicion always exist in the Mekong River Basin, meanwhile, the conflict is continuous. Based on these situations, a basin-wide dispute-resolution mechanism that aims at confidence-building is indispensable.

5. Conclusion

The Mekong River is facing a more and more severe Climate Change challenge. There are two regimes that aim at the management of water resources of the Mekong River, namely MRC and LMC. However, they have, to some degree, deficiencies in adapting to Climate Change, moreover, the riparian states in the Mekong River Basin do not indicate a willingness to conclude a new agreement. Thus, all recommendations to adapt to Climate Change in the Mekong River are based on this prerequisite. First, incorporating all procedure rules into the 1995 Mekong River, especially information and data exchange procedures. Hydrological information and data are prerequisites of decision-making concerning adaptation to Climate Change and reference to floods and drought monitor and prevention. Second, revise substantive rules in the 1995 Mekong River and make them more adaptative and operational. Some substantive rules in the 1995 Mekong River are so ambiguous that cannot directly implement, for example, criteria of reasonable and equitable utilization are not so clear, and riparian states need to incorporate relevant considerations and factors to detail this provision. Third, negotiate an MOU on water allocation between all riparian states to respond to future drought risks

resulting from Climate Change. Given that China and Myanmar are unwilling to conclude a legally binding agreement concerning the Mekong River Affairs, an MOU on water allocation with a periodical review is a direction that is worth working on. Last but not least, cooperation under the LMC mechanism should be enhanced. At present, the cooperation under LMC is just starting, more deep cooperation is needed.

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