The Mekong River Agreement and the UN Watercourses Convention
A comparative analysis

Summary
A window of opportunity for the Mekong Basin: UN Watercourses Convention entry into force aiding governance in the Mekong River Basin.

A comparative legal analysis of why the UN Watercourses Convention in operation complements the Mekong Agreement and how this can improve transboundary water management for the lower Mekong basin States

SUMMARY

The Mekong is a trans-boundary river located in Southeast Asia, the river itself is 4,800 kilometers long and the basin encompasses an area of 795,000 square kilometers. The Mekong River and its many tributaries, some which are also transboundary in nature, flow through six countries (China, Myanmar, Laos, Thailand, Cambodia and Vietnam) and its resources affect the lives of over 70 million people.¹

The Mekong Agreement

In 1995, a regional water treaty named Agreement on the Cooperation for the Sustainable Development of the Mekong River (Mekong Agreement) was adopted in order to govern the sustainable development of the river between riparian states. The Agreement was originally held up as the “most progressive of institutional frameworks for the governance of an international watercourse”² of its time. It established a joint institution, the Mekong River Commission (MRC), as a principal intergovernmental body with the aim of fostering cooperation between basin States to effectively manage uses of the river. The agreement is still considered extremely commendable 20 years later given the ever-changing geo-political and environmental contexts of the basin and its member states.³

Divided into six chapters comprising a total of 42 articles which variously seek to define the roles and responsibilities of riparian states within the basin, the Mekong Agreement takes the general character of a non-binding treaty for sustainable development, management and use of the River’s water resources.⁴ More specifically, it addresses “altered hydrological flows that would arise as a consequence of inter- and intra-basin diversions and of large storage dams”⁵.

Including principles such as sustainable development, cooperation and the not to cause significant harm within the territory of another state, the agreement regulates uses like hydropower, fisheries, irrigation, timber floating, flood control, recreation and tourism.

Despite of its success, the Agreement currently faces historical and upcoming challenges. One of the main concerns is the fact that the treaty was only signed by the lower basin states of Laos, Thailand, Cambodia and Vietnam; upstream riparians China and Myanmar have been invited but are not yet members. It is considered that China’s, and to a lesser extent Myanmar’s, refusal to become

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³ Ibídem, p. 804
⁵ Ibídem, p. 362
signatories, given both upstream nations’ rapid development of hydropower and irrigation schemes, is one of the Mekong Agreement’s critical missing links and a challenge to adopt a basin-wide approach.

The UN Watercourses Convention

On 19 May 2014, Vietnam took the monumental step of ratifying the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC). In doing so it became the 35th (and only Mekong basin state) party to the UNWC and triggered entry into force on 17 August 2014.

The UNWC it is currently “the most comprehensive and important codification of international watercourse law”. Considered a key source of international law at the global level for governing the use of transboundary freshwater rivers, it is widely recognized as a codification of key norms and customary principles/procedures in international water law and “its entry into force signals to States the primacy of such principles and the importance of respecting them”.

The UNWC was developed with the clear intention of functioning as a framework treaty in order “to support other watercourse treaties by acting as a template and filling the gaps where coverage was lacking”. Its Preamble states the aim to “ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations... taking into account the special situation and needs of developing countries”.

The UNWC’s critical role in supporting existing treaties is especially important because even where basin agreements exist, they often lack certain accepted principles or procedures of international water law, or do not count all basin states as parties; as the case of China and Myanmar for the Mekong Agreement.

The Mekong Agreement and UNWC: Legal compatibilities and gaps

Regarding the compatibility of specific legal rights and duties under the UNWC and Mekong Agreement a crucial element is how UNWC deals with existing and future watercourse agreements. Art 3.1 explicitly states that unless otherwise agreed by UNWC parties “nothing in the present Convention shall affect the rights or obligations of a watercourse state arising from agreements in force”. Thus, unless UNWC parties explicitly consent to it, their legal rights and duties within existing agreements are in no way affected by ratifying the Convention. It goes on to advise that parties “may, where necessary, consider harmonizing such agreements with the basic principles” (Art 3.2) of the UNWC. Hence, riparian States with an existing agreement(s) in place can consider adjusting their treaty provisions to align with the UNWC, but are in no way obliged to. Moreover, the UNWC is explicitly clear as to legal status of rights and duties pertaining to watercourse States generally. UNWC mean that nothing enacted under the mandate of the Mekong Agreement by the lower Mekong basin States can weaken the rights and duties of the upper Mekong basin States and

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9 Ibidem
vice versa. In addition, by ratifying the UNWC the member States of the MRC do not limit the ability of China and Myanmar to meaningfully participate in negotiations and consultations regarding the Mekong Agreement.

Based on the comparative legal analysis of the main principles and procedures of customary internal law as they relate to international water law within both instruments, there is a general finding of overall legal compatibility between the UNWC and the Mekong Agreement. Nevertheless, substantively and procedurally, it is clear the Mekong Agreement differs from the UNWC in several crucial respects. Moreover, there are crucial legal elements which are missing or inadequate within the general substantive principles and procedures as codified under the Mekong Agreement in comparison to the UNWC and inter alia customary international law.

Although the Agreement purports to have the principle of sustainable development at its heart, the principles of equitable utilization, equal participation and no significant harm are not adequately pronounced in any of its provisions or are qualified with references to territorial sovereignty. Compounding this is the absence of procedures relating to prior notification for states considering projects with potentially harmful effects on other riparian, as well as no clear and ultimately binding dispute resolution mechanisms and procedures.

Indeed, in terms of the overall obligation for prior notification and consultation, the major distinction between both instruments is that the UNWC does not distinguish between the mainstream and tributaries of international watercourses in this regard, whereas the Mekong Agreement clearly does whereby “domestic and minor uses of water not having a significant impact on mainstream flows” are excluded. The problem persist even after the production of several guidelines like the PNCPA framework (Prior Consultation and Agreement), which incorporates both the Procedures as well as the accompanying Guidelines on the Implementation of the Procedures for Notification. And regarding the dispute resolution procedures (including independent fact-finding commission), the Mekong Agreement provides member States and the MRC with a few general and ambiguous procedures leaving wide open their scope for interpretation and maintaining a focus on circular and non-binding processes.

Collectively, these comparative substantive and normative differences to the UNWC undermine the Mekong Agreement’s ability to regulate effective utilization of the Mekong River and its tributaries. Hence, the UNWC would on one hand allow for a range of legally-defined pathways for the member States to cooperate via transparent and binding procedures for sharing those watercourse resources. It would also provide the legal foundation of internationally agreed equitable use measures and dispute resolution procedures for states to follow consistently. In-turn, the normative impact of Mekong basin states ratifying the UNWC would be beneficial to the governance of international watercourses globally.

How ratifying the UNWC can aid governance in the Mekong and beyond

Although the Mekong legal regime is viable institutional framework evidencing long-term interstate cooperation during periods of conflict, it requires amendments to achieve holistic management of

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11 Bearden, B.L. (2010) p, 19
water resources. With amendments, the Mekong legal regime can provide a future pathway for effective transboundary water governance of one of Southeast Asia’s largest and most important international watercourses”\textsuperscript{12}.

Due to the recent acceleration of the UNWC ratification process, Rieu-Clarke (2010)\textsuperscript{13} has argued that having the UNWC in force across the Mekong region would actually be a more realistic way of these detailed principles and procedures of customary international law being applied evenly across all of the MRC member States, as well as the basin more broadly encompassing China and Myanmar. Without having to sacrifice the over-riding purpose and inherent “Mekong Spirit” of the Mekong Agreement, MRC States could ratify the UNWC and as a result would not have to amend or supplement the Mekong Agreement. Certainly, attempting to renegotiate the Mekong Agreement's existing provisions with the expectation of increased detail and rigor is not appealing as based on the evolution of the Agreement such an initiative would undoubtedly take a long time and increased resources to negotiate and agree upon, if at all possible. Moreover, despite the best intentions, the MRC has so far been unable to build upon the generally vague provisions and terms of the Mekong Agreement and provide much needed clarity within the non-binding policy procedures and guidelines, most notably in the PNCPA framework. The UNWC, as the internationally-recognized and widely-endorsed global framework convention which codifies customary international law for governing transboundary watercourses could address these weaknesses within the Mekong Agreement and MRC. In-turn, the UNWC would reinforce rather than replace the Mekong Agreement and the MRC as its institutional basin, as well as strengthening its broader normative impact as the most important legal instrument for the governance of transboundary watercourses globally.

On the basis of the points above, this paper contends that all of the lower Mekong basin states and inter alia members of the MRC, namely Thailand, Laos and Cambodia, should follow Vietnam’s lead and ratify the UNWC (with future possibility for China and Myanmar).

Ratifying the UNWC is further recommended on the grounds that it would:

- **Reinforce not replace the Mekong Agreement**
  - By ratifying the UNWC, it would thus provide a mutually reinforcing and supportive framework for the Mekong Agreement and its non-binding guidelines, such as the PNCPA framework which is crucial in terms of regulating hydropower development project on the Mekong River mainstream and its tributaries.
  - The over-riding purpose of ratification by States is on creating a hybrid legal architecture combining both “hard” and “soft” law for effective governance of the Mekong River basin.
  - Ratification by MRC States also requires further analysis of the legal inter-actions between the UNWC and the Mekong Agreement which have been touched upon here but could go into more detailed analysis in relation to each country ratifying the

\textsuperscript{12} Bearden, B.L. (2010) p, 799
UNWC and how this interacts with national level laws and other bilaterial/multilateral laws.

- **Align not amend the Mekong Agreement with customary international law**
  
  - MRC member States would not only affirm their willingness to adhere to the already binding rules and principles of customary international law, but it also strengthens their existing legal platform for effective and equitable governance of the Mekong basin via the Mekong Agreement in so far as this would allow them to align the basin States under international water law without having to amend its provisions therein.

  - In the context of the Mekong Agreement and inter alia the sustainable development of the Mekong River mainstream and its tributaries, the aforementioned point is crucial because it means that despite there being a legal mandate for the MRC as its primary and only dispute resolution body, the UNWC will always still apply and could thus be used as grounds for riparian dispute settlement via an independent third party or judicial body such as the ICJ.

  - Within the Mekong, Vietnam as the 35th party to the Convention could act as a champion for further ratification by its fellow MRC lower Mekong basin States. Ratification across the Mekong could in-turn foster more widespread ratification of the UNWC globally.

  - As an adjunct objective to ratification of the UNWC within the Mekong basin and globally, there should also be a parallel focus on strengthening applicable domestic laws to align with the provisions of the UNWC. All lower Mekong basin states may therefore seek to examine their national laws and consider aligning them with the key provisions and basic principles within the UNWC.

- **Strengthen not weaken the MRC to govern**

  - In particular, ratifying would have the dual benefit of: protecting the existing rights and duties of MRC member States under the Mekong Agreement, as well as those of China and Myanmar as basin States; and concurrently, strengthening the legal mandate of the MRC and its member States by providing them with a globally negotiated and agreed set of principles and obligations which are internationally recognized as binding on all States beyond the limited scope of the Mekong Agreement.

  - The UNWC protects the existing mandate of the MRC and its member States via two critical sets of provisions. Firstly, the UNWC is explicitly clear on the legal status of rights and duties stemming from existing watercourse agreements. Therefore, the parties to the Mekong Agreement would not undermine any current legal rights and duties simply by ratifying the UNWC; nor are they bound whatsoever to amend, revise, or update the Mekong Agreement to equate with its provisions.

  - The UNWC is explicitly clear as to legal status of rights and duties pertaining to watercourse States generally. UNWC mean that nothing enacted under the mandate
of the Mekong Agreement by the lower Mekong basin States can weaken the rights and duties of the upper Mekong basin States and vice versa. In addition, by ratifying the UNWC the member States of the MRC do not limit the ability of China and Myanmar to meaningfully participate in negotiations and consultations regarding the Mekong Agreement.

- The UNWC would expand the mandate of the MRC in so far as it encompasses both the mainstream and tributaries of international rivers by making no legal distinction between them. Hence, by all ratifying the UNWC, the lower Mekong basin States would inter alia widen their mandate to govern the equitable and reasonable utilization of the Mekong River’s mainstream and tributaries. This would have significant benefits as regards clarifying the procedures for planned measures, specifically hydropower dam development on crucial tributaries. Yet, if not all MRC member States ratify the UNWC, gaps would exist as per its application via non-parties.

- The UNWC adopts a framework approach and inter alia unique legal capacity to address gaps and in-turn improve the overall governance of international watercourses. Moreover, it is clear that not only would the UNWC protect as well as strengthen the existing rights and duties of the MRC member States.

- It would prove the commitment of Lower Mekong basin States to improving processes and transparency in line with customary international law which has been long-promised by the MRC Joint Council. As a result, by adopting the legally-binding and much more detailed and clearer prior notification and informed consent provisions under the UNWC, it is likely that this would significantly improve donor confidence in future worth and effective role of MRC thereby potentially maintaining the status of current funding levels.

- MRC member States could strengthen its particular mandate in regards to scientific research and knowledge-sharing functions by each ratifying the UNWC because the Convention has detailed provisions for developing joint technical standards and information exchange between watercourse States.

- Despite the ongoing absence of China and Myanmar weakening the mandate of the MRC, there are still clear benefits in the lower Mekong basin States ratifying the UNWC, especially if all MRC member States ratify. By doing so, this would create a common legal platform that is global recognized and contains binding customary international legal principles and procedures, especially regards dispute settlement, which the lower Mekong basin States via the MRC could utilize in negotiating with the upper Mekong basin States.

- **Underpin not undermine cooperation within and via the MRC**

  - The UNWC contains clearly defined and transparent dispute resolution procedures which would provide a consistent set of provisions and legal framework to underpin the respective ambiguous dispute settlement mechanisms in the Mekong Agreement, whilst maintaining the mandate of the MRC as a vehicle for basin cooperation and negotiation.
The UNWC’s binding prior notification and consultation procedures for planned measures can address critical gaps and ambiguities in the existing PNCPA framework under the Mekong Agreement and its related procedures and guidelines where the latter’s non-binding nature and lack of clear timeframes/standards in this regard has caused notable disagreements between MRC member States in relation to hydropower dam projects.

- There are potential economic benefits associated with having a clearly defined, transparent and legally-binding prior notification and consultation process, especially in relation to large-scale infrastructure projects including hydropower dams.

- Awareness-raising and capacity building workshops used in conjunction with disseminating key knowledge resources and decision-making tools will foster cooperation by building a common understanding of the role and relevance of the UNWC while also addressing common misperceptions that have proven to be barriers to ratification.

The UNWC provisions provide consensus and clarity and thus certainty regarding the implementation of international water law upon which contextual basin and watercourse treaties can provide more nuanced governance mechanisms via context-specific provisions and related non-binding policy frameworks. Hence, now is the time for lower Mekong basin States to seize this window of opportunity to strengthen water governance in the Mekong region by following the lead of Vietnam and thus ratify the UNWC.

To overcome some of the misconceptions and thus barriers to ratification, two key publications have clearly assisted in achieving this objective: the “UN Watercourses Convention User’s Guide” (Rieu-Clarke, Magsig & Moynihan, 2012) as a tool for practitioner’s, academics and officials in understanding and applying the terms of the Convention, and a complementary “UNWC Online User’s Guide” (Rieu-Clarke, Kinna & Litke, 2013) [www.unwatercoursesconvention.org] developed as an interactive, multimedia capacity building website.

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