NECESSITATING BASIN-WIDE AGREEMENT IN TRANSBOUNDARY WATERS MANAGEMENT: THE CASE OF THE MEKONG

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There are some 261 international river basins shared by two or more riparian States and more than 400 international freshwater-related agreements in the world. The dimension of cooperation and conflict in waters management of these river basins much depends on those legal instruments establishing rights and obligations of the co-basin States, vis-à-vis each other. As research showed, there exists a sort of agreement only applicable to a part of co-basin States rather than all co-basin States in a basin. The author finds that such agreements are very harmful to the basin-wide IWRM generally and water governance particularly, if the non-contracting States are in the upstream position and escalating their development and utilization. The reasons for this are as follows: (1) The unbalanced rights and obligations of upstream and downstream co-basin States could be aggravated under such agreement; (2) The non-contracting co-basin States are unwilling to express their accession because their entitlements are not respected and obligations are posed under the agreements, while the contracting co-basin States are willing to resort the agreements to reserve their interests provided and hope that the other co-basin States have better to accede it without impairing their rights; (3) The non-contracting co-basin States prefer to remain as a "third State" bound only by the rules reflecting customary international law except that the substantial amendment or modification of the agreements are implemented in harmonization with the UN International Watercourse Convention; (4) The non-contracting co-basin States could not cease their development and utilization if they are convinced that their activities are within the threshold of causing significant harm likely resulted from the transboundary water pollution, environment flow regime change or climate change.

In the case study, the author finds that the Mekong is a typical international river divided by two distinguished hydro-polities, i.e. four Lower Mekong Basin (LMB) States—Laos PDR, Thailand, Cambodia and Vietnam and two Upper Mekong Basin (UMB) States—China and Myanmar. Despite a desire for a framework for cooperation among the four LMB States after World War II, there have existed many constraints to basin-wide water development cooperation mostly due to lack of a basin-wide agreement. In much of second half of 20 century, the legal framework was established merely among the four LMB States mainly through adoption of two agreements, i.e. the 1957 Statute and the 1975 Joint Declaration. These two agreements were negotiated among the four LMB States and clearly defined the LMB as their applicable scope. During this period, the basin-wide waters management was neglected by the four LMB States because they deemed that the two UMB States were unable to play a direct role in Mekong waters management because the physical geography of the basin prevented it from doing so and regionally the international communities excluded them from the partnership. However, the situation was changed when China enhanced its open policy to outside world and accelerated the projected full development of the great hydropower potential of the upper Mekong (the Lancang Jiang) within its territory and international navigation potential of the Lancang-Mekong Waterway in early 1990s.

On the one hand, the development ambitions could lead China becoming a significant player in shaping a new power balance in hydropolitics of the Mekong River Basin (MRB). On the other hand, the four LMB States restoring the political rapprochement might face the challenge whether their rights could be reserved under the existing legal framework. The 1995 Mekong Agreement was concluded at such critical stage and aimed at extending application to the whole MRB instead of the LMB defined in the predecessors that excluded the two UMB States from the cooperation framework. However, the 1995 Mekong Agreement failed to become a basin-wide agreement in that it represents the types of agreements aimed at extending and applying to all co-basin States and as such defining the applicable scope but excluding one or more co-basin States to participate in the negotiation and to become a party. It is certain that such an agreement could not be accepted by the non-contracting co-basin States who were not invited to negotiate it and further the basin-wide cooperation is therefore impossible without their participation. It can be showed that a serious of the Mekong programs have been almost implemented within the LMB and managed by the MRC since the entering into force of the 1995 Mekong Agreement.

Moreover, the author finds that the 1995 Mekong Agreement has shaded the basin-wide cooperation and implementation of the Mekong Program targeted at a Basin Development Plan, because its major substantive rules and procedural rules are not supportive to such cooperation. Firstly, the 1995 Mekong Agreement ostensibly accepts ‘equitable and reasonable use’ and ‘no significant harm’ as two separate general principles governing the use of the waters of the Mekong River system. It gives the priority to the territorial integrity usually claimed by the downstream States in its wrong application of the principle of equitable and reasonable use. It highlights the obligation of any riparian State to notify or make prior consultation in terms of different proposed uses rather than the right to an equitable and reasonable use and benefits which should absolutely claimed by any riparian State. Furthermore, provisions of the maintenance of flows on the mainstream are elaborated to embody the principle of equitable and reasonable utilization. The provisions express the obligation to protect the prior or existing uses of the downstream States and ignore of the equitable and reasonable use so long as the use may produce harmful effects to the required river flows on the mainstream. Clearly, the alleged equitable and reasonable utilization expressed in the 1995 Mekong Agreement is irrelevant to the general principle of the UN International Watercourses Convention. Secondly, the no significant harm principle is expressed in terms of cessation of harmful impact and substantive damages in the 1995 Mekong Agreement. It relates much more to the state responsibility other than the due regard to general principle of equitable and reasonable utilization and determining factors. It simply requires the notified State(s) to cease the course of harm causing the substantial damages to other States regardless whether the course is within the equitable and reasonable utilization. It further provides that, when harmful effects cause substantial damage to other States, the “state responsibility for damages” shall apply to the causing States in conformity with the relevant principles of international law relating to state responsibility. Evidently, the Mekong Agreement adopts much stricter provisions with respect to harmful effects and substantial damages. To some extend, no significant harm rule is given priority in t the 1995 Mekong Agreement. The author infers that above wrongful application of the principles of international water law may be one of the main reasons that the two UMB States have been unwilling to accede to the 1995 Mekong Agreement, become the members of the MRC and participate the Mekong Program.

It is valuable to note the cooperation between the UMB States and the LMB States trends to other mechanisms rather then the 1995 Mekong Agreement, such as the Greater Mekong Subregion (GMS) initiated by the Asian Development Bank (ADB) and the Association of Southeast Asian Nations (ASEAN). As the Annual Report of MRC showed, attempts have also been made to bring the two UMB States into the 1995 Mekong Agreement through annual dialogue meetings hosted by the MRC since 1996. However, the dialogue partner status of the two UMB States has remained unchanged. This indicate that the two UMB States shall not become a party by accepting the rights and obligations as provided under this Agreement and could remain as a third State bound only by the rules reflecting customary international law. The MRC Annual Report 2006 indicates that the MRC will particular focus its efforts on supporting joint and basin-wide projects and programs, initially including the four LMB States, later, hopefully, also the two UMB Sates. However, the MRC Strategic Plan 2006-2010 endorsed by the MRC Joint Committee in 2006 does not mention about amending or modifying the 1995 Mekong Agreement but to have effective implementation. It can be inferred that the 1995 Mekong Agreement shall not be revised in consideration

of harmonization with the UN International Watercourses Convention in near future. As a result, the basin-wide cooperation, IWRM and water governance will not be obviously improved in the MRB.

In conclusion, above findings strongly support the view that a basin-wide agreement negotiated by all co-basin States is prerequisite to the basin-wide IWRM and good water governance of the international river basins. Also, the UN International Watercourses Convention could provide the guidance for all co-basin States seeking to negotiate such an agreement in terms of substantive rules, procedural rules, institutional mechanisms and dispute settlement mechanisms. The findings could provide a good reference for other international river basins seeking to conclude a basin-wide agreement, enforce the basin-wide cooperation and achieve the basin-wide IWRM and good water governance.

Major References

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