

A Procedural Framework for Transboundary Water Management in the Mekong River Basin

*Shared Mekong for
a Common Future*

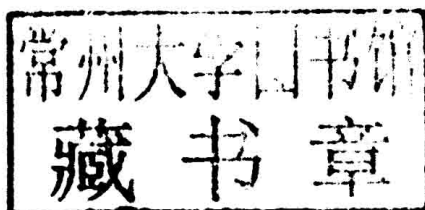
QI GAO

A Procedural framework for Transboundary Water Management in the Mekong River Basin

Shared Mekong for a Common Future

By

Qi Gao



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LEIDEN | BOSTON

Library of Congress Cataloging-in-Publication Data

Gao, Qi , author.

A procedural framework for transboundary water management in the Mekong River basin : shared Mekong for a common future / by Qi Gao.

pages cm. — (International water law series ; volume 1)

Originally issued as author's thesis (Ph. D.)—University of Western Sydney, 2013.

Includes bibliographical references and index.

ISBN 978-90-04-26678-0 (hardback : alk. paper) — ISBN 978-90-04-26679-7 (e-book) 1. Water resources development—Law and legislation—Mekong River Watershed 2. Mekong River Watershed—International status. I. Title.

KNC660.M45G36 2014

341.4'420959—dc23

2013049069

This publication has been typeset in the multilingual 'Brill' typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities. For more information, please see brill.com/brill-typeface.

ISSN 2351-9606

ISBN 978 90 04 26678 0 (hardback)

ISBN 978 90 04 26679 7 (e-book)

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Printed by Printforce, the Netherlands

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*To my beloved parents,
Shenghong Gao and Jie Xin,
my dear husband Lei Duan
and
In memory of
Professor Michael Jeffery, QC*



Preface

This book marks the culmination of my past six years of research in the area of transboundary water management. My academic journey was first guided by Professor Ke Jian from the Wuhan University, who aroused my interests on transboundary water management and the associated legal and political theories. I spent two years focusing on the management of transboundary water pollution within China, which led me to rethink the prevalent theory of integrated water resources management in the context of developing countries like China.

Further down this road, I shifted my attention to transboundary water management issues at the regional level, bearing in mind of the questions I had since my previous research. In particular, I was puzzled, yet, deeply attracted by the increasingly polycentric nature of transboundary cooperation, the various stages of domestic reforms and complicated geopolitical situation in the Mekong region. I therefore conducted around four years of research on the Mekong water governance in Australia at the University of Western Sydney (UWS) with financial support from both the Chinese Scholarship Council and the UWS. I wish to express my sincere gratitude to all those people who have given me their generous help and warm encouragement during the preparation of this book.

I am deeply grateful for Professor Michael Jeffery, QC who went beyond the call of duty to ensure that I was not only academically well supervised but also that my stay in Australia was an enjoyable and memorable one. I am also very grateful to Professor Donna Craig, for her generosity and kindness and for her influence on me as a successful female academic who managed to find a good balance between work and life. I was truly shocked and saddened to learn about the passing of Professor Jeffery in July 2013. Publishing this book is my way of remembering him and offering my condolences to his family.

For the past four years, Professor Ke Jian from Wuhan University has kindly made many valuable suggestions to me. Thanks to him, I was introduced to the Mekong Legal Network in Thailand, which has been very beneficial to my research. I would therefore like to thank Daniel King and all of the other friends I made through this great network. I have also interacted with academics and students from the Mekong Research Group (previously known as the Australian Mekong Resource Centre). I would like to thank everyone there who, in their different ways, gave support and helped me carry out my research, especially Professor Philip Hirsh, Professor Bernard Boer, Visiting Professor Lu Xing, Dong Xing, Yumiko Yasuda and Oulavanh Keovilignavong.

My academic life at the UWS, School of Law was greatly enriched by my dear colleagues. Dr. Xiaobo Zhao, Dr. Xiaoyi Jiang and Dr. Hem Aitken who helped a lot when

I first started my study there and have since shared their valuable research and life experiences. I am also grateful for numerous interesting discussions with Manzoor Rashid, Elizabeth Gachenga, Xiangbai He and Ying Shen.

I would like to thank Professor Wang Xi and the KoGuan Law School of the Shanghai Jiao Tong University for the great support I received during the process of finalizing this book. I am also deeply appreciative of the efficient and skilful help from Marie Sheldon, Lisa Hanson and the rest of the team at Brills.

Finally, the successful completion of this book would not have been possible without the enormous support and sacrifice of my family. I owe a large debt of gratitude to my loving parents for being so supportive of their daughter's choice even if that meant their only child rarely came home for the past four years. My deep apologies and gratitude also extend to my dear husband, Lei Duan, who is currently a PhD candidate in the University of Tokyo, Japan and has been my soul mate and best friend for over eight years. I would like to thank my relatives and friends in China and Japan for their generous support and help, not only to myself, but also to my parents and husband.

Abstract

The Mekong River is “both a uniting and dividing force” for China and Southeast Asia.¹ The initial focus of the study will identify the major environmental challenges on the Mekong River ecosystem and the status quo of water resources management in the Mekong region, focusing on the existing water-related legal arrangements and mechanisms at both domestic and regional levels. It will discuss the ongoing difficulties and as well as aspirations for reform of the water management regime. The capacity of governments and inter-governmental organisations with regard to implementation and legal regulation will also be analysed, as well as the role of non-state actors on decision-making processes concerning development activities in the region. It is obvious that, despite attempts to reshape the management of Mekong water resources into a more integrated regime, the current frameworks at both domestic and regional levels remain fragmented.

Under these circumstances, this book attempts to explore procedural implications of integrated water resources management and its application in the Mekong region. The increasingly polycentric nature of transboundary cooperation must be borne in mind, with the emergence of newly recognised stakeholders who represent a broader range of interests than has been the case in the past. The following major procedural requirements can be identified in the proposed procedural framework: information exchange and data collection on a regular basis (chapter three); notification and consultation (chapter four); the public's right of access to information and participation (chapter five) and environmental impact assessment, strategic environmental assessment, and their applications in the transboundary context (chapter six).

In order to tailor and better understand the procedural requirements in the context of the Mekong region, both the ideal and practical scenarios are considered, combined with selected case studies. Existing legislation and practice concerning the use and application of procedural mechanisms in the Mekong region will be analysed. The discussion on procedural mechanisms will also consider how to improve their implementation in light of the ongoing tradition and strong preference for soft law approaches to transboundary cooperation. The relationship between legally-binding agreements and the capacity for compliance in the context of the Mekong region will be discussed. In addition, the relationship between the procedural and substantial elements of integrated river basin management will be re-examined in the final chapter. The final chapter will outline the conclusions and suggest possible areas for future research.

1 Philip Hirsch et al., ‘National Interests and Transboundary Water Governance in the Mekong’ (Report, University of Sydney, 2006) iii.

List of Abbreviations

ACFTA	Association of Southeast Asian Nations—China Free Trade Area
ADB	Asian Development Bank
ANZ	Australia and New Zealand Banking Group Limited
ASEAN	Association of Southeast Asian Nations
BDP	Basin Development Plan Programme
BNP Paribas	Banque Nationale de Paris Paribas
CEO	Chief Executive Officer
CHR	Commission for the Hydrology of the Rhine Basin
EGAT	Electricity Generating Authority of Thailand
EIA	environmental impact assessment
EU	European Union
GDP	gross domestic product
GEF	Global Environmental Facility
GMS	Greater Mekong Subregion
GTI	Greater Tumen Initiative
IBWC	International Boundary and Water Commission
ICEM	International Centre for Environmental Management
ICJ	International Court of Justice
ICPR	International Commission for the Protection of the Rhine
IEE	initial environmental examination
IKMP	Information and Knowledge Management Programme
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
IWRM	integrated water resources management
KBS	Kredietbank ABB Insurance CERA Bank
MEP	Ministry of Environmental Protection
MOU	memorandum of understanding
MOX	mixed oxide
MRC	Mekong River Commission
MWR	Ministry of Water Resources
NAFTA	North American Free Trade Agreement
NEQA	Enhancement and Conservation of National Environmental Quality Act
NGO	non-governmental organisation
NMC	National Mekong Committee
NWRC	National Water Resources Committee
PM	particulate matter

SEA	strategic environmental assessment
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
WTO	World Trade Organisation

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Introduction

I The Mighty Mekong: A River at Risk



FIGURE 1 *Hydrographic map of the Mekong Basin, with indication of the Mekong River and the main tributaries and flow contribution by country*

SOURCE: WORLD BANK AND ASIAN DEVELOPMENT BANK, 'WB/ADB JOINT WORKING PAPER ON FUTURE DIRECTIONS FOR WATER RESOURCES MANAGEMENT IN THE MEKONG RIVER BASIN: MEKONG WATER RESOURCES ASSISTANCE STRATEGY' (WORKING PAPER, WORLD BANK AND ASIAN DEVELOPMENT BANK, 2006) 13.

The Mekong River is “both a uniting and dividing force” for China and Southeast Asia.¹ It originates from Qinghai Province in China. Known as the Dza Chu River in Qinghai and Tibet, it integrates with the Angqu River in Chamdo, Tibet. Only after this point, it became known as the Lancang River. It then flows southeast through the Yunnan Province and enters into Southeast Asia. The Mekong River basin (henceforth referred to as the Mekong region), with a total land area of 795 000 square kilometres, includes parts of China, Myanmar and Vietnam, about one third of Thailand and most of Cambodia and Laos.²

Not only has the river supported one of the world’s most diverse wildlife, second only to the Amazon River,³ it also has been of major cultural, traditional, social and economic significance to the dense population living in this region.⁴ All riparian states of Mekong are developing countries and most inhabitants are relevantly poor. The strong need for economic growth has tightened competition over water resources and aroused serious environmental concerns and disputes. The environmental discourses are also “intricately bound up in a wider world of geopolitics, which include China’s emerging relations with regional neighbours”.⁵

One highly controversial issue is dam construction. Driven by rapid industrialisation, export-led economic growth and expanding domestic consumer markets, demand for electricity is growing in the Mekong region.⁶ The governments in this region have seen a great potential for hydropower development on the mainstream and tributaries of the Mekong River.

The mainstream hydropower development initially started on the upper Mekong in Yunnan Province, China from 1980s. Based on the most recent data, there has been a cascade of 16 dams (half located on the upstream of Lancang and half on the midstream and downstream of Lancang) planned on

- 1 Philip Hirsch et al., ‘National Interests and Transboundary Water Governance in the Mekong’ (Report, University of Sydney, 2006) iii.
- 2 Mekong River Commission, *About Mekong—the Land & its Resources* <http://nsl.mrcmekong.org/about_mekong/about_mekong.htm>.
- 3 World Wildlife Fund, *Greater Mekong* <http://wwf.panda.org/what_we_do/where_we_work/greatermekong/>.
- 4 Mekong River Commission, *People* <<http://www.mrcmekong.org/topics/people/>>.
- 5 Philip Hirsch, *Cascade Effect* (8 February 2011) China Dialogue <<http://www.chinadialogue.net/article/show/single/en/4093-Cascade-effect>>.
- 6 But the magnitude of this growth is contested between government agencies and civil society groups. See Carl Middleton, Jelson Garcia and Tira Foran, ‘Old and New Hydropower Players in the Mekong Region: Agendas and Strategies in François Molle, Tira Foran and Mira Käkönen (eds), *Contested Waterscapes in the Mekong Region* (Earthscan, 2009) 23, 24.