

International Water Law in the Mekong River Basin: A Role for Amicus Curiae?

Andrew V. Vangh

Ph.D. Candidate, *School of Law, Xiamen University, Xiamen, Fujian, PRC.*

Supervised by Professor Huiping Chen, *School of Law, Xiamen University,*

Xiamen, Fujian, PRC.

Email: avangh@gmail.com

doi: <https://doi.org/10.37745/gjplr.2013/vol11n4119>

Published May 14, 2023

Citation: Vangh A.V.(2023) International Water Law in the Mekong River Basin: A Role for Amicus Curiae? *Global Journal of Politics and Law Research*, Vol.11, No.4, pp.1-,19

ABSTRACT: *The current framework for public participation under the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin has no clear statement or mechanism for access to justice. Without access to justice, the public is limited in its ability within the context of the agreement to enforce and verify obligations as well as prevent or remedy adverse impacts related to the development and management of the Mekong River Basin. In the event the parties to the agreement submit differences and disputes to an international court or tribunal, the procedure of amicus curiae can be used to facilitate access to justice. This article explores the background of access to justice in the context of the agreement and how the procedure of amicus curiae may function to facilitate access to justice.*

KEYWORDS: international law, water, amicus curiae, public participation, access to justice

INTRODUCTION

In 1996, the Mekong River Commission (MRC) recognized that public involvement would be necessary in order to realize the object and purpose of the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995 Mekong Agreement) (Kingdom of Cambodia; Kingdom of Thailand; Lao People's Democratic Republic; Socialist Republic of Vietnam, 1995) and initiated the Study on Public Participation in the Context of the MRC (Mekong River Commission, 1999). The study would form the basis for the current policies and practices on public participation under the 1995 Mekong Agreement. However, the current framework for public participation has no clear statement or mechanism for access to justice. Without access to justice, the public is limited in its ability to enforce and verify obligations arising from the 1995 Mekong Agreement as well as prevent or remedy adverse impacts on rights related to the development and management of the Mekong River Basin (MRB). In the event the parties to the 1995 Mekong Agreement submit differences and

Publication of the European Centre for Research Training and Development -UK

disputes to international courts and tribunals, the procedure of amicus curiae may be used to facilitate access to justice.

Statement of Problem

Access to justice is a pillar upon which public participation stands (United Nations Conference on Environment and Development, 1992, princ. 10) and public participation is recognized as necessary for the realization of the object and purpose of the 1995 Mekong Agreement (Mekong River Commission, 1999). However, there is no express provision within the 1995 Mekong Agreement or the work of the MRC that addresses access to justice.

This raises the question, what is the scope of access to justice in the context for the 1995 Mekong Agreement and how a procedure such as amicus curiae may help facilitate access to justice.

METHODOLOGY

This research will utilize primary sources such as treaties, customary international law, general principles of law, and secondary sources, such as the teachings of the most highly qualified publicists, to make its analyses and conclusions (Koskenniemi, 2012).

Scope of Access to Justice in the Context of the 1995 Mekong Agreement

In 1996, the MRC in recognizing that public involvement would be necessary in order to realize the object and purpose of the 1995 Mekong Agreement, initiated the Study on Public Participation in the Context of the MRC (Mekong River Commission, 1999, p. 1). As a result of the study and subsequent report of the MRC in 1999, the MRC defines public participation as a “process through which key stakeholders gain influence and take part in decision making, planning, implementation, monitoring and evaluation of the MRC programs and projects” (Mekong River Commission, 1999, p. 12). The process of public participation according to the MRC’s study and subsequent report may be understood in four adaptable stages: information gathering, information dissemination, consultation, and participation. Ongoing research by the MRC has continued to provide significant information and non-exhaustive tools and guidelines in support of enhancing stakeholder participation in the development and management of the MRB.

The commitment by the parties to the 1995 Mekong Agreement to the principle of public participation has been demonstrated overtime by the reaffirmation of the principle in the overall basin development plan (BDP) as well as implementation and enhancement of the principle in practice. The reaffirmation of the principle of public participation in the overall BDP takes place through the continuing emphasis placed upon public participation in MRC policy documents supporting the BDP. These documents include, but are not limited to the aforementioned Study on Public Participation in the Context of the MRC, as well as the 2004 MRC Basin Development

Plan: Stakeholder Participation (2004 BDP-SP) (Mekong River Commission, 2004), 2009 Stake Participation and Communication Plan for Basin Development Planning in the Lower Mekong Basin (2009 SPCP) (Mekong River Commission, 2009a), 2009 Communication Strategy and Disclosure Policy (2009 CSDP) (Mekong River Commission, 2009b), 2011-2015 basin development strategy (BDS) (Mekong River Commission, 2011a) and 2016-2020 BDS (Mekong River Commission, 2016a). The parties to the 1995 Mekong Agreement also embrace public participation as a principle of integrated water resource management (IWRM) which functions in tandem with MRC policies on public participation in support of the BDP (Mekong River Commission, 2009a, p. 3). The work of the MRC cites principle two of the Dublin Principles to support this position, “Water development and management should be based on a participatory approach, involving users, planner and policymakers at all levels” (International Conference on Water and the Environment, 1992, princ. 2; Mekong River Commission, 2009a, p. 3; Mekong River Commission, 2004, p. 2).

In conjunction with the periodic reaffirmation of the principle of public participation, each successive document provides tools and guidelines for the implementation or enhancement of participatory processes that support the principle of public participation. For example, the 2004 BDP-SP provided a framework for implementation of “a series of multi-stakeholder participatory planning forums at national, trans-national and sub-area levels through different BDP working groups” (Mekong River Commission, 2009a, p. 1; Mekong River Commission, 2004). The 2009 SPCP builds upon the 2004 BDP-SP and provides tools and guidelines to implement and enhance communication strategies that increase effective stakeholder engagement and meaningful participation in the basin development planning process. The 2009 CSDP defines target audiences and branding, and publishing, dissemination, and marketing practices to ensure communication processes with stakeholders are in line with development goals (Mekong River Commission, 2009b). The 2011-2015 BDS emphasizes the enhancement of stakeholder participation at the national and regional levels and ensuring implementation of the 2009 CSDP (Mekong River Commission, 2011a, p. 32). The 2016-2020 BDS seeks to “promote a more systemic, institutionalized and targeted approach to engaging with broader stakeholder. . .” (Mekong River Commission, 2016a, p. 74).

In practice, public participation in the development and management of the MRB primarily involves the collection and dissemination of information and consultative and participatory decision-making processes. Types of stakeholder engagements used to facilitate public participation include but are not limited to multimedia (Mekong River Commission, 2009b), interviews (Sneddon & Fox, 2007), sub-national, national and regional discussion forums, workshops and conferences (Mekong River Commission, 2011b; Mekong River Commission, 2009a; Mekong River Commission, 2004). Participatory approaches are adapted to the particular development and management circumstances at hand and are intended to engage a wide range of stakeholders. This is demonstrated at the regional level by the numerous programs that are carried out by the

MRC. For example, the MRC Fisheries Programme employed a cooperative governance model which emphasized formal joint responsibility between MRC supported government agencies and local communities to develop scientific knowledge about fisheries within the MRB that incorporated knowledge of local stakeholders (Sneddon & Fox, 2007). Stakeholder engagement ranged from “joint government-community formulation of resource use plans, sharing of information between government officials and community fishermen, and, perhaps most importantly, joint decision-making regarding fisheries management” (Sneddon & Fox, 2007, p. 2173; Mekong River Commission, 2005). Another example has been the establishment of an ongoing regional stakeholder forum (Mekong River Commission, 2016b, pp. 64, 74) that allows stakeholders to “share information and address interests and concerns of regional stakeholders on reasonable and equitable use of water related resources in the Mekong River Basin” (Mekong River Commission, 2020).

At the national level, each party to the 1995 Mekong Agreement through their respective National Mekong Committee (NMC) responds and commits to the BDS and overall BDP through individual national indicative plans (NIP) (Mekong River Commission Basin Development Plan Programme, 2013, p. 30; Cambodia National Mekong Committee, 2013; Lao People's Democratic Republic, 2012; Thai National Mekong Committee Secretariat, 2012; Viet Nam National Mekong Committee, 2012). NIPs for each party vary in length, format, and depth of discussion for national and sub-national development and management of the MRB in line with the 1995 Mekong Agreement. The differences in the NIPs have arisen as a result of the balancing of the specific environmental, social, and economic circumstances within each State. Circumstances reflected in each NIP include but are not limited to: sovereignty, customs, administrative systems, available natural resources, economic development strategies, financial capabilities, demographics, upstream and downstream location, etc (Mekong River Commission, 2016a, p. 21; Moder, Kuenzer, Xu, Leinenkugel, & Van Quyen, 2012, p. 136). The general consensus of each NIP has been support for the principle of public participation in developing and managing the MRB in line with the 1995 Mekong Agreement.

In practice, the depth and effectiveness of public participation within each party's national boundaries varies as much as the NIPs. This is in part due to the distinct situations within each State that have also shaped the NIPs for each party to the 1995 Mekong Agreement. For example, in the Mekong Delta, where the Mekong River flows through Vietnam into the South China Sea, increasing population, urban settlement and industrialization has increased demands on water resources and created cross sector impacts. This has made “it vitally necessary to consider options to increase water use efficiency in agriculture, proper wastewater treatment, and promoting alternative water use concepts . . .” (Ha, Dieperink, Dang Tri, Otter, & Hoekstra, 2018; Moder, Kuenzer, Xu, Leinenkugel, & Van Quyen, 2012, pp. 155-56). Another factor is the cooperative-coordinating approach to the development and management of the MRB where each

party adapts basin wide strategies to its needs (Mekong River Commission, 2011a, pp. 12-15). The MRC is not an enforcement body for the 1995 Mekong Agreement (Mekong River Commission, 2020, p. 24) nor can it directly influence the national development and management strategies of the parties to the 1995 Mekong Agreement (Moder, Kuenzer, Xu, Leinenkugel, & Van Quyen, 2012, p. 149). The MRC serves as a facilitator of cooperation in the development and management of the MRB through the “provision of shared information, technical guidance and mediation” (Mekong River Commission, 2011a; Botkosal, 2015, p. 21). An example is its development of the Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin which is non-binding guidance that:

[A]ims to facilitate MRC cooperation and support the protection of the environment, natural resources, aquatic life and conditions, and the ecological balance of the Lower Mekong River Basin and prevention and cessation of harmful effects resulting from development projects/activities in accordance with the 1995 Mekong Agreement (Mekong River Commission, 2017a, p. 3).

Despite support for the principle of public participation in policy and some practice at the regional and national level regarding access to information and public participation in decision making, there is still no clear statement or mechanism on access to justice in the development and management of the MRB in line with the 1995 Mekong Agreement (Bearden, 2010, p. 815). With no clear statement or mechanism for access to justice by which stakeholders in the MRB may enforce and verify obligation arising from the 1995 Mekong Agreement as well as prevent or remedy adverse impacts on rights related to the development and management of the MRB, the realization of the object and purpose of the 1995 Mekong Agreement may be frustrated until such obligations are addressed (Budryte, Heldt, & Denecke, 2018; Mirumachi & Torriti, 2012; Sneddon & Fox, 2007; Mostert, 2003).

There are some suggestions why there is no clear statement on access to justice in the context of the 1995 Mekong Agreement. The development of a framework and implementation of access to justice will take costs and time the MRC and parties to the agreement may not or cannot commit to. Each party to the 1995 Mekong Agreement has limited resources to commit to the MRC and obligations arising from the 1995 Mekong Agreement. The limitation in resources will be further exacerbated by the transition of the MRC from predominately donor funded to being predominantly financed by the parties to the 1995 Mekong Agreement (Mekong River Commission, 2016b, pp. 26, 45-46). The donors are predominately wealthy institutions and developed States whereas the parties to the 1995 Mekong Agreement are not wealthy and suffer from environmental, social, and economic development issues that already stress their current resources. It may also be more appealing to the parties to focus limited resources on established policies and practices that will minimize the need for access to justice. The current approaches to access to information and public

participation in decision-making took years to develop but are still in need of further improvement to enhance stakeholder participation. Reallocating funding and staff to address access to justice directly at this time may detract from that process (Mostert, 2003, p. 182). Another challenge to access to justice is the political willpower of the parties to pursue policies and procedures aimed at creating and enhancing access to justice within the context of the 1995 Mekong Agreement. Each party to the 1995 Mekong has environmental, social, and economic differences that makes the acceptance and implementation of access to justice more conducive in some States and almost foreign in others (Backer, 2007; Chomchai, 2005). One criticism suggests that it is the preference of the parties to the 1995 Mekong Agreement to have the MRC as an “organization that identifies development projects and attracts external funds, while the control of the development remains with the states themselves” (Armstrong, 2015). However, the lack of political willpower is not necessarily State-driven. Some scholars critique the MRC as being donor driven in achieving its goals and not necessarily in line with the development agenda of the parties to the 1995 Mekong Agreement (Ha, Dieperink, Dang Tri, Otter, & Hoekstra, 2018; Armstrong, 2015; Moder, Kuenzer, Xu, Leinenkugel, & Van Quyen, 2012; Campbell, 2011; Hensengerth, 2009; Backer, 2007; Sneddon & Fox, 2007; Lauridsen, 2004; Ratner, 2003). It has also been suggested that some donors see public participation as an inconvenience to development interests (Sneddon & Fox, 2007, p. 2172) and other donors have been criticized for legitimizing poor development decision-making by the parties (Lauridsen, 2004, p. 64).

All of these issues are compounded by the difficulty in estimating the benefits of investing the resources necessary to develop and implement access to justice in the context of the 1995 Mekong Agreement (Backer, 2007, p. 40). Objective constraints such as the public’s own personal finances to support even minimal travel to forums for settling differences and disputes and limited education to understand even well translated and disseminated information may still limit the quality and quantity of involvement necessary for the parties to the 1995 Mekong Agreement to justify access to justice policies and practices that are as extensive as those on access to information and public participation in decision-making. Subjective concerns such as the public’s confidence in the parties to provide fair procedural arrangements and opportunities also play a role in the willingness of the public to participate as well (Mostert, 2003, pp. 181-82).

Current review mechanisms accessible to the members of public that are stakeholders are limited to monitoring and evaluation in conjunction with regional and sub-regional mechanisms as part of the broader rolling basin development planning process to regularly update goals, outcomes, outputs and activities for each successive BDS (Mekong River Commission, 2017a; Mekong River Commission, 2016a, pp. 73-74; Mekong River Commission, 2011a, p. 4; Mekong River Commission, 2009b, pp. 20-22). Although national courts may be utilized to enforce and verify obligation arising from the 1995 Mekong Agreement as well as prevent or remedy adverse impacts on rights related to the development and management of the MRB, the jurisdiction of

national courts are generally limited to national boundaries (Woodhouse, 2003, p. 144) and the political, legal, and technical realities for each party to the agreement creates wide discrepancies in reliability of each State's judicial system, which has led to the use of courts and tribunals outside the MRB in limited instances (Scurrah & Hirsch, 2015).

Amicus Curiae for Facilitating Access to Justice in the Mekong River Basin

In the context of the 1995 Mekong Agreement, the procedure of amicus curiae before international courts and tribunals may play a significant role in facilitating access to justice. As a procedure at the court and tribunal's discretion, it does not create rights and obligations beyond the scope of the 1995 Mekong Agreement. At the same time, the procedure provides an opportunity for the public to provide perspectives, arguments, and expertise to the court and tribunal that, if determined will assist in the settlement of the issues at hand, may help enforce and verify obligation as well as prevent or remedy adverse impacts related to the development and management of the MRB.

Differences and disputes arising from development and management decisions that may not be in line with the 1995 Mekong Agreement have arisen in the past, some persist and new differences and disputes are likely to occur in the future (Schmeier, 2011). An example of all three has been the controversial development and now operation of the Xayaburi Dam which has led to environmental, social, and economic differences and disputes between the parties to the 1995 Mekong Agreement and is expected to cause differences and disputes in the future (Armstrong, 2015, pp. 11, 19, 23-26; Rieu-Clarke, 2015; Herbertson, 2013). The situation with the Xayaburi Dam is not unique in the MRB and there are many other development and management projects planned or underway that are expected to cause similar discourse (Armstrong, 2015, p. 19; Mirumachi & Torriti, 2012, p. 131). If differences or disputes are unavoidable or remain unsettled among stakeholders in regards to 1995 Mekong Agreement despite the available procedures, stakeholders must seek enforcement or remedy for any obligation arising from the 1995 Mekong Agreement through the parties to the agreement according to international law (Simma, Khan, Nolte, Paulus, & Wessendorf, 2012, pp. 184-85). This recourse is evidenced by the absence of any other recourse for public involvement in differences or disputes in the 1995 Mekong Agreement and reinforced by the NIP of each party to the 1995 Mekong Agreement. In the former instance, if the MRC is unable to resolve differences or disputes regarding matters arising under the 1995 Mekong Agreement and negotiations through diplomatic channels fail to produce mutual agreement between the parties, the parties may proceed according to international law, which may include the use of international courts and tribunals (Kingdom of Cambodia; Kingdom of Thailand; Lao People's Democratic Republic; Socialist Republic of Vietnam, 1995, pp. art. 34-35). In the latter instance, each party's NIP references its respective national water law in addressing transboundary water differences and disputes which refer to the general principles of international law, circulating stakeholders back to the former instance.

Ideally, the interests of the public as a stakeholder in the MRB will be well represented in the chosen forum for the settlement of differences and disputes thereby negating further need for facilitating policies and procedures for access to justice. But the versatility of water and its uses leads to just as many possible interests among the public. Some of these interests may be well represented, but others may not. Inadequacy in the representation of interests can be gleaned from scholarly criticism of the development of interests the public have during participatory processes in the MRB.

For example, the determination of who is a stakeholder is highly subjective and public participation may be less inclusive of those perceived as undesirable stakeholders (Campbell, 2011, p. 7; Mixap, 2015, p. 2; Hensengerth, 2009, pp. 335-38; Sneddon & Fox, 2007, pp. 2169-172; Backer, 2007, pp. 39-44). In terms of access to information, the world-wide-web is an affordable way to reach a mass audience that may otherwise be excluded, yet literacy and access to internet among the targeted audience may be limited, especially in more isolated rural areas of the MRB (Lauridsen, 2004, p. 71; Chenoworth, Ewing, & Bird, 2002, pp. 505-506). There is also a large number of documents related to the development and management of the MRB that are in English that need to be translated into the national languages of the parties to the 1995 Mekong Agreement in order to improve public participation, particularly access to information (Budryte, Heldt, & Denecke, 2018, p. 354). One group of scholars observes that besides communication barriers in the development and management of the MRB, data on relevant factors such as deforestation, soil erosion and sediment deposition are out of date and incomplete (Yun, Williams, & Wenbin, 2017, p. 16). In at least one instance, scholars cited a review where relevant environmental, social, and economic data was diminished in value due to it competing with government interests in the development and management of the MRB (Sneddon & Fox, 2007, p. 2174). Another article highlights several issues with public participation overall for a specific development project in the MRB that may recur on other projects, including inconsistencies in the data used, deficiencies in the calculation of non-monetary values, and discretionary valuation of future benefits (Mirumachi & Torriti, 2012, pp. 128-131). The same article also points out that the late introduction and participation of a key stakeholder in planning and development limited the extent of feasible public involvement, coordination with other stakeholders, and thorough assessment of the impact of the project (Mirumachi & Torriti, 2012, pp. 130-131). Several other scholars cite that participatory processes at different levels in the MRB were carried out pro forma, were not conducive to open deliberation, and the results were predetermined (Meas, 2018, pp. 87-88; Mirumachi & Torriti, 2012, pp. 130-131; Davidsen, Earle, & Malzbender, 2006).

The preceding examples are not exhaustive, but serve to demonstrate that public participation in the development and management of the MRB can be impeded, whether intentionally or unintentionally, and therefore lead to differences in the adequacy of representation of certain interests the public may have in the development and management of the MRB. Poorly represented or unrepresented interests may include

issues over public involvement in the development and management of the MRB as well as other interests, such as human rights and the environment. Left unaddressed these issues may culminate into the frustration of the realization of the object and purpose of the 1995 Mekong Agreement. This necessitates a need for procedural arrangements and opportunities by which the public may seek and obtain enforcement and verification of obligations arising from the 1995 Mekong Agreement as well as prevent or remedy adverse impacts on rights related to the MRB's development and management (i.e. access to justice).

In the case of international courts and tribunals, various procedural tools are available that may facilitate access to justice by providing perspectives, arguments or expertise from the public to the international court or tribunal. An increasing trend in water-related disputes has been increasing participation by non-party stakeholders to judicial proceedings in the form of *amicus curiae* (Boisson de Chazournes, 2013, pp. 218-26; Mbengue & Tignino, 2005, pp. 367-405; Tanzi & Pitea, 2003, pp. 286-97). *Amicus curiae* means "friend of the court" (Sands & Mackenzie, 2012). It is a procedural tool available to courts and tribunals whereby a non-party to a proceeding provides perspectives, arguments, or expertise that may assist in the proper determination of cases before them (Wiik, 2018, pp. 22-29). Participation as *amicus curiae* takes different forms, from the submission of briefs to oral testimony. Generally, anyone may participate as *amicus curiae*, however an *amicus curiae* is not a party to a dispute and participate at the court or tribunal's discretion (Bartholomuesz, 2005, p. 44).

Historically, the procedure of *amicus curiae* is practiced in common law and some civil law jurisdictions and has expanded to some international courts and tribunals (Bartholomuesz, 2005). Overcoming the shortcomings of the adversarial system is the most commonly cited basis supporting the procedure (Mohan, 2010, p. 360).

In modern practice, a non-party may intervene to become a party to the dispute and does so as a matter of legal right because it has a legal interest in the dispute (Sands & Mackenzie, 2012, p. 519). But when the legal interest is not strong enough to constitute a legal right to intervene or when a non-party wishes to provide relevant law or facts to assist courts and tribunals with the determination of a dispute, the procedure of *amicus curiae* helps to fill this gap (Bartholomuesz, 2005, p. 273).

International courts and tribunals have so far been accepting of *amicus curiae* submissions as a procedure within their discretion when supported by the parameters established by the applicable rules (Wiik, 2018, pp. 123-26; Sands & Mackenzie, 2012, p. 519; Bartholomuesz, 2005, pp. 273-76). The applicable rules are derived from sources of international law such as treaties, custom, and the general principles of law (Rassekh Afshar, 2012, p. 621) and often take the form of statutes of the courts, rules of procedure, and practice directions (Sorel, 2012, p. 613). This is the case of some international courts and tribunals, where the procedure of *amicus curiae* is expressed. However, there is no universal set of rules governing the procedure of *amicus curiae*

before international courts and tribunal and in the absence of express rules, international courts and tribunals have had to look to applicable law that allow for the court or tribunal to “seek or receive information relevant to the dispute,” and its own general procedural powers to weigh the appropriateness of amicus curiae submissions in specific cases (Sands & Mackenzie, 2012).

“Although the applicable rules may allow an arbitral tribunal the discretion to accept amicus curiae submissions, it is not an open door through which any non-party may participate in a dispute” (Vangh, 2020, p. 76). International courts and tribunals determine the acceptance of amicus curiae submissions on a case by case basis and have varying factors for such determination. These factors are guided by provisions and statements derived from the applicable law and may include: who may request leave to submit as amicus curiae, the relevancy of the perspectives, arguments or expertise to the proceedings, and the interests of the disputing parties (Vangh, 2020, p. 76). Where there are no provisions and statements guiding the exercise of discretion on amicus curiae submissions, courts and tribunals are well aware of the balancing of the interests of the disputing parties with the appropriateness of amicus curiae submissions (Wiik, 2018, pp. 64-65).

Challenges to Amicus Curiae in the Mekong River Basin

Although there is potential for the procedure of amicus curiae to facilitate access to justice within the MRB, there also has several challenges to its use. The procedure operates as a tool of international courts and tribunals, not a right of the public. The various courts and tribunals interpret their discretion to accept amicus curiae submissions to different degrees. The costs and time needed for amicus curiae submissions may also prejudice the parties’ ability to maintain proceedings. There is also the possibility for uses of the procedure that do not necessarily facilitate access to justice.

Since the procedure is a tool of international courts and tribunals, differences and dispute by the parties to the 1995 Mekong Agreement must to be submitted to a court or tribunal before a request for leave to make a submission as amicus curiae may even be entertained. Under the 1995 Mekong Agreement and international law, the parties are not obligated to settle any differences or disputes (Kingdom of Cambodia; Kingdom of Thailand; Lao People's Democratic Republic; Socialist Republic of Vietnam, 1995, art. 34-35; Pellet, 2012, pp. 208-09). The parties are only obligated to employ peaceful means if they choose to settle their differences or disputes (United Nations, 1945a, art. 2(3), 33(1)) and the 1995 Mekong Agreement makes no requirement for a referral to a court or tribunal. Adding to this challenge is the fact that the parties to the 1995 Mekong Agreement showed split support for an obligatory dispute settlement process involving referral to the ICJ or arbitration during negotiation of the agreement (Good Practices and Portfolio Learning in GEF Transboundary Freshwater and Marine Legal and Institutional Frameworks Project, 2011, p. 15), resulting in the current provisions for the settlement of differences and disputes. With no obligations to submit differences

Publication of the European Centre for Research Training and Development -UK

and disputes to a court or tribunal and reluctance for it during the negotiation of the 1995 Mekong Agreement, it is questionable if there will ever be an opportunity for the public to request leave to make submission as *amicus curiae*.

Even if the parties submit their differences or disputes to an international court or tribunal, the procedural rules of the chosen forum affect the extent to which the public may participate as *amicus curiae* if at all. This may be by stipulation of the parties themselves or already established procedures within the forum. For example, in contentious cases before the ICJ, *amicus curiae* participation is limited to “public international organizations” (United Nations, 1945b, art. 34(2)) which is defined as an “international organization of States” (International Court of Justice, 1978, r. 69(4)) Whereas in disputes before the Panel of the WTO DSB, the Panel has “the right to seek information and technical advice from any individual or body which it deems appropriate. . .” (World Trade Organization, 1994, ann. 2, art. 13(1)) and, “. . . may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. . .” (World Trade Organization, 1994, ann. 2, art. 13(2)).

Costs are another challenge as well that may prejudice the disputing parties’ ability to advocate for their positions. The disputing parties incur costs for use of a forum’s services and prolonged proceedings due to waiting for the public to request leave and make submissions as *amicus curiae* as well as the parties taking the time to respond to submissions add to these costs (i.e. attorney fees, administrative fees, fees for neutrals, fees for lodging, etc.). Wealthy and developed States can absorb such costs, but it is much more difficult for most developing States to do so. Therefore, a court or tribunal may be reluctant to grant a request for leave to make submission as *amicus curiae* even if it has discretion to do so.

Another challenge is time. In the MRB, development and management projects form a cornerstone policy for improving the economic, social, and environmental well-being of each party to the 1995 Mekong Agreement. A prolonged delay in proceedings due to waiting for and responding to, sometimes overwhelming, *amicus curiae* submissions may be viewed as a dissipation of the potential benefits perceived from development and management projects and may instead encourage unilateral action instead of cooperation. For example, it has been suggested that the potential indefinite delay to the development and management of the Xayaburi Dam due to the prior notification, consultation, and agreement process, as well as the significant amount of financial and political capital invested in the project, encouraged unilateral approval for its continued construction, eventual completion, and management (Armstrong, 2015, pp. 11, 19-20).

Lastly, the procedure of *amicus curiae* might be utilized by more resourceful and influential members of the public to advance their interests while leaving out those that may be more relevant in assisting the international court or tribunal. One scholar notes that NGOs and international funding bodies have been the driving force behind

implementation of participatory processes in some States within the framework of the 1995 Mekong Agreement (Chenoworth, Ewing, & Bird, 2002, p. 506). Organizations by their very nature have specific objectives that may not necessarily cover the interests of certain members of the public. To be a driving force within a State is a testament to an organization's resources and influence, which in turn can potentially be marshalled to request leave from a court or tribunal in order to make submissions as *amicus curiae*. If a member of the public is within an organization's sphere of service, they will likely benefit from any *amicus curiae* submission made. If not, then it is likely a difficult road ahead to put forward any perspectives, arguments, or expertise to assist the court in a proper determination of a case before it.

CONCLUSION

In conclusion, there is potential for the procedure of *amicus curiae* to facilitate access to justice in the MRB. Under the 1995 Mekong Agreement, the principle of participation is supported by the parties and the MRC in policy and some practice at both the regional and sub-regional level. However, the current framework for public participation has no clear statement or mechanism for access to justice. Without access to justice, the public is limited in its ability to enforce and verify obligations as well as prevent or remedy adverse impacts related to the development and management of the MRB, thereby frustrating the realization of the object and purpose of the 1995 Mekong Agreement. In the event the parties to the 1995 Mekong agreement submit their differences and disputes to an international court or tribunal, the procedure of *amicus curiae* can be used and can facilitate access to justice. As a procedure of international courts and tribunals, it will allow such forums to obtain perspectives, arguments, and expertise to assist in a proper determination of cases in the context of the 1995 Mekong Agreement. The admission of these perspectives, arguments, and expertise in turn can facilitate access to justice, as it allows the public the opportunity to provide perspectives, arguments, and expertise that an international court or tribunal may determine helpful in assisting in the settlement of the disputes before it. In practice, international court and tribunals have shown sensitivity to the perspectives, arguments and expertise of the public in cases related to water, particularly in regards to human rights and the environment. However, the procedure is highly dependent on the willingness of the parties to utilize international courts and tribunals that are open to the public requesting leave to make submissions as *amicus curiae*. Furthermore, those seeking to be *amicus* must be wary to not overburden the settlement process with their requests for leave and submissions. It is also important to note that those members of the public who may benefit most in terms of access to justice from being able to make submissions as *amicus curiae* may not necessarily be able to do so due to constraints in resources and capability. Despite the challenges, the procedure of *amicus curiae* offers an additional route for access to justice in the MRB that can contribute to the realization of the object and purpose of the 1995 Mekong Agreement.

Future Research

In light of the discussion and conclusion, there are two recommended areas for future research.

The first, is more research on the potential and actual impact of policies and practices related to public participation, including the impact on established and emergent rights, in the MRB under the 1995 Mekong Agreement. As some scholars have pointed out, some policies and practices have had a positive impact on the development and management of the MRB and other policies and practices have not. New research will provide more data that may be used for the further development and implementation of public participation, including access to justice, in the MRB to assist in realizing the object and purpose of the 1995 Mekong Agreement.

The second, is the further development of existing and new specific harmonized guidelines for public participation in the MRB under the 1995 Mekong Agreement. Development of harmonized guidelines for public participation, including access to justice, that take into account existing and ongoing developments in policy and practice in the MRB under the 1995 Mekong Agreement will provide frameworks that may be used to improve the likelihood of equitable results and avoid grossly disproportionate outcomes in the development and management of the MRB.

References

- Armstrong, S. C. (2015). Water Is For Fighting: Transnational Legal Disputes in the Mekong River Basin. *Vermont Journal of Environmental Law*, 17. Retrieved from <http://vjel.vermontlaw.edu/files/2015/11/Armstrong.pdf>
- Backer, E. B. (2007). The Mekong River Commission: Does It Work, and How Does the Mekong Basin's Geography Influence Its Effectiveness? *Südostasien Aktuell : Journal of Current Southeast Asian Affairs*, 26(4), 31-55. Retrieved from <https://www.ssoar.info/ssoar/handle/document/33627>
- Bartholomuesz, L. (2005). The Amicus Curiae Before International Courts and Tribunals. In M. Fitzmaurice, *Non-State Actors and International Law*. Koninklijke Brill. Retrieved from <https://heinonline.org/HOL/LandingPage?handle=hein.journals/nonstata5&div=14&id=&page=>
- Bearden, B. L. (2010). The Legal Regime of the Mekong River: A Look Back and Some Proposals for the Way Ahead. *Water Policy*, 12(8), 798-821. doi:<https://doi.org/10.2166/wp.2009.060>
- Boisson de Chazournes, L. (2013). *Fresh Water in International Law*. Oxford University Press.
- Botkosal, W. (2015). *Strategic priorities for transboundary water cooperation in the Sekong, Sesan and Sre Pok (3s) Basins*. International Union for Conservation of Nature. Retrieved from http://www.waterandnature.org/sites/default/files/strategic_priorities_for_trans-boundary_water_cooperation_in_3s_basin_april_2015.pdf

- Budryte, P., Heldt, S., & Denecke, M. (2018). Foundations of the Participatory Approach in the Mekong River Basin Management. *Science of The Total Environment*, 349-361. Retrieved from <http://www.sciencedirect.com/science/article/pii/S0048969717334034>
- Cambodia National Mekong Committee. (2013). *Mekong River Commission Basin Action Plan: The National Indicative Plan for Implementation of the MRC IWRM-Based Basin Development Strategy 2011-2015*. Cambodia National Mekong Committee. Retrieved from <https://mrcmekong.org/assets/Publications/strategies-workprog/Cambodia-National-Indicative-Plan-May2013.pdf>
- Campbell, I. C. (2011). Managing international river basins: successes and failures of the Mekong River Commission. In Q. R. Grafton, & K. Hussey, *Water Resources Planning and Management* (pp. 724-740). Cambridge University Press. Retrieved from https://www.cambridge.org/core/product/identifier/CBO9780511974304A055/type/book_part
- Chenoworth, J. L., Ewing, S. A., & Bird, J. F. (2002). Procedures for Ensuring Community Involvement in Multijurisdictional River Basins: A Comparison of the Murray-Darling and Mekong River Basins. *Environmental Management*, 497-509. doi:<https://doi.org/10.1007/s00267-001-0029-8>
- Chomchai, P. (2005). Public participation in watershed management in theory and practice: A Mekong River Basin Perspective. In C. Bruch, L. Jansky, M. Nakayama, & K. A. Salewicz, *Public Participation in the Governance of International Freshwater Resources* (pp. 139-155). United Nations University Press.
- Davidson, P. A., Earle, A., & Malzbender, D. (2006). Between Rhetoric and Reality – A Critical Account of Stakeholder Participation in Decision Making in the Mekong River Basin. *Stakeholder Participation in Transboundary Water Management - Selected Case Studies*, pp. 131-149. Retrieved from <https://iwlearn.net/resolveuid/5e3f75cede70f0aa6c0b8e749159242c>
- Good Practices and Portfolio Learning in GEF Transboundary Freshwater and Marine Legal and Institutional Frameworks Project. (2011). *In-Depth Case Study for the Mekong River Basin: the 1995 Agreement on the Cooperation for Sustainable Development of the Mekong River Basin System*. University of British Columbia. Retrieved from <http://www.internationalwatersgovernance.com/uploads/1/3/5/2/13524076/mekong.pdf>
- Ha, T., Dieperink, C., Dang Tri, V. P., Otter, H. S., & Hoekstra, P. (2018). Governance conditions for adaptive freshwater management in the Vietnamese Mekong Delta. *Journal of Hydrology*, 116-127. Retrieved from <http://www.sciencedirect.com/science/article/pii/S0022169417308429>
- Hensengerth, O. (2009). Transboundary River Cooperation and the Regional Public Good: The Case of the Mekong River. *Contemporary Southeast Asia*, 326-349. Retrieved from <https://www.jstor.org/stable/41487387>

Publication of the European Centre for Research Training and Development -UK

- Herbertson, K. (2013). *Xayaburi Dam: How Laos violated the 1995 Mekong Agreement*. International Rivers. Retrieved from https://data.opendevelopmentmekong.net/library_record/1995
- International Conference on Water and the Environment. (1992). *The Dublin Statement on Water and Sustainable Development*. World Meteorological Organization. Retrieved from <https://www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf>
- International Court of Justice. (1978). *International Court of Justice Rules of Court*. International Court of Justice. Retrieved from <https://www.icj-cij.org/en/rules>
- Kingdom of Cambodia; Kingdom of Thailand; Lao People's Democratic Republic; Socialist Republic of Vietnam. (1995, April 5). *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*. 2069 UNTS 3. Retrieved from <https://treaties.un.org/doc/Publication/UNTS/Volume%202069/v2069.pdf>
- Koskeniemi, M. (2012). International Legal Theory and Doctrine. In R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law* (pp. 976-986). Oxford University Press.
- Lao People's Democratic Republic. (2012). *Lao National Indicative Plan (2011-2015) For Implementation of the IWRM-Based Basin Development Strategy*. Lao People's Democratic Republic. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/Lao-PDR-NIP-final-Dec042012.pdf>
- Lauridsen, P. E. (2004). Transboundary Water Management in the Mekong: River of Controversy or River of Promise? *From Water 'Wars' To Water 'Riots'? - Lessons From Transboundary Water Management*, pp. 47-79. Retrieved from <https://www.jstor.org/stable/resrep13476.7>
- Mbengue, M. M., & Tignino, M. (2005). Transparency, Public Participation, and Amicus Curiae in Water Disputes. In E. B. Weiss, L. B. Chazournes, & N. Bernasconi-Osterwalder, *Fresh Water and International Economic Law* (pp. 367-405). Oxford University Press. Retrieved from https://www.academia.edu/8028929/Transparency_Public_Participation_and_Amicus_Curiae_in_Water_Disputes_with_M_M_Mbengue_
- Meas, S. (2018). Public Participation Strategy for Sustainable Water Resource Governance in the Lower Mekong Basin: A Policy Case Study from the Mekong River Commission. *Explorations: A Graduate Student Journal of Southeast Asian Studies*, pp. 73-95. Retrieved from <https://scholarspace.manoa.hawaii.edu/handle/10125/56600>
- Mekong River Commission. (1999). *Public Participation in the Context of the MRC*. Mekong River Commission. Retrieved from <https://www.mrcmekong.org/assets/Publications/policies/Public-Participation-in-MRC-context.pdf>
- Mekong River Commission. (2004). *The MRC Basin Development Plan: Stakeholder Participation (BDP Library Volume 5)*. Mekong River Commission. Retrieved from

<http://archive.iwlearn.net/mrcmekong.org/download/programmes/bdp/05-Stakeh-particip.pdf>

Mekong River Commission. (2005). *Public Participation in the Lower Mekong Basin*. Mekong River Commission. Retrieved from <http://www.mrcmekong.org/assets/Publications/governance/Public-Participation.pdf>

Mekong River Commission. (2009a). *Mekong River Commission Basin Development Plan Programme Phase 2 (BDP): Stakeholder Participation and Communication Plan for Basin Development Planning in the Lower Mekong Basin*. Mekong River Commission. Retrieved from <http://www.mrcmekong.org/assets/Other-Documents/BDP/SPCP-Final-July-2009-Final.pdf>

Mekong River Commission. (2009b). *Mekong River Commission Communication Strategy and Disclosure Policy*. Mekong River Commission. Retrieved from <https://www.mrcmekong.org/assets/Publications/policies/Communication-Strategy-n-Disclosure-Policy.pdf>

Mekong River Commission. (2011a). *Integrated Water Resources Management-based Basin Development Strategy for the Lower Mekong Basin 2011-2015*. Mekong River Commission. Retrieved from <https://mrcmekong.org/assets/Publications/strategies-workprog/BDP-Basin-Dev-Strategy-2013-Eng.pdf>

Mekong River Commission. (2011b). *MRC Work Programme 2012*. Mekong River Commission. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/work-program-12-final.pdf>

Mekong River Commission. (2016a). *Integrated Water Resources Management-based Basin Development Strategy for the Lower Mekong Basin 2016-2020*. Mekong River Commission. Retrieved from <https://mrcmekong.org/assets/Publications/strategies-workprog/BDP-Basin-Dev-Strategy-2013-Eng.pdf>

Mekong River Commission. (2016b). *The Mekong River Commission Strategic Plan 2016-2020*. Mekong River Commission. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/MRC-Strategic-Plan-2016-2020.pdf>

Mekong River Commission. (2017a). *Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin*. Mekong River Commission. Retrieved from <http://www.mrcmekong.org/assets/Uploads/Guidelines-for-Transboundary-Environmental-Impact-Assessment-in-the-Lower-Mekong-Basin-Draft-11-August-17-3.pdf>

Mekong River Commission. (2017b). *Stakeholder Submissions*. Retrieved from Mekong River Commission: <https://www.mrcmekong.org/stakeholder-consultations/stakeholder-submissions/>

Mekong River Commission. (2020). *The 9th Regional Stakeholder Forum*. Retrieved from Mekong River Commission: <https://www.mrcmekong.org/news-and->

events/consultations/regional-stakeholder-forums/the-9th-mrc-regional-stakeholder-forum/

- Mekong River Commission. (2020). *Understanding the 1995 Mekong Agreement and the five MRC Procedures: A handbook*. Mekong River Commission. Retrieved from <https://mrcmekong.org/assets/Publications/95MA-Hb.pdf>
- Mekong River Commission Basin Development Plan Programme. (2013). *Basin Action Plan: An Executive Synthesis to provide policy makers and the broader development community with a concise overview of the Basin Action Plan, comprising the Regional Action Plan and four National Indicative Plans*. Mekong River Commission. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/MRC-Basin-Action-Plan-May2013.pdf>
- Mirumachi, N., & Torriti, J. (2012). The use of public participation and economic appraisal for public involvement in large-scale hydropower projects: Case study of the Nam Theun 2 Hydropower Project. *Energy Policy*, 125-132. Retrieved from <http://www.sciencedirect.com/science/article/pii/S0301421512003394>
- Mixap, V. (2015). *Transboundary: Public Participation in Hydropower Development: Does it Matter?* Global Water Partnership. Retrieved from https://www.researchgate.net/publication/278312941_Transboundary_Public_Participation_in_Hydropower_Development_Does_it_matter
- Moder, F., Kuenzer, K., Xu, Z., Leinenkugel, P., & Van Quyen, B. (2012). Integrated Water Resources Management, IWRM, for the Mekong Basin. In F. G. Renaud, & C. Kuenzer, *The Mekong Delta System* (pp. 133-165). Springer. Retrieved from https://www.researchgate.net/publication/236029171_Integrated_Water_Resources_Management_IWRM_for_the_Mekong_Basin
- Mohan, S. C. (2010). The Amicus Curiae: Friends No More. *Singapore Journal of Legal Studies*, 352-374. Retrieved from https://www.jstor.org/stable/24870502?seq=1#page_scan_tab_contents
- Mostert, E. (2003). The Challenge of Public Participation. *Water Policy*, 179-197. doi:<https://doi.org/10.2166/wp.2003.0011>
- Pellet, A. (2012). Peaceful Settlement of International Disputes. In R. Wolfrum, *The Max Planck Encyclopedia of Public International Law* (pp. 201-224). Oxford University Press.
- Rassekh Afshar, M. K. (2012). International Courts and Tribunals, Rules and Practice Directions (ECJ, GC, ECtHR, IACtHR, ICSID, ITLOS, WTO Panels and Appellate Body). In R. Wolfrum, *The Max Planck Encyclopedia of Public International Law* (pp. 621-626). Oxford University Press.
- Ratner, B. D. (2003). The Politics of Regional Governance in the Mekong River Basin. *Global Change, Peace & Security*, 59-76. doi:<https://doi.org/10.1080/0951274032000044522>
- Rieu-Clarke, A. (2015). Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy. *Asian Journal of International Law*, 143-175. Retrieved from

- <https://www.cambridge.org/core/journals/asian-journal-of-international-law/article/abs/notification-and-consultation-procedures-under-the-mekong-agreement-insights-from-the-xayaburi-controversy/2E7B478709EB914733041285F7EB6B55>
- Sands, P. J., & Mackenzie, R. (2012). International Courts and Tribunals, Amicus Curiae. In R. Wolfrum, *Max Planck Encyclopedia of Public International Law* (pp. 519-526). Oxford University Press.
- Schmeier, S. (2011). Resilience to Climate Change-Induced Challenges in the Mekong River Basin : The Role of the MRC. *Water Papers*.
- Scurrah, N., & Hirsch, P. (2015). *Dispute Resolution and Access to Justice: Extended Synopsis*. Mekong Land Research Forum. Retrieved from <http://www.mekonglandforum.org/sites/default/files/Extended%20Synopsis%2008%20Dispute%20Resolution%20and%20Access%20to%20Justice%2020.pdf>
- Simma, B., Khan, D.-E., Nolte, G., Paulus, A., & Wessendorf, N. (2012). *The Charter of the United Nations: A Commentary* (Vol. 1). Oxford University Press. Retrieved from <https://opil.ouplaw.com/view/10.1093/law/9780199639762.001.0001/law-9780199639762>
- Sneddon, C., & Fox, C. (2007). Power, Development, and Institutional Change: Participatory Governance in the Lower Mekong Basin. *World Development*, 35(12), 2161-2181.
- Sorel, J.-M. (2012). International Courts and Tribunals, Procedure. In R. Wolfrum, *The Max Planck Encyclopedia of Public International Law* (pp. 613-620). Oxford University Press.
- Tanzi, A., & Pitea, C. (2003). Emerging Trends in the Role of Non-State Actors in International Water Disputes. In T. I. PCA, *Resolution of International Water Disputes (PCA/Peace Palace Papers)*. Kluwer Law International. Retrieved from https://www.academia.edu/7211264/Emerging_Trends_in_the_Role_of_Non_State_Actors_in_International_Water_Disputes
- Thai National Mekong Committee Secretariat. (2012). *National Indicative Plan*. Thai National Mekong Committee Secretariat. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/Thailand-National-Indicative-Plan-Final-Dec2012.pdf>
- United Nations. (1945a). *Charter of the United Nations and Statute of the International Court of Justice*. United Nations. 1 UNTS 16. Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-1&chapter=1&clang=_en
- United Nations. (1945b). *Statute of the International Court of Justice*. United Nations. 33 UNTS 993. Retrieved from https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=I-3&chapter=1&clang=_en

Publication of the European Centre for Research Training and Development -UK

- United Nations Conference on Environment and Development. (1992). *Rio Declaration on Environment and Development*. United Nations. Retrieved from https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf
- United Nations Conference on the Law of Treaties. (1969). *Vienna Convention on the Law of Treaties*. 1155 UNTS 331. United Nations.
- Vangh, A. (2020). Prospects for Amicus Curiae Under the Annex to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. *Mae Fah Luang University Law Journal*, 49-85.
- Viet Nam National Mekong Committee. (2012). *Viet Nam National Mekong Committee: National Indicative Plan to Implement the IWRM-Based Basin Development Strategy of the Mekong River Commission*. Viet Nam National Mekong Committee. Retrieved from <https://www.mrcmekong.org/assets/Publications/strategies-workprog/VietNam-Nation-Indicative-plan-final-Aug2012.pdf>
- Wiik, A. (2018). *Amicus Curiae Before International Courts and Tribunals*. Nomos Verlagsgesellschaft.
- Woodhouse, M. (2003). Is Public Participation a Rule of the Law of International Watercourses? *Natural Resources Journal*, 137-183. Retrieved from <https://www.jstor.org/stable/24888789>
- World Trade Organization. (1994). *Marrakesh Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes*. 1869 UNTS 401. Retrieved from <https://treaties.un.org/doc/publication/unts/volume%201867/volume-1867-i-31874-english.pdf>
- Yun, G., Williams, S., & Wenbin, D. (2017). Water Management Of The Mekong River. *Water Conservation & Management (WCM)*, 10-12. Retrieved from https://econpapers.repec.org/article/zibzbnwcm/v_3a1_3ay_3a2017_3ai_3a2_3ap_3a10-12.htm