Taming the Mekong: 
The Possibilities and Pitfalls of a Mekong Basin Joint 
Energy Development Agreement 

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I. INTRODUCTION

China is currently building a series of dams on the Mekong River to meet its growing need for energy.\(^1\) Feeding an industrializing economy on imported energy is no longer economically feasible as energy prices rapidly increase. While China’s needs are quickly evolving to consume more electricity, these dams are estimated to produce seventy percent of China’s current electricity needs.\(^2\) Generating this much electricity by

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\(^2\) See Michael Richardson, *Not Many Left Who Will Bait the Dragon*, NEW
damming the Mekong River thrills China; however, downstream riparian states such as Thailand, Cambodia, Laos, Vietnam, and Myanmar (the “Mekong Basin States”) are not excited by the idea.\textsuperscript{3} The Mekong Basin States foresee serious economic and environmental consequences resulting from China’s damming.\textsuperscript{4}

In 1995, Thailand, Cambodia, Laos, and Vietnam signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (the “MRC Agreement”).\textsuperscript{5} The MRC agreement created the Mekong River Commission (the “MRC”), a supranational organization designed to oversee the sustainable development of the Mekong River.\textsuperscript{6} The area of coordination given to the MRC generally includes “irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism.”\textsuperscript{7} The MRC agreement also focused on minimizing the environmental impacts of development on the Mekong River.\textsuperscript{8} China and Myanmar opted out of the treaty because they failed to see the benefits of joining the MRC.\textsuperscript{9}

After exploring potential legal avenues that could be taken to resolve the Mekong River Dispute, some legal scholars conclude that international law leaves the Mekong Basin States with little legal recourse for resolving the disputes over China’s damming the Mekong River.\textsuperscript{10} Furthermore, they have dismissed those available as futile. This paper will explore the possibilities for a non-legal resolution to the Mekong

\textsuperscript{3} Davis, \textit{supra} note 1, at 1-2.

\textsuperscript{4} Id.


\textsuperscript{6} See id. at art. 1, 11.

\textsuperscript{7} Id. at art. 1.

\textsuperscript{8} See id. at art. 3-8 (providing for a commitment to environmental maintenance and protection of the area with state liability for environmental damage caused by activities on or around the Mekong).

\textsuperscript{9} Id. (noting the absence of China and Myanmar from the agreement though they are fellow riparian states); Tun Myint, \textit{Democracy in Global Environmental Governance: Issues, Interests, and Actors in the Mekong and the Rhine}, 10 \textit{Ind. J. Global Legal Stud.} 287, 299 (2003) (noting that China and Myanmar chose to opt out of the MRC Agreement).

\textsuperscript{10} See Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Laos-Cambodia-Thail.-Vietnam, \textit{supra} note 5; Myint, \textit{supra} note 9.
River dispute through the formation of a joint development agreement ("JDA"). Section II addresses the needs and interests of China and the Mekong Basin States. Section III explores one possible approach to bring China to the negotiating table. Section IV discusses the background of JDAs and provides an example of one possible organization structure which can address the development needs and can safeguard against the difficulties of a negotiated resolution. Section V examines the obstacles to resolving this dispute through a JDA. The paper concludes that the Mekong Basin States may have sufficient bargaining power to bring China to a negotiated agreement and that if the agreement carefully forms organizations with the proper safeguards, such an agreement may foster cooperation and avoid corruption.

II. NEEDS AND INTERESTS OF THE PARTIES

States’ economies and needs provide a starting place for examining possible non-legal solutions to the Mekong River dispute. The economies and needs of the Mekong Basin States are very diverse and offer many possibilities to bargain outside of the context of the Mekong River alone. The following table provides a snapshot of states’ economies that are party to this dispute.
### Table 1.

<table>
<thead>
<tr>
<th></th>
<th>Cambodia</th>
<th>China</th>
<th>Laos</th>
<th>Myanmar</th>
<th>Thailand</th>
<th>Vietnam</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>GDP</strong></td>
<td>$8.3 billion (Agriculture Products = 31% of GDP; Industry = 26% of GDP; Services = 43% of GDP)</td>
<td>$3.249 trillion (Agriculture Products = 41.3% of GDP; Industry = 32.2% of GDP)</td>
<td>$4.2 billion (Agriculture Products = 41.3% of GDP; Industry = 32.2% of GDP)</td>
<td>$13.7 billion (Agriculture Products = 8.9% of GDP)</td>
<td>$246 billion (Agriculture Products = 20.4% of GDP; Industry = 41.5% of GDP; Services = 38.1% of GDP)</td>
<td>$61 billion (Agriculture Products = 20.4% of GDP; Industry = 41.5% of GDP; Services = 38.1% of GDP)</td>
</tr>
<tr>
<td><strong>Real Growth Rate</strong></td>
<td>9.05%</td>
<td>11.4%</td>
<td>7.0%</td>
<td>5.5%</td>
<td>4.8%</td>
<td>8.3%</td>
</tr>
<tr>
<td><strong>Exports Amount</strong></td>
<td>$4.1 billion</td>
<td>$1.221 trillion</td>
<td>$970 million</td>
<td>$3.6 billion</td>
<td>$152.5 billion</td>
<td>$39.6 billion</td>
</tr>
<tr>
<td><strong>Export Partners</strong></td>
<td>United States, Germany, U.K., Singapore, Japan, Vietnam.</td>
<td>United States, Hong Kong, Japan, EU, South Korea, Singapore</td>
<td>Thailand, Vietnam, France, and Germany.</td>
<td>Thailand, India, China, Hong Kong, Japan</td>
<td>ASEAN, EU, U.S., Japan, China, and Singapore</td>
<td>U.S., EU, Japan, China, Singapore, Australia, Taiwan, and Germany</td>
</tr>
<tr>
<td><strong>Imports Amount</strong></td>
<td>$5.3 billion</td>
<td>$917.4 billion</td>
<td>$1.376 billion</td>
<td>$2 billion</td>
<td>$140.0 billion</td>
<td>$44.4 billion</td>
</tr>
<tr>
<td><strong>Major Import Partners</strong></td>
<td>Thailand, Singapore, China, Hong Kong, Vietnam, Taiwan, United States.</td>
<td>Japan, EU, Taiwan, South Korea, United States, Malaysia, Australia</td>
<td>Thailand, China, Vietnam, Singapore.</td>
<td>Singapore, China, Thailand, Malaysia.</td>
<td>Japan, ASEAN, China, EU, U.S. and Malaysia</td>
<td>China, Japan, Singapore, Taiwan, South Korea, Hong Kong, and Thailand</td>
</tr>
</tbody>
</table>

The broad disparities between each country’s Gross Domestic Products, economic growth rates, imported and exported dollar amounts, and the number of principal import and export partners, demonstrate their economic interests and the potential for using international trade and

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economic development as a reason for cooperating in the Mekong River development. Subsection A below will further discuss China’s needs and perspectives on the dispute. Subsection B will explore the needs, resources, and perspectives of the Mekong Basin States and their techniques to the negotiating table.

A. China’s Perspective and Needs

Table 1 demonstrates China’s fast growing economy whose major imports are related to energy and production. China is interested in building infrastructure and capacity to continue to feed its economic growth. Furthermore, the skyrocketing price of oil is also exacerbating China’s need and reliance on energy resources.17 These energy needs were the motivating factors behind China’s decision to harness the hydropower of the Mekong River.18 By the time China finishes the dam, the power from the Mekong will provide approximately seventy percent of the electricity needed to sustain the nation at its current usage.19 While the energy output of the Mekong River dams will not likely provide for seventy percent of China’s electricity needs at the time the dams are all functioning, this input of domestic electricity will provide a powerful platform on which China can diversify and forward their energy independence needs. The following table provides a timeline and the potential annual Megawatt-hours (“MW-h”) output of China’s Mekong hydropower plan.

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17 See David Fullbrook, Dams It Is!, WORLD TODAY, June 1, 2008, available at 2008 WLNR 10723482.

18 See id.

19 See Richardson, supra note 2.
Table 2.\textsuperscript{20}

<table>
<thead>
<tr>
<th>Name</th>
<th>Height (meter)</th>
<th>Gross/Active Storage (billion m$^3$)</th>
<th>Capacity (MW-h)</th>
<th>Construction Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manwan</td>
<td>126</td>
<td>0.92/0.25</td>
<td>1,500</td>
<td>1986-1993</td>
</tr>
<tr>
<td>Dachaoshan</td>
<td>110</td>
<td>0.96/0.37</td>
<td>1,350</td>
<td>1997-2003</td>
</tr>
<tr>
<td>Jinghong</td>
<td>118</td>
<td>1.04/0.25</td>
<td>1,500</td>
<td>Planned</td>
</tr>
<tr>
<td>Xiaowan</td>
<td>300</td>
<td>14.55/0.99</td>
<td>4,200</td>
<td>2002-2012</td>
</tr>
<tr>
<td>Nuozhadu</td>
<td>254</td>
<td>22.7/1.22</td>
<td>5,000</td>
<td>NA</td>
</tr>
<tr>
<td>Mengsong</td>
<td>NA</td>
<td>600</td>
<td></td>
<td>NA</td>
</tr>
<tr>
<td>Gonguqiao</td>
<td>0.51</td>
<td>0.12</td>
<td>750</td>
<td>NA</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>40.68/3.20</strong></td>
<td></td>
<td><strong>14,900</strong></td>
<td></td>
</tr>
</tbody>
</table>

Table 2 demonstrates that only two of the dams planned have been finished including the Manwan and Dachaoshan dams. The Xiaowan dam, which will provide more power than the two completed dams, is under construction. The table also demonstrates the great power potential the Mekong River has as it winds through China.

While this dispute is focused on the possible negative impacts of the dams, China and other outside sources have explained that the dams may actually provide some benefit to the Mekong Basin States. China explains that the Mekong dams will store water during the rainy season and then release the water in the dry season, thus, evening out the flood and drought patterns of the lower Mekong River.\textsuperscript{21} A MRC senior environmental specialist explained that, while the dams did impact the lower Mekong, the dams could help by reducing the serious flooding and also by lowering the high sedimentation levels that are currently affecting the lower Mekong.\textsuperscript{22}


\textsuperscript{22} See id. (citing Piyaporn Hawiset, Mekong River Commission’s Middleman Role Attacked (Nov. 16, 2002), http://www.geocities.com/vlado_stastny (last visited Feb.
Easing the growing oil tensions in the region is another benefit to harnessing hydropower from the Mekong.\(^{23}\) Rising oil prices have created a huge problem not only for China, but for Thailand and Vietnam also.\(^{24}\) All three of these countries rely heavily on oil imports.\(^{25}\) Building dams on the Mekong River would diversify energy resources and alleviate the region’s precarious energy needs.\(^{26}\) Easing pressure on the import of oil will result in greater political stability in the area because oil disputes have historically destabilized those involved.\(^{27}\)

Although the Mekong River development was not enough to convince China to cooperate or become a party to the MRC, China has a strong interest to cooperate with the Mekong Basin States for economic and political reasons. These interests stem from China’s desire to be both a regional leader in Asia as well as a world leader and global power.\(^{28}\) To advance these interests, China has been economically “playing nice” in the area.\(^{29}\) China is beginning to understand that their legitimacy as a leader in the area could be undermined by being uncooperative with the other states in the region.\(^{30}\) China may undermine its cooperative image that it is attempting to portray by forcing their will in damming the Mekong River and ignoring local treaties and other international law conventions that regulate the Mekong’s use.\(^{31}\)

China has improved regional and worldwide perception of itself through its recent economic moves to cooperate in the region. The most recent cooperation between China and the Mekong Basin States is the free

\(^{23}\) See Fullbrook, supra note 17 (explaining the impacts of rising oil prices in the region on their need for other sources of energy); e.g., Michael T. Klare, The New Geography of Conflict, 80 FOREIGN AFF. 49, 51 (2001) (explaining that China has made securing oil imports a matter of high importance and how they have moved war ships and military into the region of the South China Sea to strengthen their claim to the area).\(^{24}\) See Fullbrook, supra note 17.\(^{25}\) See id.\(^{26}\) See id.\(^{27}\) See, e.g., Klare, supra note 23, at 51.\(^{28}\) See Juliana W. Chen, Comment, Achieving Supreme Excellence: How China Is Using Agreements with ASEAN to Overcome Obstacles to Its Leadership in Asian Regional Economic Integration, 7 CHT. INT’L L. 655, 655 (2007).\(^{29}\) See, e.g., Fu-kuo Liu, China’s Embrace Leaves US in Cold, ASIA TIMES ONLINE (May 16, 2008), http://www.atimes.com/atimes/China_Business/JE16Cb01.html (last visited Feb. 21, 2009) (reporting China’s cooperation in creating a free trade agreement with the Mekong Basin States).\(^{30}\) See Joseph W. Dellapenna et al., International Environmental Law, 41 INT’L LAW, 201, 210 (2007).\(^{31}\) See id.
trade agreement that China recently recommitted itself to at the Southeast Asia Summit.\textsuperscript{32} This agreement has been built on the back of other acts, which demonstrate China’s economic cooperation with the region.\textsuperscript{33} Scholars have speculated about the motivation for this kind of cooperation. One theory is that China has decided to put aside local rivalries for the sake of regional stability.\textsuperscript{34} Another theory is that China believes that cooperation with the region and the Association of Southeast Asian Nations (‘‘ASEAN’’) gains greater influence and bargaining power with the West.\textsuperscript{35} As long as China continues to cooperate with the region and the international community, it is unimportant why China is motivated to cooperate.

On November 4, 2002, China and ASEAN signed the Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation, (the ‘‘ACFTA Agreement’’), which reconfirmed the commitment for a ASEAN-China free trade agreement (‘‘ACFTA’’) by 2010.\textsuperscript{36} Before China signed the ACFTA Agreement, scholars and the media viewed a free trade agreement as unlikely.\textsuperscript{37} Those who doubted China’s willingness to cooperate based their distrust on China’s power and international clout.\textsuperscript{38}

\textsuperscript{32} Liu, supra note 29 (noting that while China has cooperated there is still doubt and speculation as to how they will act in 2010 when the agreement becomes active).

\textsuperscript{33} E.g., Chen, supra note 28, at 666 (describing China’s forgiving one billion dollars of Cambodian debt, providing preferential tariff treatment to products from Cambodia, Laos and Myanmar, and cooperating with the Mekong Basin States in creating an agreement to develop local transportation, an information superhighway, and power trade); Zou Keyuan, Transnational Cooperation for Managing the Control of Environmental Disputes in East Asia, 16 J. ENVT'L. L. 341, 346–47 (2004) (explaining that in 2002, China signed an agreement with the Mekong River Commission to provide hydrological information about the Mekong River to the Mekong Basin States); see Chen, supra note 28, at 662–63 (explaining that China has recently engaged in cooperative behavior in South Asia to help overcome local rivalries and to position itself as a driving force in defining the economic rules of the region).

\textsuperscript{34} See Chen, supra note 28, at 662–63.

\textsuperscript{35} The member nations of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam.

\textsuperscript{36} Agreement on Trade in Goods of the Framework Agreement on Comprehensive Economic Co-operation between the Association of Southeast Asian Nations and the People’s Republic of China, ASEAN-P.R.C., Nov. 2, 2002, available at http://www.aseansec.org/16646.htm [hereinafter ACFTA Agreement]; see also Liu, supra note 32 (noting that while China has cooperated there is still doubt and speculation as to how they will act in 2010 when the agreement becomes active); Association of Southeast Asian Nations, Overview, http://www.aseansec.org/64.htm (last visited June 27, 2008) (providing background information on ASEAN and its members).

\textsuperscript{37} Richardson, supra note 2 (expecting China’s power and international clout to get in the way of a regional free trade agreement).

\textsuperscript{38} See id.
Despite China’s perceived unwillingness to cooperate in the area, China committed to ACFTA.\textsuperscript{39} This free trade agreement does not go into effect until 2010.\textsuperscript{40} Whether China intends to follow through with the agreement has generated speculation.\textsuperscript{41} It appears, however, that China has already begun its efforts to bring this agreement to fruition.\textsuperscript{42} China has demonstrated its sincere effort to continue diplomacy with its “good neighbor” policies and its appreciation for the benefits of ACFTA because it started to develop the economic infrastructure required to carry out the agreement with the Mekong Basin States.\textsuperscript{43}

Another important indication of China’s willingness to cooperate is its “two corridors, one ring” agreement that was entered in 2004,\textsuperscript{44} which proposed to blend the economic efforts of the areas surrounding China and Vietnam.\textsuperscript{45} This agreement lays out three areas where industry and labor are divided: “first, the Pearl River Delta, electronics, telecommunications, and services; second, Yunan and Guanxi, labor and capital-intensive industries; third, Vietnam, consumer market—linking China’s southern provinces of Yunan and Guanxi with Vietnam.”\textsuperscript{46}

The tripartite agreement between China, Vietnam, and the Philippines, which encouraged cooperation in gathering data and searching for oil in the South China Sea, is another example of China’s cooperation.\textsuperscript{47} China, Vietnam, and the Philippines signed this agreement in 2005 as part of the aftermath of the 2002 Declaration on Conduct of Parties in the South China Sea, which China and ASEAN executed.\textsuperscript{48}

\textsuperscript{39} See Liu, supra note 29.
\textsuperscript{40} Id.
\textsuperscript{41} See id.
\textsuperscript{42} Id.
\textsuperscript{43} Id.; see Raul L. Cordenillo, \textit{The Economic Benefits to ASEAN of the ASEAN-China Free Trade Area (ACFTA)}, ASEAN SECRETARIAT, Jan. 18, 2005, available at http://www.aseansec.org/17310.htm (pointing out that an enlarged market size, improved trading, removal of trade barriers, specialization of labor, enhanced economic efficiency, and improved investment prospects are all benefits that will precipitate from ACFTA); Liu, supra note 29.
\textsuperscript{44} See Liu, supra note 29; see also Wendy N. Duong, \textit{Following the Path of Oil: The Law of the Sea or Realpolitik--What Good Does Law Do in the South China Sea Territorial Conflicts?}, 30 FORDHAM INT’L L.J. 1098, 1155 (2007) (providing a detailed analysis of the agreement).
\textsuperscript{45} See Liu, supra note 29.
\textsuperscript{46} See id.
\textsuperscript{47} Duong, supra note 44, at 1174-80 (giving a solid discussion on the tripartite agreement and argues it should be seen as an attempt to divide up ASEAN).
\textsuperscript{48} See generally id. at 1171-74 (providing a detailed analysis of the 2002 declaration).
The signing of ACFTA, the China-Vietnam “two corridors, one ring” agreement, and the tripartite agreement reflect that China has an interest in the stability and economic viability of the region. It also demonstrates that China is willing to coordinate economic development efforts by dividing labor and production. Moreover, the shared interests of China and the other Mekong Basin States regarding energy, technology, and economic cooperation may create room for a negotiated resolution to the dispute. A joint development agreement between China and the Mekong Basin States is appropriate to account for individual states’ complex needs.

China has a strong economic interest in convincing the rest of the world that it and the Mekong Basin region are politically and economically stable. China’s desire to cooperate hinges on economic growth, which requires sufficient energy to feed their growing economy. China’s interest to cooperate with the region alone will not provide sufficient motivation to stop construction of the dams. This conclusion, however, will not cease regional cooperation as discussed in subsection B below.

B. Needs and Perspectives of the Mekong Basin States on the Development of the Mekong River

In the Mekong Basin States, sixty million, mostly impoverished, people depend on the Mekong River for food, life, and transportation.\(^49\) This section will address the interests and ability of the Mekong Basin States to bring China to negotiations regarding the management of the Mekong River for the benefit of those who are dependant on the river. The environmental interests of the region will be addressed first; the energy interests of the Mekong Basin States will be discussed second; and finally, the interests and concerns of the MRC will be examined.

First, the environmental concerns of the Mekong Basin States will play an important role in negotiating the development of the Mekong River. Natural flood pattern changes and sediment blockage “may lead to severely detrimental effects on the downstream states and the riverine ecology,” which is a frightening possibility.\(^50\) Another problem is the impact the dams may have on the natural species in aquatic and wetland habitats.\(^51\) These impacts will directly affect the region’s food supply and the economic viability of the region.\(^52\)

Not only is the Mekong River a source of life for many inhabitants in the Mekong Basin States, but it is also a means of transportation that

\(^{49}\) See Davis, supra note 1, at 4.

\(^{50}\) See id. at 5.

\(^{51}\) See id. at 6.

\(^{52}\) See id.
may be inhibited or eliminated by poor management of the dams. The dams will lower the flow of the river, which may be problematic. A lower flow would inhibit cargo shipping along the river and possibly allow saltwater to creep into the Mekong River delta, which affects that would deal a severe blow to Vietnam’s rice crops. Moreover, the unpredictable ebb and flow water causes severe problems for the poor who live off of the gardens that are sustained by the river. Another potential problem is that the sediment-free water will cause increased erosion as it flows downstream. The Tonle Sap is an area of particular importance to Cambodia because it houses important fisheries that provide eighty percent of the protein in the Cambodian diet. The Tonle Sap’s survival depends on the heavy flooding of the Mekong River to push water back upstream to flood the shallow wetlands of the Tonle Sap. For the majority of the year the Tonle Sap flows downstream into the Mekong River, but during periods of heavy flooding the flow of the Tonle Sap reverses. The heavy flooding of the Mekong River pushes water back up the Tonle Sap’s riverbed, reversing the flow. These unique phenomena would be severely damaged by erosion traced to the Mekong dams.

Secondly, China and the Mekong Basin States are interested in sufficient energy for their developing economies. Despite their meager GDPs, these countries are all experiencing significant economic growth. Currently, Thailand, Laos, and Cambodia have or are considering plans to build dams in their own countries on Mekong tributaries. These plans do not consider the potential impact on the fish and the poor, who will have to move big city slums to work in factories. Thailand, Laos, and Cambodia’s plans to dam the Mekong weaken their criticism regarding the negative impacts resulting from China’s plans. For this reason, China’s insistence on continuing to develop hydropower on the Mekong River will not block the success of a potential negotiated agreement.

The third aspect of the Mekong Basin States that must be

53 See id. at 7.
54 See id. at 7-8.
55 See id. at 9.
56 E.g., id. at 9-10 (explaining erosion already adversely affects Mekong villages, with the unpredictable flow of the river floods washing away the homes of 113 families in the Laotian village of Baan Don Sawan).
58 See Davis, supra note 1, at 12–15.
59 See supra Table 1.
60 See Fullbrook, supra note 17.
addressed are the interests of the MRC. The MRC is an intergovernmental organization and a coalition between Laos, Thailand, Cambodia, and Vietnam. The purpose of this organization is to advance “cooperation in a constructive and mutually beneficial manner for sustainable development, utilization, conservation, and management of the Mekong River Basin water and related resources.” Along with China, Myanmar has chosen not to participate in the MRC. The MRC elaborated the following four goals for the use and development of the Mekong River from 2006 to 2010:

(1) “To promote and support coordinated, sustainable, and pro-poor development”;
(2) “To enhance effective regional cooperation”;
(3) “To strengthen basin-wide environmental monitoring and impact assessment”;
(4) “To strengthen the Integrated Water Resources Management capacity and knowledge base of the MRC bodies, National Mekong Committees, Line Agencies, and other stakeholders.”

These goals provide a starting point for negotiations; however, the small scope development and Mekong River preservation may not be enough to convince China to budge. There is no reason to believe that cooperating with the MRC now holds a greater incentive for China than it did when the MRC was formed.

Any possible resolution to the South China Sea oil dispute will require the small states to unite into one negotiating bloc. One of the difficulties forming such a bloc is aligning the interests of the multiple states. Such a negotiating bloc of the majority of the smaller states has already been formed in the MRC. Although this does not solve the unequal bargaining power problem, the MRC provides a foundation for

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62 Davis, supra note 1, at 2 (citations and internal quotations omitted).
63 See id.
64 Mekong River Commission Secretariat, supra note 61.
65 See Myint, supra note 9, at 299 (noting that China and Myanmar chose to opt out of the agreement because they did not see any benefit from the agreement).
66 See id.
67 Duong, supra note 44, at 1102 (explaining that the difficulty for the ASEAN states to create one voting bloc in the South China Sea dispute is aligning all of the interests of the independent states).
68 Id.
further consensus and collaboration in the region.

III. CONVINCING CHINA TO NEGOTIATE

For a JDA to work, the potential subjects open for negotiation must be broadened to encourage China to participate. China’s refusal to join the MRC demonstrates that the MRC alone does not offer enough to bring China to the bargaining table. In any case, there are certain incentives that could encourage China to cooperate. This subsection will address three such incentives. The first incentive is regional economic cooperation and growth; the second incentive is greater regional energy diversification and independence; the third incentive is increasing China’s ability to be the regional economic leader of Japan. The combination of economic development and leadership in the region and an increased allotment of regional energy resources may create enough benefits to encourage China to cooperate in a JDA.

A. China’s Interest in Regional Economic Cooperation

China has recently found that regional economic growth to be an important interest. This is evidenced by China’s commitment to ACFTA. Further economic cooperation and joint development of the area may bring China to the bargaining table. The region’s ability to rival Western economies depend on the economic viability of all the states involved. The ACFTA agreement should provide such a framework for creating a strong Asian economy. In addition, the “two corridors, one ring” agreement between China and Vietnam demonstrates a willingness to cooperate that is required to encourage economic success. China’s next economic step is to be an economy that can utilize the labor and services of other nations. The Mekong Basin States would benefit from providing labor and services to Chinese corporations. Lower transaction costs in dealing with these nations are also an incentive for China’s cooperation.

The development of high quality internet and information systems, and outsourcing some of China’s work to the other Mekong Basin States will aid both economies. This development will be a product of the “two corridors, one ring” agreement. Part of creating an economically viable region depends on the viability of all of the states involved. Both China and the Mekong Basin States will benefit from the stability of the region through a mutually beneficial resolution to the Mekong River dispute.

B. China’s Interest in Regional Energy Resources

The second common interest in the area is securing energy for growth and development to continue. Energy is consistently a common

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69 See generally THOMAS FRIEDMAN, THE WORLD IS FLAT (First Thus ed., Farrar, Straus & Giroux 2006) (2005) (explaining that communication technology and the internet has flattened the world in allowing real-time global cooperation and sharing of corporate labors on other sides of the globe).
interest for all of the parties at issue. China is a huge importer of oil and its ability to secure oil, natural resources, and other energy resources will provide China with a desired step toward energy independence. There are three possible sources of energy that may attract China to the bargaining table: first, the South China Seas dispute; second, the Gulf of Thailand dispute; and third, undeveloped hydropower in Cambodia.

The first possible source of energy to be discussed is the South China Sea dispute, which involves some of the Mekong Basin States. This dispute is complicated by the large number of parties that assert rights and claims to the oil in the South China Sea. A joint negotiating bloc made up of the Mekong Basin States and China may convince China to negotiate and be advantageous to all.

China and Vietnam are coastal states on the South China Sea. Other states that are party to the South China Sea dispute are Taiwan, Philippines, Indonesia, and Brunei. The United Nations Convention on the Law of the Sea (“UNCLOS”) will not address the complicated and competing claims to oil and natural gas in the South China Sea because there are complexities involved with multiparty suits. A JDA is the recommended solution. The possibility that a JDA will form a uniform voting block in the South China Sea oil dispute may provide a powerful bargaining chip for China and the Mekong Basin States.

Bargaining power is important to China considering their tenuous claim in the South China Seas dispute. China’s most compelling claim to being a part of the South China Sea dispute is through the Paracel and Spratly Islands. China’s claim to these islands is undermined by its dispute with Vietnam over the ownership of the Paracel and Spratly Islands. A JDA that aligned Vietnam and China’s claims to the Paracel and the Spratly Islands would unify their bargaining power and result in a

\[\text{\textsuperscript{70}}\text{Klare, supra note 23, at 51.}\]
\[\text{\textsuperscript{71}}\text{See Duong, supra note 44, at 1098-99.}\]
\[\text{\textsuperscript{72}}\text{See id. at 1102.}\]
\[\text{\textsuperscript{73}}\text{See id. at 1104-09.}\]
\[\text{\textsuperscript{75}}\text{See Duong, supra note 44, at 1130-42.}\]
\[\text{\textsuperscript{76}}\text{See id. at 1156-65.}\]
\[\text{\textsuperscript{77}}\text{See id. at 1101.}\]
\[\text{\textsuperscript{78}}\text{See id. at 1104-09.}\]
\[\text{\textsuperscript{79}}\text{See id. at 1104, 1106.}\]
significantly stronger claim.\textsuperscript{80}

The second energy interest is found in the Gulf of Thailand where a relatively undeveloped area has the potential for large reserves of oil and natural gas.\textsuperscript{81} The dispute centers on potential oil and natural gas reserves in an Overlapping Claims Area ("OCA"), to which both Thailand and Cambodia have claims.\textsuperscript{82}

This dispute is important to both Thailand and Cambodia because escalating the dispute may destabilize the region. In 2007, Cambodia announced that it would triple the size of their navy to protect the production of the oil in the area.\textsuperscript{83} Seeking a cooperative agreement for the development of these oil and natural gas fields will be important in furthering the region’s energy independence along with maintaining regional stability.

The third energy interest lies in Cambodia. Cambodia has the potential for harvesting hydropower.\textsuperscript{84} In addition, Cambodia may encourage China to negotiate by licensing Chinese companies to design and build the dams and surrounding infrastructure in exchange for its cooperation. Sharing technology and industry expertise will mutually benefit Cambodia and China. The development of the Mekong Basin States’ hydropower potential will provide more regional energy independence breaking down China’s and the Mekong Basin States’ reliance on foreign power sources.\textsuperscript{85}

C. \textit{China’s Rivalry with Japan over Regional Economic Leadership}

The Mekong Basin States may gain bargaining power by negotiating with Japan. Japan is the Mekong Basin States’ alternative to China in advancing regional economic growth. Both China and Japan have a strong interest in establishing itself as the Asian economic leader, and in obtaining oil from the South China Sea by asserting a right or

\textsuperscript{80} See id.


\textsuperscript{82} See id.

\textsuperscript{83} See id.

\textsuperscript{84} See Bureau of East Asian and Pacific Affairs, \textit{supra} note 11.

\textsuperscript{85} See Fullbrook, \textit{supra} note 17 (explaining that Thailand, Laos and Cambodia are all considering plans to build dams in their own countries on the tributaries of the Mekong regardless for the severe impact on the fish and the poor who will likely have to move to the slums of big cities to work in factories without the river); see also Duong, \textit{supra} note 44, at 1181 (explaining that the sharing of technology and industry know-how was of such importance to Sao Tomé that Sao Tomé was willing to make valuable concessions to Nigeria to obtain such know-how in the resolution of the Nigeria-Sao Tomé oil dispute).
through an alliance.

Japan and China find the South China Sea dispute to be of utmost importance.\(^{86}\) Both countries have moved military into the region to further secure their claim to the oil.\(^{87}\) Thus, China’s cooperation with Thailand is an incentive to gain further international support.

China and Japan have a history of economic rivalry and competition. Japan’s negotiation with Cambodia, Laos, Myanmar, and Vietnam to develop the Mekong River Basin in 2005 is a recent example of its rivalry with China.\(^{88}\) China’s rivalry with Japan over regional economic leadership may motivate China to cooperate with the Mekong Basin States.\(^{89}\)

Convincing China to cooperate is not an easy task. The size of China’s population and the power of its military have resulted in a situation where the Mekong Basin States’ ability to obtain equal bargaining power with China may be difficult. However, the three interests discussed above may be sufficient to bring China to cooperate and negotiate a JDA.

IV. THE JOINT DEVELOPMENT AGREEMENT

Scholars have explored the legal solutions to the Mekong River dispute, presuming that China will ultimately not cooperate.\(^{90}\) This section is dedicated to addressing the possible negotiated solutions to the Mekong River dispute. Subsection A will provide background information on JDAs. Subsection B will lay out in detail an example of the terms and of a possible organizational structure for the JDA. The organization structure of the Mekong Basin Joint Energy Development Agreement (“MBJEDA”) will be integral in creating a legitimate JDA to avoid corruption.

A. Background on JDAs

Multilateral JDAs create an interesting possibility to resolve this dispute and other disputes in the region. JDAs are increasingly recognized as a good alternative to solving territorial disputes.\(^{91}\) JDAs are powerful alternatives in international disputes because of their ability to diffuse the emotional issues that nationalism often causes.\(^{92}\) Professor Duong also

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\(^{86}\) See Klare, supra note 23, at 51.

\(^{87}\) See id.

\(^{88}\) See id. at 665.

\(^{89}\) See e.g., id. at 665–66 (noting China’s response to Japan’s moves by entering in good faith dealing with the Mekong Basin states and other ASEAN members).

\(^{90}\) See Davis, supra note 1, at 43-62.

\(^{91}\) Duong, supra note 44, at 1142-43.

\(^{92}\) Id. at 1143.
speculates that “[t]o the extent that [JDAs] form norms of practice and can shape future commercial conduct, they could become part of international economic law.”

JDAs have generally been used in the oil development context. The JDA is gaining popularity as a method to regulate transnational rivers while the JDA is used in the oil dispute context. The transnational river context has similar needs to oil disputes that are addressed by JDAs. With a transnational river like an oil reserve, development in one area may seriously impact development in another area. JDAs also minimize or prevent the tragedy of the commons, which is a serious concern when riparian states gather as much resources from the river as they can at the same time. Through cooperation, a JDA creates a foundation to avoid potential environmental problems and encourages the most efficient exploitation of resources.

Three types of JDAs are identified for use between state parties. The first type of JDA requires each state party in the dispute to appoint a licensee to oversee development within their state. These licensees are then directed to negotiate and create a JDA between them. The second type of JDA requires the states to create a supranational agency to oversee development and grant licenses for the development of the entire project. The third type of JDA gives one state the sovereignty to develop the entire project and subsequently requires it to divide up the proceeds according to agreed upon interests.

Recently, JDAs have proved successful in the Malaysia-Thailand and the Nigeria-Sao Tomé disputes. The Nigeria-Sao Tomé JDA provides a good example of a functional agreement in situations where there are large negotiating power disparities. The Nigeria-Sao Tomé dispute was

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93 Id.
94 See, e.g., id. (arguing for the application of a JDA to the South China Sea dispute over oil and natural gas).
96 Duong, supra note 43, at 1143-44.
97 Id.
98 Id.
99 Id. (noting this type of agreement has been used in the Malaysia-Thailand dispute and in the Nigeria-Sao-Tomé dispute).
100 Id. (explaining that this form is most often used in the Middle East).
over oil found off of the coast of the countries.\(^{102}\) Sao Tomé, which had much less bargaining power than Nigeria, brought Nigeria to the bargaining table by filing a claim with the United Nations.\(^{103}\) The JDA awarded Nigeria sixty percent of the oil extracted and the remaining forty percent to Sao Tomé.\(^{104}\) Although Sao Tomé may have received a larger proportion under the U.N. claim, Sao Tomé benefitted from Nigeria’s knowledge and technology in developing and producing oil and oil products through the JDA.\(^{105}\)

The Nigeria-Sao Tomé JDA is one example where supranational organization is possible. The Nigeria-Sao Tomé supranational organization is made of two groups: the Council and the Authority.\(^{106}\) The Council is made up two to four ministers that are appointed by each state.\(^{107}\) Although there is no provision requiring equal representation of the states in the Council, the treaty requires at least one member of each state and a quorum of at least one-half of the states be present before a valid decision is made. The treaty also requires total consensus among all who are present and the signature of each Council member before a decision is adopted.\(^{108}\) The Council approves development contracts made by the Authority,\(^{109}\) and has the ability to act on behalf of the states within the realm of development of the JDA and delegate activities to the Authority.\(^{110}\)

The structure of the Authority is similar to the organization of a corporation made up of a board of directors and officers; the Secretariat in the JDA is the functional equivalent to the officers in a corporation. The Secretariat oversees the day-to-day operations of the organization.\(^{111}\) A board of directors including two directors from Nigeria and two from Sao Tomé appoint members of the Secretariat.\(^{112}\) The directors serve a three

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\(^{102}\) Nigeria-Sao Tomé JDA Agreement, supra note 101, at art. 2.

\(^{103}\) Duong, supra note 43, at 1180.

\(^{104}\) Nigeria-Sao Tomé JDA Agreement, supra note 101, at art. 3.

\(^{105}\) Duong, supra note 44, at 1181.

\(^{106}\) Nigeria-Sao Tomé JDA Agreement, supra note 101, at art. 6-13.

\(^{107}\) Id. at art.6.

\(^{108}\) Id. at art. 7.

\(^{109}\) Id. at art. 8.

\(^{110}\) Id.

\(^{111}\) Id. at art. 10, 14.

\(^{112}\) Id. at art. 14.
year term that is renewable once. Similar to Council decisions, Board decisions must be made by consensus and with at least one director representing each state. If a decision cannot be made, the decision is referred for the Council’s decision.

Aside from its organizational structure and safeguards, the Nigeria-Sao Tomé JDA is not immune to criticism. Professor Duong criticizes the Nigeria-Sao Tomé JDA for lack of transparency and its ability to provide a license to a Nigerian national corporation. While there are imperfections, the Nigeria-Sao Tomé JDA has created a reasonable organizational structure to manage complex disputes between parties with disparate bargaining powers.

B. Form and Terms of the JDA

Deciding what JDA form to use according to particular situations is an integral part of negotiations. Among the three JDA types discussed above, the creation of a supranational organization provides a promising organization structure to address the issues found in the Mekong River dispute. This paper will address the supranational organization. Regarding alternate options, the following two paragraphs will address why the first and third JDAs types may be insufficient to meet the interests at stake in this dispute. The next paragraphs will discuss the supranational organization type.

Opposition from the other states to develop the entire area as a third type or the complete-sovereignty option will discourage this option, despite China’s desire for control. In any case, there has been a level of cooperation between China and the Mekong Basin States as evidenced by their entry into the ACFTA, and the Mekong Basin States will be reluctant to provide China free development within their borders and control of the distribution of the earnings.

Allowing China to oversee development within the territories of the Mekong Basin States will encroach on individual state sovereignty. Unlike the South China Sea dispute, aspects of this development will likely require development within the physical borders of individual states. Such an arrangement may be explosive and would create a large problem as it would violate the nationalistic sentiments of the leaders and peoples of the states involved. The Mekong Basin States’ distrust of China

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113 *Id.* at art. 10.
114 *Id.*
115 *See* Duong, *supra* note 44, at 1184-87.
116 *See supra* Part IV.A.
117 *See supra* Part II.A.
118 *See* Duong, *supra* note 44, at 1145 (explaining the potential for JDAs and zones to create nationalism backlashes).
stems from years of dispute and non-cooperation in situations where the negotiations do not significantly benefit them. Two examples of this distrust is China’s refusal to join the Mekong River Commission,119 and the dispute between China and Vietnam over the Paracel and Spratly Islands.120 This distrust may undermine China’s ability to appoint a licensee wholly accountable to the Chinese government as the first option provides.

The paper features the supranational organization as an example of a functional organization that caters to the issues and complexities of the Mekong River. The supranational organization is a powerful option because it can operate across borders without strong ties to any one nationality. To create a legitimate and functional agreement, China and the Mekong Basin States can look to the JDA structure of the Nigeria-Sao Tomé dispute as an example. Under such an organization structure, the MBJEDA supranational organization could consist of a Council and two Authorities patterned after that of the Nigeria-Sao Tomé JDA. One Authority will oversee the management and development of the Mekong River and the other Authority will oversee the negotiation and potential development of oil from the South China Sea dispute.

This section will discuss the form and structure of the Council, the Authority that coordinates the development and management of the Mekong River, and the Authority that oversees the South China Sea negotiations, the resolution of the exploitation of oil dispute, and the safeguards and dispute resolution mechanisms available to protect against corruption will be examined.

First, for the purposes of this paper, the Council should be patterned after the Nigeria-Sao Tomé JDA.121 Although the MBJEDA Council will have a similar form and function to that of the Nigeria-Sao Tomé JDA, some deviation from the Nigeria-Sao Tomé JDA structure may be necessary, given the number of parties and the difficulties of reaching consensus. The Council will be made up of twelve members and each state will appoint two members. For the Council to reach a decision there must be at least six voters present with each state participating represented. While complete consensus of the members present should not be required of the Counsel, there must be at least one affirmative vote by each state for any decision made. Requiring a perfect consensus will stalemate operations. The Council will appoint the two Authorities’ board of directors. This board should be made up of twelve directors, including two from each state. Although the structure is similar to the Council, appointing the directors will be made subject to the approval of the

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119 See Davis, supra note 1, at 1-8.
120 See Duong, supra note 44, at 1104, 1106.
121 Nigeria-Sao Tomé JDA Agreement, supra note 101.
Council and will not be left to the sole discretion of the participant states. The Council will also be provided the final decision on those matters that cannot be decided by consensus within the Authorities.

Second, the Council will create an Authority to coordinate the energy development of the Mekong River and to manage the flows of the Mekong. The Authority pertaining to the Mekong River energy agreement will be referred to as the Mekong Basin Energy Authority (the “MBEA”).

The MBEA will function best if its leadership is protected from undue influence of any one state. The MBEA's structure should include a board of directors to make decisions on behalf of the MBEA and to manage and appoint the Secretariat, who will oversee the day-to-day management of the MBEA. As discussed above, the board of directors should be made up of twelve directors with two representatives from each state appointed under the discretion of the Council. Approving and appointing licensees to exploit the development prospects of the region will constitute a majority of the board of directors’ work. Every decision by the board of directors must be made by consensus with at least one representative from each state present. If a consensus cannot be made, the decision will be referred to the Council to decide. Given the powers at play, this supranational organization will provide an unbiased organization.

The MBEA should have the following legal duties. First, the MBEA should have a fiduciary duty to each state and the people of each state and the MBEA should provide a cognizable cause of action for breaching that duty. Second, the MBEA should have a duty of environmental maintenance and responsibility to the inhabitants of China and the Mekong Basin States. Included in these environmental duties, the MBEA should be committed to developing energy sources that have a lesser impact on the environment. The use of funds to research and develop solar, wind, and other alternative forms of power can provide an important ability for the states to improve their domestic energy efficiency.¹²²

There should also be a cognizable cause of action that can be brought by any state against the MBEA for a breach of this duty. This second duty addresses a problem facing the integrity of this agreement, which is the environmental degradation or the complete disregard for the peoples inhabiting the banks of the Mekong River. A severe abuse of either of these interests could result in instability in the area and also a loss of legitimacy from the international community.

The MBJEDA should provide an agreement specifying the unitization of both the hydropower energy from the Mekong River and the alternative energy production in the region. This unitization agreement will create a framework for the MBEA to distribute the energy created

¹²² See Fullbrook, supra note 17.
through their effort to harness the power of the Mekong River and also harvest power through solar, wind, and biomass power development. The states should conduct a feasibility analysis to determine the most efficient development of the hydropower and alternative energy sources prior to finalizing the unitization agreement.

To address future adjustments in production, the parties should adopt an equation that takes into account both the state’s MW-h contribution and the state’s MW-h potential contribution. Whether for environmental or impracticality of development, the state’s MW-h potential has remained undeveloped. Such an equation would provide countries a benefit for those potential energy sources within their boarders that are left untapped for the purposes of having a more sustainable, efficient, and environmentally-friendly system. Such a benefit will be important to China because of the potentially harmful environmental affects of damming that far upstream. This unitization agreement will create a bright line rule for the MBEA to follow in distributing the energy now and in the future.

Third, the Council should create an Authority to oversee the South China Sea and Gulf of Thailand negotiations and the exploitation of oil and natural gas at the resolution of the disputes. This Authority will be referred to as the South China Sea Energy Authority (the “SCSEA”). The SCSEA will have the same organizational structure as the MBEA. While the SCSEA will not have the same environmental duties to the states as the oil reserves are outside of the physical boundaries of the states, the SCSEA will maintain a fiduciary duty to the participant states. The current status of the South China Sea dispute creates interesting challenges that the MBJEDA will need to address, as the conflict involves the interest of states outside of the Mekong Basin States and China yet to be resolved.

The SCSEA should form of a separate negotiating group apart from the SCSEA's board of directors. This large bloc of states will create a group carrying a lot of bargaining power. The appointment of a separate negotiating group apart from the board of directors addresses the need for the board of directors to oversee the entire project. The separate appointment will also allow the board to appoint members to the negotiation group that either have important relationships and connections with the other states involved or have a particular specialization in the South China Seas dispute. Those appointed to the board of directors and as officers of the Secretariat should be able to bridge the gap between strategic negotiating over the resources as well as lead the development efforts when the dispute is resolved.

The SCSEA will be more stable if a unitization agreement can be made between the states prior to their negotiations. Such a unitization agreement will avoid dispute within the MBJEDA states in the future

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123 This large bloc of states made largely of the Mekong Basin States.
when the oil and natural gas reserves in the South China Sea and Gulf of Thailand are apportioned. To wait to negotiate the unitization agreement until after the resolution of the South China Sea dispute could possibly result in undoing all that was done. The ability to reach a unitization agreement will face many challenges. One of the most pronounced problems is negotiating over portions of an area that has yet to be entirely divided between the claiming states. The best way to address this is to look at the validity of the claims of the member states, their energy needs, and the energy the states are to receive under the Mekong Basin energy agreement. China will likely want a guarantee of a certain amount of oil and natural gas. The Mekong Basin States will need to evaluate whether the stability and coordinated development of the Mekong River is worth the potential sacrifice of oil if the negotiating bloc does not result in a better apportionment of oil for the entire bloc. A further challenge is to convince the states to buy into the idea that the joint negotiating bloc supersedes possible individual power plays on the oil. These problems will complicate China and Mekong Basin States’ ability to come to a unitization agreement.

There is also the question of what should be done with Laos and Myanmar, states who do not have a claim in the South China Sea dispute or the related Gulf of Thailand dispute. These states will likely need to be excluded from the oil apportionment because to include Laos and Myanmar would result in a smaller energy apportionment to those other states with a valid claim to the oil and natural gas reserves. Allowing Laos and Myanmar an interest in these disputes will undermine the creation of a negotiating bloc that can obtain a larger piece of the pie because by adding Laos and Myanmar much of the increased size of the pie will go to states who did not have a claim to or would have received any of the energy in the first place. Laos and Myanmar will not likely be deterred from the MBJEDA by this because of what they will gain under the MBEA.

Fourth, the MBJEDA will need to create safeguards against corruption, overreaching of governmental power, and other actions that threaten the legitimacy of the agreement. To make this agreement work, there will need to be an agreement between the parties to consent to the jurisdiction of the International Court of Justice (“ICJ”) or another international dispute resolution tribunal. This jurisdiction will likely need to be limited only to disputes arising out the MBJEDA. China is unlikely to join an agreement that requires it to submit to the general jurisdiction of the ICJ. Moreover, the MBEA and SCSEA will also fall under the jurisdiction of the ICJ for breach of duty causes of action relating to MBJEDA decisions and actions.

To create further safeguards, the MBJEDA must be committed to transparency, information sharing, and other cooperative efforts between the states and the public. Transparency, coupled with the states duties to the people, will play a huge role in keeping corruption out of the
MBJEDA, a problem which haunts the Nigeria-Sao Tomé JDA. Providing financial and production related information to the public will create a greater sense of legitimacy in the MBJEDA as any interested party will be able to look into the productions and the proceeds of the projects at will. Moreover, an audit of the released information should also be required from an agreed upon and reliable auditing/accounting firm.

Much of the success of the MBJEDA depends on the organization structures and safeguards that are put in place to impede corruption and incentivize cooperation. If the Mekong Basin States flexes their economic muscles by joining forces with China in the South China Sea dispute, there may be a large enough incentive to bring China to an agreement and encourage it to cooperate in their development of the Mekong River Basin.

V. POSSIBLE OBSTACLES TO THE MBJEDA

There are many obstacles that can arise that may make coming to such an arrangement difficult. This section has broken these obstacles into three categories. Subsection A will discuss the obstacles that may disturb the negotiation of the MBJEDA. Subsection B will address the obstacles that may arise in the future which may undermine the entering into and functioning of the MBJEDA. Subsection C will explore obstacles that may arise from the meddling of external parties.

A. Negotiation Obstacles

There are numerous obstacles that may slow or impede negotiations. This section will look at the following potential obstacles: first, the nationalism of the independent states, second, China’s desire to deal bilaterally with individual states instead of dealing multilaterally with the Mekong Basin States as a bloc, third, high negotiation costs attendant with a complicated multilateral agreement, and finally, greed and the curse of oil.

The first negotiation obstacle will be dealing with the strong nationalist ideas of participating states. Professor Duong addressed the nationalism problem in the specific context of creating JDAs. Professor Duong explains that even if the leaders of the states can get past the nationalism problem, these “leaders may still face vehement objection from their constituents.” Many people may see the joint agreement as a serious “concession of sovereignty” insulting their sense of nationalism.

Professor Duong argues that JDAs may, in some circumstances, be a destabilizing influence in the area. The destabilizing may occur

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124 See Duong, supra note 44, at 1145.
125 Id.
126 Id.
127 See id.
because the negotiation of the economic terms is a complicated issue which may go on “endlessly,” while at the same time the feelings of “emotional nationalism” may bring out “open hostilities that might have otherwise remained dormant.” There are deep feelings of distrust and nationalism embedded in the cultures of China and the Mekong Basin States. This destabilizing effect is a possible result of the MBJEDA.

The second obstacle that may impede negotiations is China’s desire to deal bilaterally with individual Mekong Basin States, rather than multilaterally with the Mekong Basin States as a bloc. China’s preference for dealing bilaterally demonstrates China’s desire to exploit its bargaining power because China will have more control over smaller states. China’s desire for control may undermine the negotiation process. Moreover, the desire to have as much bargaining power as possible may keep China from negotiating in the first place. This problem can be minimized if the Mekong Basin States agree to form a unified negotiating bloc and stick to their agreement avoiding the prisoner’s dilemma problem.

The third obstacle is the high negotiating costs that will result from this agreement. The number of parties and number of issues will make negotiations complicated and multifaceted. There are six countries that are involved in these negotiations. Because transaction costs rise with every additional party to a multilateral agreement, the benefit to the remainder of the parties lowers with every additional party to the multilateral party. These negotiations will include issues of what type of organization structure should be implemented, how much control should each state have over this organization, how should this organization be funded, what types of duties and obligations should be given to the organization, what environmental protections will be needed, what unitization is appropriate in both the Mekong River and the South China Sea disputes, and how energy distribution should be handled. The different interests of the parties will make negotiations lengthy and difficult.

A particularly difficult issue will be environmental protection. Professor Helfer explains that multilateral environmental protection

128 Id.
130 See Rix, supra note 129, at 128; Hirsch, supra note 129, at 407.
131 See Duong, supra note 44, at 1101.
agreements have particularly high transaction costs.\textsuperscript{133} China will have little incentive to give credence to the environmental protection issue because the impacts and benefits are felt outside of its borders and the effects will have little impact on their ability to use the Mekong River for their desired purposes. Finding a solution to this problem and encouraging China to divert funds to the environmental protection of the other states will be a difficult agreement to reach.

In addition, the MBJEDA negotiations may face the free-rider problem because any change in China’s action will influence every states’ environment.\textsuperscript{134} Some of the Mekong Basin States may try to take advantage of the environmental protections of this agreement without being willing to make any bargaining concessions. This problem will be pronounced in situations where one state will feel the environmental impacts more acutely than another state. When one state is more adversely impacted than another, that state has a greater incentive to relieve the environmental impacts, which will create the ideal conditions for a lesser impacted state to free ride.

The fourth negotiation obstacle is the oil curse and its ability to destroy international agreements due to greed. The vast wealth that oil generates is a politically destabilizing influence.\textsuperscript{135} The potential wealth from the oil obtained in the South China Sea dispute may actually be a destabilizing force in the negotiation as each desires as much oil as can be obtained to boost and feed their economies.

While this section only addresses a few of the potential obstacles to coming to a negotiated agreement, this section demonstrates that the parties face a long and difficult road to establish a non-legal negotiated agreement. The differences among the states’ interests and the numerous issues will create very high transaction costs and lengthy discussions that may allow time for international relations in the region to deteriorate under the pressure of a negotiated JDA.

\textbf{B. Future Obstacles}

Even if the states are able to reach a JDA over the negotiation obstacles, there are numerous issues that may emerge in the future that could destabilize the agreement or destroy it altogether. The overall instability of the government institutions in the region will be discussed first. A second problem that can arise is the ability to enforce the agreement if China decides that cooperation is no longer needed to satisfy their national interests at a later time. Finally, the eventual degradation of

\textsuperscript{133} Laurence R. Helfer, \textit{Nonconsensual International Lawmaking}, 2008 U. ILL. L. REV. 71, 112 (2008) (explaining that one of the causes of high transaction costs in environmental regulation negotiations is due to the free-rider problem).

\textsuperscript{134} Id.

\textsuperscript{135} See, e.g., Klare, supra note 23, at 51.
the environment from the damming of the Mekong River could destabilize
the region because of the disproportionate adverse impacts on the Mekong Basin States compared to China.

The first future obstacle is the political instability of the region. A
huge liability to the function and lasting impact of a JDA is the overall
instability and legitimacy of the government institutions in the region. Of
the member states, China’s and Myanmar’s governments have been
recently scrutinized for human rights violations. If these violations
continue, China and Myanmar will be under serious international pressure
to change, and a significant political change in either state may result in
destabilizing the MBJEDA.

The second problem that will haunt the agreement is whether the
MBJEDA can be ultimately enforced against China. Although China’s
power will encourage cooperation with the other states, if China feels
there is no reason to cooperate after the MBJEDA has been entered there
may be little recourse available to maintain China’s cooperation. While
China has a strong interest in maintaining its cooperative image and the
MBJEDA structure encourages cooperation among the parties, only a
threat of economic sanctions or violence from a larger power like the
international community could maintain China’s cooperation. Moreover,
even if China originally consents to the jurisdiction of the ICJ, China may
not consent to the jurisdiction of or the remedies assessed against China by
the ICJ if the stakes get to high and outweigh China’s incentives to
cooperate. If all the bargaining incentives that inducing China’s
participation still exist, then China will likely continue to cooperate.
However, if any of the incentives are removed, then there is little that can
force China to cooperate when China feels that they can exploit the
resources better on its own.

The third future obstacle to be discussed is the Mekong River’s
environmental destruction. Even if an economic and environmental
agreement is made, there is the possibility that the inevitable damming of
the Mekong River will result in serious environmental problems. While
many of the environmental problems appear to be issues of cooperation,
it

\[136\] E.g., Amnesty International USA, China Human Rights,
http://www.amnestyusa.org/china/page.do?id=1011134 (lasted visited Mar. 19, 2009);
Amnesty International USA, Myanmar (Burma) Human Rights,
http://www.amnestyusa.org/all-countries/myanmar-burma/page.do?id=1011205 (last

\[137\] Political unrest has already undermined a previous Mekong River
coordination agreement. In 1957 the Mekong Committee was formed among Laos,
Cambodia, Thailand, and South Vietnam. See Myint, supra note 9, at 298. The Indo-
China war almost put an end to this agreement. See id. The new communist regimes
decided not to cooperate with the noncommunist states, which forced the Mekong
Committee into an Interim Mekong Committee. See id. The Interim Mekong Committee
continued in its limited functions until cooperation resumed years later. See id. at 298-99.
would be naïve to claim that no environmental impacts will exist. The question is how severe those impacts will be on the environment, which is difficult to assess beforehand.

One such problem concerns the impacts of de-sedimentation. The de-sedimentation problem arises when a river is dammed and river sediment is trapped behind the dam. This is a problem where few economically feasible solutions exist. The consequences of these impacts are going to fall disproportionately on the backs of the Mekong Basin States. China will suffer much lower environmental consequences from the damming and the river sedimentation will not impact its use of the river; however, the lower states uses may be dependent on the nutrient rich sediment.

The MBJEDA may be fragile from the outset. Much of what provides the incentive to bring the parties together may create the same problems that may ultimately undermine the project in the future. The political and economic stability of the region—the improvement of which is a strong interest that brings these parties together—may turn out to be explosive and undermine the entire project. Furthermore, even if an agreement is reached, China’s long-term cooperation may always be tenuous. One other possible future obstacle is the unpredictable environmental impacts. The MBJEDA is not only tenuous in the making, but tenuous in its execution.

C. External Obstacles

China may face obstacles from external sources in making such an agreement. Japan has been China’s leading competitor in vying for a lead in diplomacy in the Mekong River Basin. Japan and China are and have been rivals, and if Japan gains a lead in the diplomacy in the area, there is speculation that this may result in a potentially violent conflict. While the Mekong Basin States can trust Japan more than China, China has the advantage of offering the joint development and cooperative management of the Mekong River. Rivalries and political unrest may serve to be a destabilizing factor in allowing a JDA to come to fruition.

VI. Conclusion

The Mekong River dispute is a complicated problem. It reflects the tension between interdependence and nationalism. This situation also reflects the difficulties of negotiating when the negotiating partners are

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139 See Davis, supra note 1, at 5.

140 See Chen, supra note 28, at 665.

141 See id.
very different in their relative military power, the size of their economies, and their goals for development. In such disputes international law offers little support for resolution. The purpose of this paper is to look at the ability to reach negotiated solutions to these complicated disputes. This paper hypothesizes that through making the size of the overall bargain bigger a giant, like China, may be brought to the bargaining table.

The MBJEDA is dependant upon China and the Mekong Basin States buying into the idea that without each other they will not be able to create an energy independent and economically viable system in the region. This philosophical adjustment may be a huge challenge, as it will require concessions with regards to the states’ nationalism. While this paper speculates on what may bring China to the table, the number of parties, the complicated and extensive list of issues, and the numerous obstacles to reaching such an agreement will make coming to an agreement a difficult, but possible task.