Enforcing transboundary water obligations through investment treaty arbitration

Received: 15 June 2020 | Accepted: 9 September 2020

DOI: 10.1111/reel.12365

SPECIAL ISSUE ARTICLE

RECIEL Review of European, Comparative & International Environmental Law WILEY

Enforcing transboundary water obligations through investment treaty arbitration: China, Laos and the Mekong River

Ana Maria Daza-Clark

Correspondence
Email: anamaria.dazavargas@ed.ac.uk

Abstract

The study of the intersection between international investment law and international water law is not new. However, this intersection may be better understood through the analysis of specific case studies, regions and/or economic sectors. This article observes the relationship between China and Laos in connection to the construction of dams in the Lancang/Mekong River. In so doing, it addresses China's attitudes towards the negotiation and conclusion of economic integration and transboundary water agreements, observing a sharp contrast between the two. Against this background, the article examines some of the most important agreements between China and Laos regarding both the protection of foreign investment and the management of shared waters. The article argues that investor-State dispute settlement may lend some 'teeth' to the enforcement of transboundary obligations with regard to the Mekong River.

1 | INTRODUCTION

By any measure, China's economic growth in the last 50 years has proven extraordinary.[1] As a result of this growth, China has become one of the most important actors in trade and investment. Yet, while China does not define itself as an open-market economy, at least in the context of international trading rules, it has successfully navigated the rules of free market liberalism to become one of the most important economic powers.[2] Governmental intervention at all levels has not only created this particular economic framework but has also carefully crafted both the scope and extent to which China enters into international agreements and the degree to which China consents to engage in international adjudication.

Since economic development almost invariably goes hand-in-hand with utilization of natural resources, like many other countries, China and its neighbouring States often compete for shared natural resources to secure economic growth. This means that, while they cooperate and integrate through trade and investment flows via the conclusion of trade and investment agreements, they also need to agree and cooperate in the management of shared natural resources, including transboundary waters, which is the focus of this article. These areas of State interaction are covered by two distinct fields of international law: international investment law (IIL), covering international investment agreements (IIAs) and investor-State dispute settlement (ISDS), and international water law (IWL) covering the law of non-navigational uses of international watercourses. It is a common ground that these two areas of law intersect. First, via a perceived conflict of norms, albeit this is contested by some practitioners and academics who consider that investment obligations under IIAs and other international obligations under human rights and environmental protection conventions are not mutually exclusive. Second, by influencing one another, thereby achieving some degree of mutual supportiveness. China is an interesting example to analyse this interaction in practice, despite the distinctive approaches it adopts in the negotiation of economic integration treaties and agreements for the management of shared water resources.

Indeed, while China is currently strongly committed to rules of trade and investment protection, it remains cautious about

[1] N Zhu, 'Is China's Growth Model a Threat to Free-Market Economics?' (The Economist, 13 June 2018).

[2] ibid.

compromising its control over the use of shared water resources originating in its territory. In so doing, China seems to adopt a soft approach to the management of shared natural resources and avoids adversarial, yet potentially effective, means of dispute resolution. China's caution about compromising its control over shared water resources is reminiscent of its approach to investor-State dispute resolution overall. When China was a capital-importing country, it offered limited protection to foreign investors seeking to operate therein, reserving broad regulatory powers over foreign investment activities. As China's endeavours to export capital succeeded, it also adopted effective means of dispute settlement, as protection of its investors abroad, which could only be achieved through reciprocal treatment.[3] By contrast, China has shown little change in its attitude towards the management of shared waters: it did not sign the United Nations Watercourses Convention (UNWC);[4] it has not joined the Mekong Agreement;[5] and its engagement in regional agreements on transboundary resource management has been modest in terms of commitments. Moreover, China's significant development of hydropower projects to secure energy generation for its internal market and for the development of its different regions suggests that it requires secure control over water resources, which often cross its borders.[6] China also exports technology, know-how and capital to invest in hydropower and other water-intensive activities in both neighbouring countries and further afield.[7] As such, it plays a dual role: first, as an upstream riparian State whose development of domestic hydropower infrastructure could have negative impacts flowing to downstream riparian States; and second, as a foreign investor in the form of State-owned enterprises (SOEs), or home State of Chinese investors, who may rely on water resources flowing from China to realize hydropower and other water-intensive infrastructure projects in neighbouring States.

Against this backdrop, this article analyses the intersection between IIL and IWL through the relationship between China and Lao People's Democratic Republic (Laos), both of which are riparian of the Lancang/Mekong River and are also investment partners. While there have been numerous reports by news media and nongovernmental organizations (NGOs) that claim that China's development of hydropower infrastructure on the upper reaches of the Lancang/Mekong River has had negative impacts on the water flowing to downstream riparian States,[8] it must be acknowledged that the accuracy of these claims remains contentious. The Mekong River Commission has reported that reduced water flows in the lower Mekong cannot be solely attributed to Chinese dams; reduced rain fall also has negative effects on the Mekong River's water levels.[9] Comparatively, there is strong evidence that, even if China's hydropower activities have not adversely affected water flow, they can make sediment flow still and affect fish migration downstream thereby adversely affecting fisheries, ecosystems and livelihoods in the co-riparian States of Laos, Myanmar, Thailand, Vietnam and Cambodia.[10]

Like China, some of the Mekong co-riparians have embarked on large-scale hydropower projects along different sections of the Mekong—notably Laos, which seeks to become the 'battery of South East Asia'.[11] Laos has enough water resources from the Mekong to realize its hydropower projects, albeit the question that arises is whether there is enough water to meet the needs of competing users, who have expressed dissatisfaction as a result of drought, loss of livelihoods and disasters caused by dams.[12]

Laos' reliance on both capital and water resources flowing from China creates interdependency and a *sui generis* dynamic of cooperation. For one thing, China's capital exports do not only flow through private channels; a great deal of investment flows through SOEs, whose interests are aligned to those of China and vice versa.[13] For another, Chinese investors in Laos, particularly those dependent on water resources, rely on water flowing from their home State to develop their projects in Laos. In the event of water scarcity and drought, Laos could adopt regulatory measures allocating or reallocating water resources to other uses, for instance farming, fisheries and ecosystems services. It follows that Chinese investments could be affected if water flows are reduced due to China's water consumption upstream. Yet, it does not necessarily follow that China would directly intervene in any potential dispute to favour its own investors or to protect Chinese State-owned companies in Laos.

Against this backdrop, this article (i) compares China's attitudes towards the negotiation of shared water management and economic

[3]SW Schill, 'Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China' (2007) 15 Cardozo Journal of International and Comparative Law 73, 81.

[4]Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700.

[5]Agreement between Thailand, Laos, Cambodia and Vietnam on the Cooperation for the Sustainable Development of the Mekong River Basin (adopted and entered into force 5 April 1995) 34 ILM 864 (Mekong Agreement).

[6]B Eyler and C Weatherby, 'Mekong Mainstream Dams as of January 2020' (Stimson Center, 2 April 2020), <https://www.stimson.org/2020/mekong-mainstream-dams-as-of-january-2020/>.

[7]K McDonald, P Bosshard and N Brewer, 'Exporting Dams: China's Hydropower Industry goes Global' (2009) 90 Journal of Environmental Management 294.

[8]B Eyler, 'How China Turned Off the Tap on the Mekong River' (Stimson Center, 13 April 2020), <https://www.stimson.org/2020/new-evidence-how-china-turned-off-the-mekong-tap/>. See also H Beech, 'China Limited the Mekong's Flow. Other Countries Suffered a Drought' (New York Times, 13 April 2020); A Trandem 'Is the Mekong at a Tipping Point?' (2014) 29 World Rivers Review 1.

[9]See 'The Effects of Chinese Dams on Water Flows in the Lower Mekong Basin' (Mekong River Commission, 6 June 2017) <http://www.mrcmekong.org/news-and-events/news/the-effects-of-chinese-dams-on-water-flows-in-the-lower-mekong-basin/>; 'Mekong Water Levels Reach Low Record' (Mekong River Commission, 18 July 2019) <http://www.mrcmekong.org/news-and-events/news/mekong-water-levels-reach-low-record/>.

[10]See 'The Effects of Chinese Dams on Water Flows in the Lower Mekong Basin' (n 9).

[11]'Laos Hydroelectric Power Ambitions under Scrutiny' (BBC, 24 July 2018); J Fisher, 'Laos' Work on the Mekong River Draws Criticism' (BBC, 4 July 2012).

[12]See KR Olson and LW Morton, 'Water Rights and Fights: Lao Dams on the Mekong River' (2018) 73 Journal of Soil and Water Conservation 35A; K Johnson and P Wongcha-um, 'Amid Hydropower Boom, Laos Streams ahead on Latest Mekong Dam' (Reuters, 7 February 2020); S Lovgren, 'Southeast Asia's Most Critical River is Entering Uncharted Waters' (National Geographic, 31 January 2010).

[13]'Laos and its Dams: Southeast Asia's Battery, Built by China' (Radio Free Asia) <https://www.rfa.org/english/news/special/china-build-laos-dams/>. See also S Tietzzi, 'China and Laos' Dam Disaster' (The Diplomat, 2 August 2018).

integration agreements; (ii) analyses the manner in which China has negotiated dispute settlement provisions in both contexts; (iii) addresses the economic and transboundary relations between Laos and China; (iv) considers the potential intersection between IWL and IIL as a result of water resource management measures potentially affecting foreign investors; and (v) addresses the potential for mutual supportiveness between IIL and IWL.

2 | ECONOMIC INTEGRATION VERSUS TRANSBOUNDARY COOPERATION: THE PRACTICE OF CHINA

China's foreign policy has been characterized by five principles of inter-State relations: peaceful co-existence, mutual respect of State sovereignty and territorial integrity; mutual nonaggression; mutual non-interference in each other's internal affairs; and equality and mutual benefit.[14] These principles emerge both in China's attitude towards the conclusion of transboundary water as well as international investment agreements. Yet, as will be discussed below, China's economic integration policy has gradually evolved towards a more open market economy, initially as a capital-importing country, and subsequently as a capital-exporting one.[15] In the context of transboundary water agreements, China has concluded broader international agreements with neighbouring countries, which deal with matters such as delimitation, friendship and neighbourhood, and shared natural resources management. Some of these include specific provisions on the management of shared freshwater resources. Since the focus of this article is the China–Laos relationship, this section endeavours to examine agreements between these two States. The section has two objectives: (i) providing a brief comparison of the development of China's normative frameworks of IWL and IIL; and (ii) examining China's attitude to the settlement of disputes within these two fields of international law, which initially seems inconsistent.

2.1 | Negotiation and conclusion of international investment agreements and transboundary water agreements

It is a common ground that the decision to conclude, or refuse to conclude, international agreements is inherent to a State's sovereignty.[16] A cautious State, such as China, might be aware of the implications of its commitments to trading partners, be protective of its territorial sovereignty over natural resources and/or be reluctant to consent to specific mechanisms of dispute resolution. China is all three. Indeed, China's caution played out prominently during the negotiation of the UNWC, where China, together with Turkey and Burundi, voted against the United Nations General Assembly (UNGA) Resolution adopting the UNWC. Among China's main concerns were that the Draft Convention did not affirm the principle of territorial sovereignty over international water courses, and the inclusion of a compulsory dispute-settlement mechanism, which went against China's preferred method of peaceful consultations.[17] China's refusal to join the UNWC seems consistent with its general practice of abstaining from joining multilateral agreements on the management of shared natural resources. China is not a party to the 1995 Mekong Agreement[18] or the 1996 Ganges Water Sharing Agreement (between India and Bangladesh);[19] nor has it acceded to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.[20] Instead, China has opted for the conclusion of bilateral agreements for the management of shared water resources with riparian States.[21] An example relevant to our case study is the seven Laos-China Boundary Agreements concluded between 1991 and 2012.[22] This policy choice is characteristic of hydro-hegemonic States which are often upstream-riparian,[23] with a degree of economic and military power.[24] However, there are some exceptions at the multilateral level: the China, Laos, Myanmar and Thailand Lancang-Upper Mekong River Commercial

[14]Q Kong, 'Bilateral Investment Treaties: The Chinese Approach and Practice' (1999) 8 Asian Yearbook of International Law 105, 109. See also Treaty of Good-Neighborliness and Friendly Cooperation between China and Russia (24 July 2001) art 1. See also P Wouters and S Vinogradov, 'Reframing the Transboundary Water Discourse: Contextualized International Law in Practice' (2020) 29 Review of European, Comparative and International Environmental Law; and DJ Devlaeminck and X Huang, 'China and the Global Water Conventions in Light of Recent Developments: Time to Take a Second Look?' (2020) 29 Review of European, Comparative and International Environmental Law.

[15]T Cohen and D Schneiderman, 'The Political Economy of Chinese Bilateral Investment Treaty Policy' (2017) 5 Chinese Journal of Comparative Law 110, 114; Schill (n 3); Kong (n 14).

[16]'[T]he right of entering into international engagements is an attribute of State sovereignty.' *S.S. Wimbledon (United Kingdom v Germany)* (Judgment) PCIJ Rep Series A No. 1 (17 August 1923) 25.

[17]UNGA '99th Plenary Meeting, Fifty-First Session' UN Doc A/51/PV.99 (21 May 1997) 6–7.

[18]Mekong Agreement (n 5).

[19]Treaty between Bangladesh and India on Sharing of the Ganges (adopted 12 December 1996).

[20]Convention on the Protection and Use of Transboundary Rivers and Lakes (adopted 17 March 1992; entered into force 6 October 1996) 1936 UNTS 269.

[21]S Ho, 'Why Do Hydro-Hegemons Cooperate?' (CWR, 17 October 2017), <http://www.chinawaterrisk.org/opinions/why-do-hydro-hegemons-cooperate/>.

[22]China-Laos Temporal Protocol on the Settlement of Boundary Issues (1990); China-Laos Boundary Treaty (1992); Protocol to China-Laos Boundary Treaty (1993); China-Laos Treaty on Boundary Regulations (1994); Additional Protocol to the China-Laos Treaty on Boundary Regulations (1997); China-Laos Agreement on Boundary Management (2012); and China-Laos Agreement on Border Ports and Their Management System (2012), all available at <http://treaty.mfa.gov.cn/Treaty/web/index.jsp> (China-Laos Boundary Agreements).

[23]For example, India, Turkey and Israel. See H Chen, A Rieu-Clarke and P Wouters, 'Exploring China's Transboundary Water Treaty Practice through the Prism of the UN Watercourses Convention' (2013) 38 Water International 217, 219.

[24]It has been suggested that powerful States located upstream of a transboundary water source are likely to develop the source to meet their own domestic needs and will be less prone to engage in international agreements or other type of formal cooperation. Conversely, when a powerful riparian State is located downstream, it will promote the establishment of basin regimes through international treaties or formal cooperation agreements to protect its interests against upstream riparian States. See M Zeitoun and N Mirumachi, 'Transboundary Water Interaction I: Reconsidering Conflict and Cooperation' (2008) 8 International Environmental Agreements: Politics, Law and Economics 297; Ho (n 21).

Agreement,[25] the Greater Mekong Sub-region Programme supporting the implementation of high priority projects,[26] and the Joint Statement on Law Enforcement Cooperation along the Mekong River with Laos, Myanmar and Thailand.[27] These agreements say little on the management of transboundary waters, instead they focus on commercial ties. Without treaty lawmaking in the specific area of transboundary water management, one could argue that general and customary international law could play a gap-filling role if a dispute arises.[28]

Treaty rules on watercourses are developed mainly from customary international law and the work of the International Law Commission (ILC). Boyle and Chinkin point out that, in *Gabčikovo-Nagymaros*, the International Court of Justice (ICJ) relied more heavily on the work on the ILC 'as representing customary law' than in trying to establish the consistent practice of States.[29] In that case, the Court recognized that Hungary had the riparian right to an equitable and reasonable share of the waters of the Danube River, which Slovakia had diverted to build a new channel as part of its hydropower project.[30] The ICJ relied also on the *River Oder Case* and the newly adopted Article 5 of the UNWC, which had not yet entered into force.[31] This begs the question whether China would consent to international adjudication and whether it would abide by the decision of any international tribunal deciding on the matter.

By contrast, China's efforts on economic integration through international trade and investment agreements are unprecedented. In 1982, China concluded its first bilateral investment treaty (BIT) with Sweden, and since then it has concluded 126 IIAs which are in force (covering BITs and broader international economic agreements with investment provisions).[32] In this relatively short period of time, China has become the State with the second highest number of IIAs (behind Germany).[33] In international trade, China has been a Member of the World Trade Organization (WTO) since 2001, following 15 years of accession negotiations. While China's commitments to trade in goods and services surpass those of the original WTO members[34] – the so-called 'WTO plus obligations' – China's commitment to the protection of foreign investment through IIAs was initially cautious.[35] For example, most treaties within the first generation of IIAs (1980–1990) concluded by China did not include a national treatment standard of protection.[36] The standard of protection against expropriation without compensation was limited to challenging the amount of compensation (see next section).[37] After the 1990s, China adopted new foreign policies with a view to protecting its own investors abroad. This capital-exporting country perspective provided China with incentives to broaden the protection offered in previous IIAs.[38]

2.2 | China's attitude towards compulsory dispute settlement

China has opted for negotiations and consultations in its international agreements related to shared natural resources management, rather than consenting to compulsory dispute settlement. This position suggests that at least in the area of IWL, China is unwilling to compromise its adherence to the principles of non-intervention in other States' affairs and mutual respect for sovereignty and territorial integrity, which China incorporates in its international agreements. This does not mean, however, that China practices absolute territorial sovereignty.[39] One of China's main concerns during the United Nations General Assembly meeting on the adoption of the Watercourses Convention—besides the issue of territorial sovereignty – was the compulsory dispute settlement regime embodied in the UNWC. China argued that its preferred method for dispute resolution had traditionally been consultations, conciliation and other peaceful means.[40] This statement seems consistent with China's bilateral agreements with neighbouring countries, where the methods of dispute resolution adopted include consultations,[41] negotiations[42] and political settlement.[43] China's reluctance to consent to compulsory dispute settlement is epitomized by its written declaration

[25]Agreement on Commercial Navigation on Lancang-Mekong River among China, Laos, Myanmar and Thailand (adopted 20 April 2000).

[26]See 'About the Greater Mekong Subregion' <https://greatermekong.org/about>.

[27]Joint Statement of Ministerial Meeting on Cooperation in Patrol, Law Enforcement Along Mekong River (29 November 2011) <http://en.people.cn/90883/7660464.html>.

[28]See Chen et al (n 23) 219.

[29]A Boyle and C Chinkin, *The Making of International Law* (Oxford University Press 2007) 201.

[30]*Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7.

[31]*Territorial Jurisdiction of the International Commission of the River Oder (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden v. Poland)* (Judgment) PCIJ Rep Series A No. 23 (10 September 1929). See Boyle and Chinkin (n 29) 201.

[32]United Nations Conference on Trade and Development (UNCTAD), Investment Policy Hub, 'International Investment Agreements Navigator', <https://investmentpolicy.unctad.org/international-investment-agreements/by-economy> (UNCTAD IIA Navigator) 'China'.

[33]Germany currently has 183 international investment agreements in force; UNCTAD IIA Navigator, 'Germany'.

[34]H Gao, 'China's Participation in WTO Negotiations' (2012) 1 China Perspectives 59, 59–60.

[35]Schill (n 3).

[36]UNCTAD IIA Navigator (n 32) 'China'.

[37]F Lindmark, D Behn and O Fauchald, 'Explaining China's Absence from Investment Treaty Arbitration' in D Behn, O Fauchald and M Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press fc); Schill (n 3).

[38]See Schill (n 3); Cohen and Schneiderman (n 15); L Cotula et al, 'China-Africa Investment Treaties: Do They Work?' (International Institute for Environment and Development 2016).

[39]S Vinogradov and P Wouters 'Sino-Russian Transboundary Waters: A Legal Perspective on Cooperation' (Institute for Security and Development Policy 2013) 16, 21.

[40]UNGA (n 17) 6–7.

[41]For example, Agreement on Commercial Navigation on Lancang-Mekong River (n 25) art 25.

[42]For example, Treaty Between the China and Mongolia on the Management of the Boundary (2010) arts 11 and 13.

[43]For example, Treaty between China and Russia (2001) (n 14) art 11.

issued pursuant to Article 298 (optional exceptions) of the United Nations Convention on the Law of the Sea,[44] whereby China opts out from a range of disputes, including those concerning maritime delimitations, historic bays and titles.[45] In judicial practice, China refused to participate in the proceedings of the *South China Sea Arbitration* even when, according to the tribunal, the dispute was outside the scope of maritime boundaries.[46] Instead, through its position paper China took issue with the Philippines' characterization of the disputed sovereignty over maritime features and maritime delimitation.[47] Throughout these proceedings, China expressed its position not to accept or recognize the decision rendered by the tribunal and has strongly adhered to this position,[48] albeit China remains bound by the award.

In sharp contrast, in the area of international trade, China had to accept the dispute settlement mechanism of the WTO as part of the negotiations on accession.[49] Since, China has been an active user of this mechanism, acting as claimant in 21 disputes and respondent in 44 disputes.[50] Not only has China accepted the decisions of the ad hoc panels and Appellate Body, it has also adopted the recommendations of the Dispute Settlement Body, adjusting its trade measures to ensure conformity with the WTO covered agreements.[51]

Much more nuanced has been China's consent to dispute settlement in its IIAs. The first wave of treaties did not include ISDS; disputes on the interpretation, application and enforcement of treaty obligations were to be solved through inter-State ad hoc international arbitration between the contracting parties.[52] A second group of Chinese IIAs, concluded between 1983 and the 1990s, included ISDS restricted to disputes over the amount of compensation for expropriation of foreign investment only.[53] As Schill explains, China's increased engagement with the international community, and its interest in both attracting foreign investment and protecting its own investors abroad, influenced China's willingness to consent to more comprehensive dispute settlement mechanisms and to incorporate the national treatment standard of protection in its IIAs.[54] Notably, in 1993, China ratified the ICSID Convention,[55] paving the way to increasingly consent to ISDS under the ICSID Convention in its subsequent IIAs. While China is now wholly committed to the conclusion of IIAs with broad ISDS provisions, this does not mean that China fully engages in international arbitration. It imposes formal conditions upon its national investors, requiring that they enforce investment protection provisions in their host States.[56] The question remains as to why there have been so few investment arbitration cases involving China as respondent, or involving Chinese investors, though further analysis on this issue is beyond the scope of this article.[57]

3 | TRANSBOUNDARY AND ECONOMIC RELATIONS BETWEEN CHINA AND LAOS

China and Laos provide a relevant case study for observing the interaction between IIL and IWL and exploring the potential for mutual supportiveness. Laos' ambition to generate revenue from energy exports dates to the 1960s, being Thailand its first export destination.[58] During the 1980s and 1990s, Laos attracted hydropower investment flows from Japan, Korea, Norway and other Western and Asian States, with projects technically and financially supported by the World Bank. The second half of the 1990s and the 2000s showed renewed interest from Thailand and Vietnam, as well as newcomers such as Malaysia, Russia and China.[59]

China's infrastructure projects and investment interests in Laos involve Chinese SOEs and independent corporations seeking to open markets for infrastructure projects, goods and services, and accessing natural resources, such as water, land and minerals.[60] Laos is a resource-rich State and close neighbour to China, with abundant water sources contributing to 35% of the Mekong

[44]United Nations Convention on the Law of the Sea (adopted on 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

[45]See United Nations, 'Declarations and Statements with Respect to the United Nations Convention on the Law of the Sea and to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea' (United Nations Sales No. E.97.V.3).

[46]See *Arbitration before An Arbitral Tribunal Constituted Under Annex VII to the 1982 United Nations Convention on the Law of the Sea (Philippines v China)* (Award on Jurisdiction and Admissibility) (29 October 2015) PCA Case No. 2013-19 para 157. See also Award (12 July 2016).

[47]See 'Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines' in (2016) 15 Chinese Journal of International Law 431.

[48]Chinese Society of International Law, 'The South China Sea Arbitration Awards: A Critical Study' (2018) 17 Chinese Journal of International Law 207, para 8.

[49]Gao (n 34); Cohen and Schneiderman (n 15) 122.

[50]World Trade Organization, Disputes by Member, 'China' <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>.

[51]H Moynihan, 'China's Evolving Approach to International Dispute Settlement' (Chatham House 2017) 6; W Ji and C Huang, 'China's Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective' (2011) 45 Journal of World Trade 1, 31.

[52]See, e.g., Sweden-China BIT (1982) art 6; Norway-China BIT (1984) art 7; Italy-China BIT (1985) art 11; Thailand-China BIT (1985) art 9. Full details on each BIT referred to within this article are available at UNCTAD IIA Navigator (n 32).

[53]See, e.g., China-Bulgaria BIT (1989) art 9; China-Denmark (1985) art 8; China-Malaysia (1988) art 7.

[54]Schill (n 3) 81–82.

[55]Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention).

[56]Lindmark et al (n 37).

[57]There have been three cases brought by foreign investors against China and six investment disputes brought by Chinese investors against various host States. UNCTAD, Investment Policy Hub, 'Investment Dispute Settlement Navigator (China)' <https://investmentpolicy.unctad.org/investment-dispute-settlement?id=42&name=china>. See also Lindmark et al (n 37).

[58]C Middleton, J Garcia and T Foran, 'Old and New Hydropower Players in the Mekong Region: Agendas and Strategies' in F Molle (ed), *Contested Waterscapes in the Mekong Region. Hydropower, Livelihoods and Governance* (Routledge 2009) 23, 31.

[59]ibid 34.

[60]F Urban, G Siciliano and J Nordensvard, 'China's Dam-Builders: Their Role in Transboundary River Management in South-East Asia' (2018) 34 International Journal of Water Resources Development 747, 748; see also F Urban et al, 'An Analysis of China's Investment in the Hydropower Sector in the Greater Mekong Sub-Region' (2013) 15 Environment, Development and Sustainability 301.

River flow.[61] Currently, there are 51 investment projects in Laos developed by approximately 22 Chinese investors, most of which are SOEs.[62] China's foreign investment in Laos concentrates on hydropower generation to export electricity (32 projects), while other investments focus on timber, real estate, utilities and tourism.[63] China and Laos have 'resolved to formulate and implement a joint plan to advance the "Belt and Road" initiative, make solid efforts to promote production capacity and investment cooperation, and bring economic and technological cooperation plans into full play'.[64]

Chinese construction enterprises have become prolific in dam development, most often through Build-Operate-Transfer schemes,[65] albeit not without controversy. The potential environmental impacts of such activities, affecting fish stocks and livelihoods in downstream States, is well documented.[66] Chinese enterprises, including SOEs, have become important players in the industry of dam building in Southeast Asia.[67]

Before addressing possible conflicting scenarios associated with transboundary hydropower projects, it is useful to consider and compare some relevant rights and obligations between China and Laos in the areas of IIL and IWL.

3.1 | Rights and obligations under the rules of IWL

As discussed in Section 2, China and Laos have concluded seven boundary agreements and protocols, some of which contain a few provisions on the management of shared waters.[68] In addition, while China is not a party to the Mekong River Commission, it cooperates (as does Myanmar), providing hydrological data as a 'dialog partner'.[69] By way of example, the China–Laos Boundary Agreement of 2012 includes a narrow definition of 'transboundary water', covering only rivers flowing across the borders between the two States.[70] Pursuant to Articles 9 and 10 of the treaty, the parties should resort to consultations if any difficulties arise from the use and protection of the waters (Article 9) and/or if significant impact is caused by the construction or dismantling of dams or other hydro projects (Article 10). A close reading of the provisions suggests that the principle of equity in this context refers to the consequences of causing *significant harm* to the other party (despite the adoption of all appropriate measures). In other words, equity, in this context, does not seem to impose a prior, preventive and direct obligation on the use of the transboundary river in the sense of Article 5 of the UNWC or customary international law. Instead, these provisions seem to guide, *ex post facto*, the process of consultations between the parties should difficulties or significant impact be caused by one party to the other as a result of the utilization of the waters. This approach may find support in McCaffrey's assessment of Article 7(2) of the UNWC, which points out that '[t]he facts and circumstances of each case, rather than any prior rule, will ultimately be the key determinants of the rights and obligations of the parties'.[71] Article 10 does not seem to impose specific obligations on China or Laos, yet one could assume that the parties will conduct their activities with due diligence so as to prevent avoidable harm to one another.

Could customary law fill the gaps in the boundary agreements between China and Laos? Despite voting against the adoption of the UNWC, China has, in its own practice, embraced the rules of reasonable utilization and no significant harm in several bilateral treaties concluded with neighbouring countries, such as Mongolia,[72] Kazakhstan[73] and Russia.[74] Article 9 of the China–Laos Boundary Agreement of 2012 adopts the terms *use and protection* of the waters, which is slightly different than the bilateral treaties mentioned above. However, this wording could still be read in line with the notion of sustainability embedded within the general principle of equitable and reasonable utilization. In its commentary to Article 6 of the UNWC, the ILC noted that the provision not only covers conservation and security but also measures to regulate water flow to mitigate draught and salinity, flood control, pollution and erosion.[75] This was recognized, in turn, by the ICJ in *Gabčikovo-Nagymaros*.[76] As regards the customary status of the principles of no significant harm and prior notification, the former is a long-standing customary obligation recognized in the *Trail Smelter Arbitration*[77] and endorsed by tribunals in later disputes. For instance, the *Indus Waters Kishenganga Arbitration* tribunal, deciding on the basis of the 1960 Indus Water

[61] 'Laos' (International Rivers) <https://www.internationalrivers.org/campaigns/laos>.

[62] 'China Global Investment Tracker' (American Enterprise Institute 2020) <https://www.aei.org/china-global-investment-tracker/>. Note that International Rivers counts 37 projects as at 2017: 'China Global Dams Database, 2017' (International Rivers 2017) <https://www.internationalrivers.org/blogs/435/reflections-on-chinese-companies'-global-investments-in-the-hydropower-sector-between-2006>.

[63] China Global Investment Tracker (n 62); China Global Dams Database, 2017 (n 62).

[64] 'Assessment and Prospect of China-Laos Development Corporation' (Shanghai Institutes for International Studies 2016) 28 <http://en.siis.org.cn/UploadFiles/file/20170417/20170316_中国与老挝发展合作_英文版.pdf>.

[65] Urban et al, 'China's Dam-Builders' (n 60) 757–758.

[66] 'The Effects of Chinese Dams on Water Flows in the Lower Mekong Basin' (n 9). See TA Räsänen et al, 'Observed River Discharge Changes due to Hydropower Operations in the Upper Mekong Basin' (2017) 545 Journal of Hydrology 28.

[67] See Urban et al, 'China's Dam-Builders' (n 60).

[68] China–Laos Boundary Agreements (n 22).

[69] Mekong River Commission, 'China Signs Data-Sharing Agreement' (Mekong News, April–June 2002).

[70] China–Laos Agreement on Boundary Management (2012) (n 22) art 1; China-Laos Treaty on Boundary Regulations (1994) (n 22) art 6.

[71] S McCaffrey and M Sinjela, 'The 1997 United Nations Convention on International Watercourses' (1998) 92 American Journal of International Law 97, 101–102. For a detailed analysis of the relationship between the principles of reasonable and equitable utilization and no significant harm, see P Birnie, A Boyle and C Redgwell, International Law and the Environment (3rd edn, Oxford University Press 2009) 551–553.

[72] Agreement between China and Mongolia on the Protection and Utilization of Transboundary Waters (adopted 29 April 1994) art 4 and art 6.

[73] Agreement between Kazakhstan and China on Water Quality Protection of Transboundary Waters (22 February 2011) arts 2–3.

[74] China–Russia Agreement on the Reasonable Utilisation and Protection of Transboundary Waters (adopted 29 January 2008) preamble and art 7.

[75] 'Report of the International Law Commission on the Work of its Forty-Sixth Session (2 May–22 July 1994)' para 4, in Yearbook of the International Law Commission 1994, Volume II' UN Doc A/CN.4/SER.A/1994/Add.1(Part 2).

[76] *Gabčikovo-Nagymaros* (n 30) para 140.

[77] *Trail Smelter Case (United States v Canada)* (1938/1941) 3 RIAA 1905.

Treaty, recalled that, under customary international law, 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein'.[78] The principle is itself connected to further obligations, such as due diligence and prevention and the foundational principle of sovereign equality of States.[79] Similarly, the obligation imposed by the principle of prior notification is a well-established rule of customary international law, as affirmed by the ICJ and other arbitral tribunals.[80]

The lack of precise normative content for the management and protection of shared waters between China and Laos can be complemented with the rules of customary international law discussed above. However, the lack of consent to arbitrate or adjudicate disputes so as to ascertain the scope and enforce these rules presents further challenges to the protection of shared waters.

3.2 | Rights and obligations under the rules of IIL

China and Laos concluded a BIT in 1993 that continues to be in force.[81] In the context of the evolution of IIAs, this is a first-generation treaty, albeit in the Chinese context, the BIT belongs to a second generation of treaties, which have broadened the scope of dispute settlement and standards of protection. Interestingly, the preamble of this treaty recognizes the principles embraced by China's foreign policy of mutual respect for sovereignty and equality, and mutual benefit.[82] As regards its scope *rationae personae* and *rationae materiae*, the BIT does not distinguish between Chinese State-owned and other investors provided that 'these economic entities' are 'established in accordance with the laws of each contracting State'.[83] Under the definition of investment, investments include 'movable and immovable property and other property rights' and 'concessions conferred by law, including concessions to search for or to exploit natural resources'.[84] Under these provisions, Chinese hydropower investments in Laos would fall within the scope of Article 1 of the BIT, thus enjoying the protection afforded by the treaty.

The standards of protection owed to Chinese and Laotian investors are broad in scope and wording. The BIT includes provisions on national and most-favoured-nation treatment, as well as an unqualified fair and equitable treatment standard;[85] by not being pegged to other legal norms or specific legal content, arbitral tribunals often interpret the fair and equitable treatment standard quite broadly.[86] Like most IIAs concluded around this time, the BIT includes a general prohibition on direct and indirect expropriation, although indirect expropriation is neither defined nor further regulated.[87] The inclusion of these standards represents China's step forward from its initial reluctance to include national treatment provisions in earlier BITs and to allow challenges to expropriatory measures.[88]

Finally, parties' consent to arbitration under this BIT is limited compared to other BITs concluded by China after 1990.[89] Article 8 of the China–Laos BIT includes ISDS, where the parties consent to (i) negotiations seeking an amicable solution for a period of 6 months; (ii) resort to domestic courts; and (iii) ISDS (arbitration after the negotiation period) when the dispute concerns the amount of compensation for expropriation.[90] In practice, the scope of review of the compensatory obligation presents difficulties: Can tribunals ascertain the appropriate amount of compensation in cases of indirect expropriation without concluding that expropriation has in fact occurred? Conceivably, respondent States will assert that the measures are not expropriatory, and hence not compensable. Tribunals have adopted divergent interpretations on this point. Some have opted for a narrow reading of the provision, refusing to analyse the alleged expropriatory measures as such. Others have adopted a broader interpretation, asserting that it is not possible to address a claim involving the amount of compensation without considering whether, in fact, an expropriation has occurred.[91] In *Tza Yap Shum v Peru* the tribunal noted:

> *[T]o rule otherwise would eviscerate the provision relating to ICSID arbitration since, in accordance with the final sentence of Article 8(3), to have recourse to tribunals of the State recipient of the investment would definitely preclude the possibility to accede to arbitration under the ICSID Convention.*[92]

[78] *Indus Waters Kishenganga Arbitration (Pakistan v India)* (Final Award) (20 December 2013) PCA Case No 2011-01 para 448. See also *Iron Rhine Arbitration (Belgium v Netherlands)* (Award) (24 May 2005) PCA Case No. 2003-02 para 59; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 (*Pulp Mills*) para 101.

[79] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)* (Judgment) [2015] ICJ Rep 665, Separate Opinion of Judge Donoghue. For a detailed summary of the case and the different views of the members of the ICJ, see J Harrison, 'Significant Environmental Law Cases: 2015–16' (2016) 28 Journal of Environmental Law 533.

[80] See *Lake Lanoux Arbitration (France v Spain)* (Award) (1957/1963) 12 RIAA 281; *Gabčikovo-Nagymaros* (n 30); *Pulp Mills* (n 78); and *Indus Waters Kishenganga Arbitration* (n 78).

[81] China–Laos BIT (1993) in UNCTAD IIA Navigator (n 32).

[82] Cohen and Schneiderman (n 15); Schill (n 3); Kong (n 14).

[83] China–Laos BIT (n 81) art 1(2)(b).

[84] ibid art 1(1).

[85] ibid art 3.

[86] E De Brabandere, 'Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity' (2017) 18 Journal of World Investment and Trade 530.

[87] China–Laos BIT (n 81) art 4.

[88] See for instance Norway–China BIT (1984) in UNCTAD IIA Navigator (n 32), where there is no express prohibition of expropriation, albeit expropriatory measures attach conditions of public purpose, non-discrimination and payment of compensation. In contract, Article 3 of the Sweden-China BIT (1982)—China's first BIT—contains a prohibition upon expropriation except for reasons of public purpose with due process of law and payment of compensation. In practice, both provisions protect investors from arbitrary expropriation.

[89] Lindmark et al (n 37).

[90] China–Laos BIT (n 81) art 8.

[91] *Sanum Investments v Laos (I)* (Award on Jurisdiction) (13 December 2013) PCA Case No. 2013-13 paras 322–342; *Tza Yap Shum v Peru* (Award) (7 July 2011) ICSID Case No. ARB/07/6.

[92] *Tza Yap Shum v Peru* (n 91) para 188.

Additionally, a narrow reading of this provision, that is, disregarding the expropriatory context around compensation, would deter any potential for enforcing transboundary water obligations through IIL and the potential for mutual supportiveness. This is because Chinese and Laotian investors would be prevented from challenging indirect expropriation and other measures with similar effects.[93] The scenario proposed in this article seeks to prompt the home State (China) to meet its transboundary water obligations, considering its investment interests through SOEs in the host State (Laos).

4 | FROM REGIME INTERACTION TO MUTUAL SUPPORT

The central argument of this article is that the interaction between IWL and IIL could achieve some degree of mutual supportiveness.[94] On the one hand, the IWL regime for the management of shared waters between China, Laos and the other Mekong States lacks an adequate dispute settlement mechanism to enforce treaty and customary obligations on prevention of harm and sustainable use. On the other hand, the IIL regime under which China and its counterparts consent to more effective and depoliticized forms of dispute settlement—even as modest as those set out in the BIT between China and Laos—could give some teeth to the implementation of IWL obligations.

As discussed in previous sections, the claims that dam infrastructure has the effect of reducing water flows downstream is inconclusive.[95] However, its effect, added to reduce rainfall—during a given year—can cause water stress, affecting other water-intensive activities, such as irrigation and the provision of water services.[96] Furthermore, the livelihoods of local communities would be at risk, due to reduced access to water for agriculture, loss of ecosystem services and fisheries. The lower Mekong basin States, which are also parties to the Mekong Agreement, are, in turn, likely to be affected by the aggregate construction of dams in the Lancang/Mekong River. There have been instances where China has agreed to release water into the lower Mekong, attending Vietnam's requests to alleviate the effects of drought.[97]

Laos's efforts to become the 'battery of South East Asia' has already raised concerns in other basin States. The Xayabury dam, located in Laos on the lower stream of the Mekong, is a project undertaken by Thai commercial banks that commenced in 2011. It is expected that the dam will affect fisheries,[98] agriculture and the livelihoods of 200,000 people living near the site.[99] In 2017, Vietnam urged Laos to rethink the construction of the Pak Beng Dam and other future projects, as the dam is expected to cause further severe drought, saline intrusion and land sinking, which Vietnam has faced for several years.[100] Furthermore, the site of the Pak Beng Dam is prone to earthquakes occurring approximately every 5–10 years.[101] These hazards materialized in July 2018, when the Xe Pian-Xe Namnoy Dam collapsed, killing around 35 people and displacing nearly 7,000 from their villages.[102] It has been reported that little action has been taken by the Korean investor to compensate the victims of the disaster, nor has Laos taken legal action against the investor.[103]

Community dissatisfaction and fear of ecosystems and livelihood loss are strong signals of public policy challenges.[104] Governments have often been pushed by social pressure to secure the essential interests of communities, and, in such situations, host States have found themselves in the difficult position of having to adopt measures such as the cancellation of mining projects,[105] water

[93] *Beijing Shougang and others v Mongolia* (Award) (30 June 2017) PCA Case No. 2010-20 paras 439–454.

[94] For previous and more detailed work on mutual supportiveness, see N Matz-Lück, 'Harmonization, Systemic Integration, and "Mutual Supportiveness" as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation?' (2006) 17 Finnish Yearbook of International Law 39; R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the "WTO-and-Competing-Regimes" Debate?' (2010) 21 European Journal of International Law 649.

[95] See 'The Effects of Chinese Dams on Water Flows in the Lower Mekong Basin' (n 9).

[96] 'Lancang River Dams: Threatening the Flow of the Lower Mekong' (International Rivers 2013) <https://www.internationalrivers.org/sites/default/files/attached-files/ir_lacang_dams_2013_5.pdf>; 'The Cost of Non-Cooperation: The Mekong River' (The Economist, 5 February 2020). For a more general analysis of governmental measures related to water management (quantity and quality), see A Daza-Clark, *International Investment Law and Water Resources Management* (Brill Nijhoff 2017) 115–132.

[97] China attributed this request to the El Niño phenomenon, rather than the effects of dam construction. S Tiezzi, 'Facing Mekong Drought, China to Release Water from Yunnan Dam' (*The Diplomat*, 6 March 2016). See also CP Freeman, 'Dam Diplomacy? China's New Neighbourhood Policy and Chinese Dam-Building Companies' (2017) 42 Water International 187.

[98] Mekong River Commission, 'Prior Consultation Project Review Report, Vol. 2 Stakeholder Consultations Related to the Proposed Xayaburi Dam Project' (24 March 2011) <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf> 17.

[99] H Beech, '"Our River Was Like a God": How Dams and China's Might Imperil the Mekong' (New York Times, 12 October 2019).

[100] The Pak Beng dam is a US$2.4 billion project developed by China Datang Overseas Investment. M Macan-Markar, 'Chinese Dams Ramp up Lao External Debt' (Nikkei Asian Review, 2 November 2018).

[101] Vietnam News, 'Vietnam Urges Laos to Rethink Mekong River Dams' (The Nation Thailand, 16 May 2017).

[102] H Ellis-Petersen, 'Laos Dam Collapse: Work Continues on Huge Projects despite Promised Halt' (The Guardian, 21 August 2018); 'Laos: Xe Pian-Xe Namnoy Dam Collapse' (Inclusive Development International 2018).

[103] 'Reckless Endangerment: Assessing Responsibly for the Xe Pian-Xe Namnoy Dam Collapse' (Inclusive Development International and International Rivers 2018) 2.

[104] P Barron, R Diprose and M Woolcock, 'Local Conflict and Development Projects in Indonesia: Part of the Problem or Part of a Solution?' (World Bank 2007) 21–22.

[105] There has been a wave of measures adopted by host States stepping back from mining projects, often prompted by social pressure and concern over the protection of water resources. Colombia is an example to be noted: *Galway Gold Inc. v Republic of Colombia*, ICSID Case No. ARB/18/13 (pending); *Gran Colombia Gold Corp. v Republic of Colombia*, ICSID Case No. ARB/18/23 (pending); *Red Eagle Exploration Limited v Republic of Colombia*, ICSID Case No. ARB/18/12 (pending); *Eco Oro v Colombia*, ICSID Case No. ARB/16/41 (pending); *Cosigo Resources and others v Colombia* (pending). See also recent decisions in *Bear Creek Mining v Peru* (Award) (30 November 2017) ICSID Case No. ARB/14/21; *South American Silver v Bolivia* (Award) (22 November 2018), PCA Case No. 2013-15; *Pac Rim v El Salvador* (Award) (14 October 2016) ICSID Case No. ARB/09/12; *Commerce Group v El Salvador* (Award) (14 March 2011) ICSID Case No. ARB/09/17.

services and infrastructure projects,[106] and gas and oil concessions.[107] In other cases, governments have had a belated change of heart in relation to the protection of environmental sites *vis-à-vis* real estate infrastructure projects.[108] In an ideal world, disputes arising out of social conflicts would not be resolved through ISDS.[109] However, in reality, the issues connecting IIL with other areas of domestic and international regulation, such as IWL are so intertwined that the decisions adopted by ISDS tribunals are bound to have an effect on other areas of environmental or social regulation. Due to the nature of these disputes, arbitral tribunals must increasingly engage with environmental, human rights and other social concerns.

Laos could adopt regulatory measures seeking to avert social unrest and community pressure arising out of the construction of dams. The IIL regime, envisaged to protect the rights of affected foreign investors, could also become the forum for counterclaims brought by the host States against investors (where there is consent to arbitrate such counterclaims) and/or the promotor of systemic integration of international norms. It is important to recall that, under the China–Laos BIT, only (disputes concerning compensation of) expropriatory measures could lead to ISDS. Furthermore, the arbitral tribunal would need to adopt an expansive interpretation of Article 8(3) of the BIT, as discussed above.

4.1 | A systemic approach to interpretation that could lend 'teeth' to the IWL regime

Arbitral tribunals in ISDS have been cautiously, albeit increasingly interpreting the scope of BIT provisions in light of other relevant rules of international law, pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[110] As stated earlier, only through the interpretation of Article 4 of the BIT (on expropriation), tribunals may consider other relevant rules of transboundary waters, such as reasonable and equitable utilization and the no significant harm principles.[111] Both principles are an expression of customary international law and treaty practice, as reflected in the 2012 China—Laos Boundary Management Agreement. As such, they constitute relevant rules of international law under the VCLT, which could prevent an isolated enforcement of IIL provisions alone. In *Philip Morris v Uruguay*, the arbitral tribunal had to decide whether the measures adopted by Uruguay to curb tobacco consumption expropriated the investor's property rights over trademarks. The tribunal dismissed the claim of expropriation, determining, first, that the measures had not substantially deprived Philip Morris from its investment, and, second, that police powers[112] had become an expression of customary international law, and thus a relevant rule 'applicable to the relations between the parties'. Thus, Uruguay had legitimately exercised its right to regulate to protect public health.[113] Earlier, in *Saluka v Czech Republic*, the arbitral tribunal concluded that the measures adopted by the host State in the banking sector, did not amount to the expropriation of Saluka's investment; rather, they were the normal exercise of regulatory powers.[114]

Under the scenarios discussed above, Laos may, at any given moment, seek to (i) rebalance the ecological equilibrium of shared waters, (ii) address problems of displacement and dissatisfaction of local communities; and (iii) secure compliance with transboundary obligations towards its downstream neighbours (i.e. Vietnam, Cambodia and Thailand). These measures, in turn, could potentially interfere with foreign investor's investment projects (including Chinese investors), in violation of Laos' obligations under its BITs. Under the scenario proposed, a systemic integration approach to the interpretation of the China–Laos BIT would need to uncover the intention of the parties to the BIT without ignoring the broader framework of international law, which includes commitments by treaty and custom adopted by China and Laos.[115] Among these are the principles reflected in the customary rules for the management of shared water resources and the commitments negotiated in the China–Laos Boundary Agreements. Considering the BIT's narrow grounds (expropriation—disputes about compensation), it is likely that the discussion revolves around the issue of whether an environmental/health/safety-related measure, which is non-discriminatory and follows due process of law, constitutes an expropriation or is compensable altogether. Would the measure fall within the scope of the police powers of Laos—today recognized as customary law?[116]

[106] *Methanex v United States* (Final Award) (3 August 2005); *Aguas del Tunari v Bolivia*, ICSID Case No. ARB/02/3 (settled); *SAUR v Argentina* (Award) (22 May 2014) ICSID Case No. ARB/04/4; *Urbaser and CABB v Argentina* (Award) (8 December 2016) ICSID Case No. ARB/07/26; *Biwater v Tanzania* (Award) (24 July 2008) ICSID Case No. ARB/05/22.

[107] *Perenco v Ecuador* (Award) (27 September 2019) ICSID Case No. ARB/08/6; *Burlington v Ecuador* (Decisions on Ecuador's Counterclaims) (7 February 2017) ICSID Case No. ARB/08/5.

[108] Costa Rica has recently been involved in several investment disputes concerning real estate and tourism projects that were reversed due to environmental concerns: *Reinhard Unglaube v Costa Rica* (Award) (16 May 2012) ICSID Case No. ARB/09/20; *Cervin and Rhone v Costa Rica* (Award) (7 March 2017) ICSID Case No. ARB/13/2; *Berkowitz v Costa Rica*, ICSID Case No. UNCT/13/2 (discontinued); *Infinito Gold v Costa Rica*, ICSID Case No. ARB/14/5 (pending); *Aven and others v Costa Rica* (Award) (18 September 2018) ICSID Case No. UNCT/15/3.

[109] See N Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the International Investment Regime' (2019) 113 AJIL Unbound 16, 17.

[110] See PM Dupuy and J Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress' in M Bungenberg et al (eds), *International Investment Law* (C.H. Beck, Hart, Nomos 2012) 1739; B Simma and T Kill, 'Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology' in C Binder et al. (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 678. For a general commentary see C McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279.

[111] Discussed in Section 3.1. See OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis' (2008) 19 European Journal of International Law 301, 324.

[112] For a discussion of the police powers doctrine in IIL see Daza-Clark (n 96) 102–113.

[113] *Philip Morris v Uruguay* (Award) (8 July 2016) ICSID Case No. ARB/10/7 paras 289–301.

[114] *Saluka v Czech Republic* (Partial Award) (17 March 2006) PCA Case No. 2001-04 paras 254–265; *Burlington v Republic of Ecuador* (Decision on Liability) (14 December 2012) ICSID Case No. ARB/08/5 para 392.

[115] McLachlan (n 110) 280-281.

[116] *Philip Morris v Uruguay* (n 113).

That said, it is important to recall that a systematic approach to interpretation of the BIT does not, in itself, seek to resolve possible conflict of norms originating in IWL and IIL. The main purpose remains to enforce the provisions of the BIT. As noted by the tribunal in *RosInvestCo UK v Russia*:

> *Applicable in the relations between the parties' must be taken as a reference to rules of international law that condition the performance of the specific rights and obligations stipulated in the treaty — or else it would amount to a general licence to override the treaty terms that would be quite incompatible with the general spirit of the Vienna Convention as a whole.*[117]

Tribunals may be more or less inclined to apply an expansive or narrow systemic interpretation of BIT provisions. According to Pauwelyn and Elsig, this could be due to an array of incentives tribunals may have, ranging from cultural norms and a sense of systemic community to competition among them.[118] These are aspects that can only be addressed on a case-by-case basis, looking at the character of the regulatory measure, its purpose and the manner in which it was adopted.

4.2 | Holding investors accountable through counterclaims

Some defences invoked by host States can turn into counterclaims when the investor has itself breached specific obligations (if any) under the treaty itself, domestic law or the contracts under which the investor operates in the host State. Subject to the limitations of consent given by the parties in the treaty[119] or in the arbitration agreement,[120] the IIL regime could also assist governments in holding investors accountable for environmental degradation and damage to the livelihoods of local communities, or perhaps social displacement, arising out of construction and operation of dams and hydropower infrastructure.[121]

The law and jurisprudence on counterclaims are still underdeveloped in the practice of investment arbitration and, while counterclaims impose a high threshold on host States, they are increasingly brought in investment disputes.[122] For one thing, few newer IIAs include enforceable obligations for investors.[123] For another, most IIAs also fail to include consent to arbitrate counterclaims. Several tribunals have found jurisdiction through the combined interpretation of the IIA and application of Article 46 of the ICSID Convention[124] and Rule 40 of the Rules of Procedure for Arbitration Proceedings.[125] Hence, only *ex abundanti cautela* have arbitrators considered counterclaims and in very few cases have they held the investor responsible for misconduct.[126] Arbitral tribunals often consider a two-tier test to entertain a counterclaim: (i) it must be within the jurisdiction of the arbitral tribunal; and (ii) it must arise out of the same subject matter of the dispute ('close connection').[127]

Regarding the first condition, the China–Laos BIT, which only allows ad hoc arbitration over issues related to the amount of compensation, appears to include consent to arbitrate counterclaims. Paragraphs 1, 2 and 3 of Article 8 of the BIT effectively state that, for any investor-host State dispute concerning an investment that cannot be settled within 6 months of negotiation, the dispute may be submitted to the competent court of the host State *by either party*, and, where the dispute involves the amount of compensation for expropriation, it may be submitted to an ad hoc tribunal *at the request of either party*.[128] Article 8(5), in turn, states that the tribunal shall determine its own procedure and may take as guidance the ICSID Convention Arbitration Rules. In *Sanum v Laos*, which involved the China–Laos BIT, the Tribunal analysed Article 47 of the ICSID Additional Facility Rules in connection to a request by the claimant to present additional claims.[129] The tribunal considered that ascertaining its jurisdiction over ancillary claims in an ad hoc arbitration required additional layers of consent between the parties to admit additional claims pursuant to Article 47.[130] It is submitted that the Tribunal in *Sanum* left the door partially open, should parties to a dispute consent to the application of the ICSID Additional Facility Rules or the ICSID Convention Rules. This is, in fact, an additional layer of consent to the consent already granted under Article 8 of the BIT.

[117] *RosInvest v Russia* (Award on Jurisdiction) (5 October 2007) SCC Case No. Abr. V 079/2005 para 39.

[118] J Pauwelyn and M Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals' in JL Dunoff and MA Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 445, 467.

[119] *Urbaser v Argentina* (n 106).

[120] *Burlington v Ecuador* (n 107).

[121] The IIL regime was originally designed to provide a forum for investor claims against host States only, limiting the possibility to assert misconduct by investors operating in the host State. See J Gathii and S Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law' (2019) 113 AJIL Unbound 1.

[122] See, e.g., *Perenco v Ecuador* (n 107); *Burlington v Ecuador* (n 107); and *Urbaser v Argentina* (n 106).

[123] See, e.g., the Dominican Republic-Central America-United States Free Trade Agreement (2004) art 10; the Netherlands Model Investment Agreement (2018) art 7; the Protocol on Investment Cooperation and Facilitation (MERCOSUR Protocol) art 13.

[124] ICSID Convention (n 55).

[125] ICSID Rules of Procedure for Arbitration Proceedings (2006) <https://icsid.worldbank.org/sites/default/files/documents/ICSID%20Convention%20English.pdf>.

[126] *Perenco v Ecuador* (n 107); *Burlington v Ecuador* (n 107). Each dispute concerned the same investment, the parties consented to arbitrate through different channels, and both tribunals found the investors liable for environmental damages.

[127] *Metal-Tech v Uzbekistan* (Award) (4 October 2013) ICSID Case No. ARB/10/3 407. Z Douglas, *The International Law of Investment Claims* (Oxford University Press 2009) 260–263, paras 496–501.

[128] China–Laos BIT (n 81) art 8.

[129] 'ICSID Additional Facility Rules' (ICSID 2006) Schedule C Arbitration <https://icsid.worldbank.org/sites/default/files/AFR_2006%20English-final.pdf>.

[130] *Sanum Investments v Laos (II)* (Procedural Order No. 2) (23 October 2017) ICSID Case No. ADHOC/17/1 paras 23–28.

Regarding the second condition ('close connection'), a nexus between the primary claim and the counterclaim allow an efficient and systemic decision of both disputes. This will depend on whether the counterclaim brought by Laos (in the example under consideration) is connected to the same hydropower project affected by the expropriatory measure, that is, the counterclaim must arise out of the same investment.[131]

Finally, what law holds the investor accountable in the event of a counterclaim? Assuming that the China–Laos BIT does indeed provide consent to adjudicate counterclaims and the tribunal is able to find jurisdiction to entertain the counterclaim, the question that follows is whether the investor's obligations could be found in the BIT, in domestic host State law, or in the contractual arrangements related to the project, if the treaty so provides.[132] The BIT under analysis provides in Article 8(7):

> *The tribunal shall adjudicate the dispute in accordance with the law of the Contracting State accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepted by both Contracting States.*[133]

Under this provision, which somewhat echoes Article 42 of the ICSID Convention, a potential counterclaim against the investor could be brought on the basis of obligations arising from the BIT itself, general international law and domestic law. Relevant here is the general international law obligation, recognized in *Pulp Mills*, to carry out an environmental impact assessment (EIA). In *Pulp Mills*, the ICJ clarified that, while general international law requires States to conduct an EIA where there is a risk that the proposed activity causes transboundary harm, it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content and scope of the EIAs to be conducted in the implementation process. [134] In the investment treaty arbitration *Blusun v Italy*, the tribunal conceded that:

> *Article 19 [of the Energy Charter Treaty] operates not at the level of individual investors but at the interstate level as is the case with the developing general international law of EIAs. In so far as there is any requirement for private parties to carry out an EIA for any proposed project this can only arise under the relevant national law.*[135]

For a State to bring a successful counterclaim in this scenario and enforce rules on transboundary waters, it is important that there is indeed a breach by investors (or the likelihood of a breach) of the applicable law (as determined in Article 8(7) of the China–Laos BIT), reflecting international EIA standards and principles. Against this backdrop, ascertaining the content and scope of Laos's domestic legislation requiring EIAs is relevant to the determination of investors' obligations under domestic law. The Laos 1999 Environmental Protection Law, supported by its 2002 Implementing Decree, set the parameters for environmental and social management and monitoring. Laos' specific domestic legislation guiding the development of EIAs is therefore mandatory to Chinese and other foreign investors, though a detailed analysis of these obligations is outside the scope of this article.[136] In this context, while domestic laws on EIAs are binding upon investors and could be enforced through the IIL regime of the counterclaim, the international law principles of no harm and obligation to undertake and EIA is binding upon (host) States and may be enforced under transboundary water agreements such as the Mekong Agreement.

Another relevant aspect of the scenario proposed is the increasing recognition that consultation with residents of the affected State is an essential component of EIAs. This reading of the international EIA obligation may be broad, though it reflects international practice despite the Court's categorical statement in *Pulp Mills* that 'no legal obligation to consult the affected populations arises for the parties from the instruments invoked by Argentina'.[137] More generally, the public consultation component of EIA is supported elsewhere in international law. For instance, when addressing the specific content of an EIA, the Commentary of the ILC Articles on Transboundary Harm observes that '[t]he assessment should include the effects of the activity not only on persons and property, but also on the environment of other States'.[138] As Boyle puts it,

> *[i]t is apparent from the commentary that whatever else may be required by national law, international law requires at a minimum that an EIA assess possible effects on people, property and the environment of other states likely to be affected. If national law does not ensure that such an assessment is carried out – for whatever reason – then there is inevitably a breach of the obligation to do a transboundary EIA.*[139]

[131] In *ADF v United States*, the tribunal held that ancillary claims must involve the same project that was the subject of the original claims, rejecting other projects 'physically distinct from and totally unrelated to the Springfield Interchange Project'. *ADF v United States* (Award) (9 January 2003) ICSID Case No. ARB(AF)/00 paras 142–145.

[132] See *Burlington v Ecuador* (n 107) and *Perenco v Ecuador* (n 107).

[133] China–Laos BIT (n 81) art 8(7).

[134] *Pulp Mills* (n 78) para 204–205.

[135] *Blusun v Italy* (Award) (27 December 2016) ICSID Case No. ARB/14/3 para 275.

[136] See S Wayakone and I Makoto, 'Evaluation of the Environmental Impacts Assessment (EIA) System in Lao PDR' (2012) 3 Journal of Environmental Protection 1655.

[137] *Pulp Mills* (n 78) para 216.

[138] 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities' in ILC 'Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July-10 August 2001)' UN Doc A/56/10 (2001) art 7, para 8.

[139] See also A Boyle, 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention' (2011) 20 Review of European Community International Environmental Law 227.

Laotian environmental law seems to recognize the importance of 'public participation in projects' as a component of the EIA system,

> *and demands that appraisal meetings or hearings be held, or that the opinions of the relevant authorities, experts and the public be obtained in some other way in the EIA preparation phase concerning plans or construction projects that may have deleterious impacts on the environment*.[140]

ISDS proceedings are increasingly confronted with host State defences, which claim that the investor failed to engage with local communities when implementing the investment project.[141] In most cases, these defences follow measures that sought to avert the escalation of social unrest, presumably adopted under great pressure and with no possibility to prevent breach of IIA obligations.[142] One should note that these defences have often been dismissed by tribunals, either because there was no specific obligation upon investors to seek engagement with communities or when the investor followed the existing legal framework in the country at the time of the investment, which proved insufficient.[143]

The possibility of counterclaims based on environmental damage and the failure to engage with local communities as a component of EIAs in ISDS proceedings presently seems to pose a high bar for respondent States. However, the fast-growing IIL regime provides at least some support, offering a forum for discussion of transboundary water challenges, which cannot be addressed under the IWL regime of the Mekong-Lancang riparian States due to the lack of adequate enforcement mechanisms.

5 | CONCLUDING REMARKS

The intersection between international law regimes such as IIL and IWL has often been examined from the perspective of conflict of norms. This article took a step back and investigated the attitudes of States such as China and Laos in developing their IIL and IWL regimes. The resulting legal frameworks reflect the divergent attitudes towards the advancement of economic integration agreements *vis-à-vis* the reluctant adoption of effective transboundary water management rules. It can be preliminarily suggested that States exercise their sovereign powers in contrasting ways, perhaps influenced by opposing incentives. It is not excessive optimism or naivety to promote the interconnectedness and potential for mutual support between IIL and IWL at a time where ISDS and the investment protection regime is undergoing profound changes. The purpose of this article was not to discuss the virtues of the IIL regime and ISDS, or the lack thereof, as this has been done elsewhere.[144] The purpose was much more modest, namely to look at the current rules of IWL and IIL as they stand, and propose possible practical approaches to achieve mutual supportiveness in the enforcement of rules between the two regimes. The stronger and more amenable the institutional mechanisms of enforcement are in one regime, the more they may lend a helping hand to the highly important substantive rules of the other via systemic interpretation and cross-fertilization. Moreover, even just the fear of having an ad hoc tribunal deciding on environmental issues, with effects that could run contrary to the original intentions of the parties in terms of dispute settlement on IWL, could motivate the parties to sit at the negotiating table to reach effective solutions.

ORCID

Ana Maria Daza-Clark https://orcid.org/0000-0002-4804-0592

Ana Maria Daza-Clark is a Lecturer in International Law at the Law School, University of Edinburgh, where she serves as Director for the International Economic Law LLM Programme. She is a member of the Edinburgh Centre for International and Global Law, and a member of the Academic Forum participating in the UNCITRAL Group III meetings on the reform of investor-State dispute settlement. She has also advised disputing parties in investment treaty disputes.

Special recognition and thanks to the editors of the special issue, the anonymous reviewers, and to Huiping Chen for useful comments. Many thanks to my research assistants Darin Clearwater and Ke Song at Edinburgh University for their invaluable assistance. All mistakes remain mine.

How to cite this article: Daza-Clark AM. Enforcing transboundary water obligations through investment treaty arbitration: China, Laos and the Mekong River. *RECIEL*. 2020;29:442–453. https://doi.org/10.1111/reel.12365

[140] Wayakone and Makoto (n 136) 1662.

[141] By way of example, see *Bear Creek Mining v Peru* (n 105); *Glamis Gold v The United States*, UNCITRAL Arbitration (2009); *South American Silver v Bolivia* (n 105).

[142] As Stuart-Fox reports Laos is not immune to domestic pressure, including pressure for reform, transparency and respect for livelihoods. See M Stuart-Fox 'Laos: The Chinese Connection' (2009) Southeast Asia Affairs 141.

[143] See *Bear Creek Mining v Peru* (n 105). In another contract-based dispute, the arbitral tribunal noted that 'the nature of the project (and notably the erection of dozens of turbines on agricultural lands owned by extremely poor Kenyans) "required considerable and sensitive engagement with the local community and in particular the [people affected by the project]"'; see *Kinangop Wind Park v Kenya* (Award) (2 July 2018) ICC Arbitration (confidential). As reported by D Charlotin, 'Investigation: Newly-unearthed ICC Award Analyses whether Local Community Opposition to Project is a Political Risk for which African State Had Pledged to Indemnify Investors' (*IA Reporter*, 30 November 2018).

[144] T Schultz and C Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law 1147; D Schneidermann, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint' (2011) 2 Journal of International Dispute Settlement 471; M Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International 2010).