SUMMARY NOTES:
THE 1997 UN WATERCOURSES CONVENTION (UNWC)
NATIONAL AWARENESS WORKSHOP AND
IN-DEPTH TRAINING

Hai Au Hotel
Zone II, Do Son, Hai Phong City
Viet Nam, May 15-16, 2012
TABLE OF CONTENTS

LIST OF APPENDICES ................................................................................................. i

1.0 NATIONAL AWARENESS WORKSHOP AND IN-DEPTH TRAINING ............................................................................................ 1

1.1 OPENING ............................................................................................................... 2

1.2 THE UNWC: WHY SHOULD WE CARE? ..................................................................................................................... 2

1.2.1 Water Law and Water Resources Management in Viet Nam .............................................................................. 3

1.2.2 UNWC and International Water Law .............................................................................................................. 6

1.3 A VIETNAMESE EXPERT’S PERSPECTIVES ON THE UNWC ................................................................................. 7

1.4 PERSPECTIVES FOR STRENGTHENING TRANSBOUNDARY ARRANGEMENTS IN THE MEKONG REGION ........................................................................... 9

1.4.1 International Water Resources and their Management in Viet Nam........................................................................... 9

2.0 1995 MA AND PROCEDURES FOR SUPPORTING EQUITABLE UTILIZATION AND CASES FROM OTHER REGIONS .................... 10

2.1 SIMULATION EXERCISE: .................................................................................... 11

2.1.1 Simulation Exercise: ........................................................................................ 11

3.0 WRAP-UP ............................................................................................................ 12

LIST OF APPENDICES

Appendix A1 List of Participants

Appendix A2 National Awareness Workshop and In-Depth Training: Program

Appendix A3 Presentation: The UNWC: Why We Care?

Appendix A4 Presentation: UNWC, International Water Law and the Viet Nam Perspective

Appendix A5 Presentation: A Comparative Analysis of Substantive Norms of the 1995 MA and the 1997 UNWC

Appendix A6 Presentation: Procedural and Institutional Comparison

Appendix A7 Handout: Comparison of the Key Issues Covered in the 1995 MA and 1997 UNWC

Appendix A8 Presentation: UNWC and Viet Nam: an Analytical Analysis

Appendix A9 Presentation: Transboundary Waters: Challenges and Opportunities

Appendix A10 Presentation: Perspectives for Strengthening Transboundary Arrangements in the Mekong Region
Appendix A11 Presentation: Case Study: Gabčíkovo-Nagymaros

Appendix A12 Presentation: Procedures for Notification, Prior Consultation and Agreement

Appendix A13 Handout: Procedures for Notification, Prior Consultation and Agreement

Appendix A14 Handout: Guidelines for Implementing the Procedures for Notification, Prior Consultation and Agreement

Appendix A15 Presentation: Simulation Exercise

Appendix A16 Handout: Simulation Exercise
1.0 NATIONAL AWARENESS WORKSHOP AND IN-DEPTH TRAINING

The national workshop/training gathered key actors in Viet Nam to share knowledge and experiences on transboundary water management (TWM) and international water law (IWL), and increase their awareness and understanding of the UNWC, its role and relevance, and the challenges and opportunities involved in its ratification and future implementation. The workshop built upon awareness-raising and other activities at the regional level, including meetings, interviews, findings and recommendations. Attendees included representatives from relevant government agencies, academia and civil society, which (i) presented and discussed the UNWC, its role and relevance; (ii) examined the normative content of the convention; (iii) explored potential costs/benefits from ratification; (iv) identified challenges and strategies for implementing the UNWC; and (v) proposed some next steps towards facilitating continued regional and national dialogue around the convention.
1.1 OPENING

Dr. Truong Hong Tien, Deputy Director General, VNMC, opened the workshop/training, and welcomed participants from government agencies (MONRE, MARD, MOFA, Ministry of Justice, and VNMC) and non-governmental groups (Association of Water Resources, Institute of Water Resources Planning, VN Television, Institute of Foreign Affairs, Large Dam Association, Green ID, and Viet Nam River Network). The list of participants and program are provided as Appendices A1-A2.

Dr. Tien recalled that, on May 21, 1997, 103 countries approved the UNWC and opened it for signature, ratification, and accession; and that, in 1995, Viet Nam signed the Mekong Agreement (1995 MA) with the three other Lower Mekong Countries (LMCs). Yet, none of those states has ratified the UNWC. He appreciated the efforts under the UN Watercourses Convention Global Initiative in promoting awareness and knowledge of the UNWC as a global legal framework for TWM.

Dr. Tien referred to the recent Regional Workshop on the UNWC, organized in Siem Reap, Cambodia, on May 10-11, 2012, and attended by participants from all six Mekong countries. The workshop highlighted the importance of follow-up steps, regionally and in each country, for the relevant government and non-governmental stakeholders to continue to raise awareness, develop capacity and, where appropriate, take a lead on and provide support for the UNWC’s ratification and future implementation.

1.2 THE UNWC: WHY SHOULD WE CARE?

Flavia Loures, Senior Program Officer, WWF, introduced the UNWC and the importance of having it in force and widely ratified. The convention counts now 25 contracting states – 10 short of the number required for entry into force. She discussed the status of IWL, explaining the convention’s role in addressing the issue of fragmentation and the failings and gaps in the international architecture governing transboundary waters. She presented about the UNWC’s background and relevance for the multi-level legal governance of transboundary waters; the reasons potentially slowing down the ratification process, as well as prospects for entry into force; the convention’s authority, stated aims, policy and legal objectives, and functions; and the convention’s effects on non-parties, now and upon entry into force.

In terms of the UNWC’s legal functions, she explained that the convention was adopted to codify, clarify and progressively develop the rules and procedures governing international watercourses. Why? So that customary law would no longer be the only legal source governing interstate relations globally. After all, the process for identifying customs often leaves gaps and ambiguities, and is often based on obscure or inconclusive sources. Customary law is often vague, contested and unclear, in addition to lacking a neutral enforcement mechanism. The convention was thus adopted to offer a clearer, more stable framework for cooperation at the global level.
However, pending entry into force, it cannot be said that the convention has fully attained its legal objective. For this reason, the convention has been performing its intended functions only to a limited extent. Such functions include serving as: (i) a common denominator for inspiring new watercourse agreements and support the interpretation and application of existing treaties; (ii) a solid template for governing interstate relations where agreements do not exist, fail to cover a given situation or do not include all states within a basin; (iii) a mother convention for the development of global treaty law on emerging issues; and (iv) a foundation for international water cooperation in support of other multilateral environmental agreements, such as the CBD, the UNFCCC and the Ramsar Convention.

Among the Mekong countries, in particular, the UNWC could supplement the 1995 MA, especially with respect to planned measures on tributaries, and serve as a starting point for improving the governance of other basins within the regional lacking any cooperative frameworks, such as the Red river basin.

At the end, Flavia introduced the UN Watercourses Convention Global Initiative. Launched in 2006 by WWF and since then joined by numerous partners, the initiative aims to forge multi-stakeholder dialogue and contribute to the process for entry into force and future implementation of the UNWC.

Flavia’s presentation is provided as Appendix A3.

1.2.1 Water Law and Water Resources Management in Viet Nam

Dr. Dao Trong Tu presented about water law and water resources management in Viet Nam. He highlighted that Viet Nam’s water resources are strongly dependent on flow from upstream countries – China (Mekong and Red Rivers), Laos, Myanmar, Thailand and Cambodia.
He then referred to the International Law Association’s 1966 Helsinki Rules. The principle of equitable and reasonable use, as formulated under the Helsinki Rules, was explicitly incorporated by the Mekong Committee into the 1975 Declaration of Principles. The UNWC’s drafters drew heavily from the Helsinki Rules, with both instruments requiring riparian states in an international watercourse to communicate and cooperate. In particular, the UNWC includes provisions on information exchange, notification of possible adverse effects from planned measures, protection of ecosystems, and emergency situations.

During the convention’s negotiations, discussions centered on how to balance "reasonable and equitable use" within each watercourse state, "with a view to attaining optimal utilization thereof and benefits therefrom," with an obligation to prevent significant transboundary harm. Reasonable and equitable use, as defined in the UNWC, is based on a non-exhaustive list of seven relevant factors. Article 6 then establishes that "the weight to be given to each factor is to be determined by its importance," and that "all relevant factors are to be considered together". Dr. Tu also underlined that the formal process for developing the UNWC (in 1977-1993, through the International Law Commission (ILC); and in 1993-1997, under the UN General Assembly) took into account widely accepted and emerging international water law principles, norms, rules and standards.

He also recalled the 1994 Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, which were prepared by the ILC to inform the negotiations leading up to the adoption of the UNWC. The draft articles also...
guided discussions on the 1995 MA. As a result, there is overall consistency between the UNWC and the 1995 MA, good experience in implementing many of the convention’s principles and rules, and potential for these treaties to complement each other.

He closed by advising the VNMC to work closely with other countries in the Mekong Region to ratify the UNWC, and noting that many government agencies would have a role in the process.

Discussion:

- Participants asked how many among the countries that voted in favor and the 25 contracting states are upstream, mid-stream or downstream. It was noted that the voting records may not represent current state opinion. Some countries like France and Spain that abstained from voting, have since acceded to the UNWC. France has even offered to host the first Conference of the Parties (COP) once the convention is in force. Among the contracting states, many are both upstream and downstream countries. Burundi was one of the three countries that voted against, but has recently signed a new agreement on the Nile Basin, with provisions similar to those in the UNWC.

- A participant from MOFA, who took part in the UNWC’s negotiations, informed that, in the late 1990s, the then Prime Minister instructed MOFA, MARD and other Line Ministries to assess and initiate the decision-making process on ratification. But the lack of a UN body in charge of the UNWC might have hampered internal progress in that regard. The lack of awareness among relevant Line Ministries and treaty congestion might have played a role as well.

- Participants asked about procedures for developing the convention once it is in force. The UNWC does not have provisions for implementing bodies or the adoption of amendments, protocols or annexes. However, some initial ideas have been proposed for the creation of a COP, a Secretariat and a trust-fund for supporting its implementation, as well as the insertion of a new provision allowing parties to approve amendments, protocols and annexes.

- The last question was about the provisions of the convention that bind non-parties as customary norms. Experts have made the point that entry into force and widespread ratification would further enhance the convention’s effects on non-parties: (i) politically, once the majority of UN member states ratify, the non-party states may feel compelled to reconsider their position and eventually join as well (in the case of the Kyoto Protocol, Canada and Australia took years to make a decision, but eventually decided to join); (ii) legally, the more states that join, the greater the convention’s contribution to the development of new customary rules, which would then also bind non-parties and could potentially be enforced through existing watercourse agreements.
1.2.2 UNWC and International Water Law

1.2.2.1 Comparative analysis of Substantive, Procedural and Institutional norms of the 1995 Mekong Agreement and the UNWC

Sokhem Pech and Alistair Rieu-Clarke provided a comparative analysis of the 1995 MA and the UNWC. They demonstrated consistency between the two treaties, and proposed areas where the UNWC can supplement the 1995 MA. The presentations are in Appendix A5, A6, and A7.

There are some similarities and differences between the two agreements, but despite such differences both instruments complement each other. The 1995 MA specifically refers to the river basin, whereas the 1997 UNWC uses the term 'watercourse'. However, there may be little tangible difference in scope between the two agreements, given that both recognize land-water interactions within their substantive obligations. To supplement the agreement, parties have adopted an interim definition of mainstream and tributaries. Also, the procedures on notification, prior consultation and agreement provide a restrictive definition of the tributaries, only covering those that have significant impact on mainstream flows. The UNWC does not make these distinctions: any proposed use that may cause significant harm to other riparian countries is subject to the rules and procedures on planned measures.

The factors for determining equitable and reasonable use in the UNWC may prove to be useful in guiding the development of equivalent factors in future MA procedures or rules. Although each agreement uses different expressions (harmful effects and substantial damage in the 1995 MA; adverse effect and significant harm in the UNWC), both treaties require that the proposing country take all appropriate measures or make every effort to prevent, minimize and mitigate harmful impacts; once substantial damage or significant harm happens, the parties must enter into negotiation to find an acceptable solution for ceasing the damage and agreeing on the appropriate reparation measures.

With regard to freshwater conservation, the UNWC requires states to protect and preserve ecosystems, control alien species, and prevent, reduce, and control pollution. Such provisions are relevant to the Mekong countries, especially for Viet Nam and Cambodia, with respect to the Mekong Delta, coastal zone pollution from land-based activities, and the Tonle Sap ecosystems. If all or most of the Mekong countries were to become contracting states, those provisions could also be useful in governing other transboundary basins in the region, in the absence of applicable watercourse agreements.

The 1995 MA contains detailed provisions on the institutional arrangement for its implementation, i.e., the Mekong River Commission (MRC). Due to its global nature, the UNWC only goes as far as to encourage countries to establish joint bodies.
The UNWC’s detailed procedural and substantive rules for dispute prevention and its time-bound step-by-step dispute resolution mechanism may also be relevant for supplementing and/or further developing the 1995 MA.

Comments:

- The discussion touched on the ways and means for defining significant harm or substantial damage, as well as measures and approaches for assessing equity, appropriateness, and reasonableness. These issues should be included in a future workshop or training.

- Harm reparation, mitigation and compensation, as well as the determination of state responsibility and liability under international law, were discussed at length. It was agreed that additional case studies on this matter should be shared.

- The UNWC does not differentiate between inter-basin and intra-basin transfers, or between use on the mainstream and tributaries or in dry or wet season. Hence, where and when activities take place is not so relevant; the test is whether they have a significant transboundary impact.

1.3 A VIETNAMESE EXPERT’S PERSPECTIVES ON THE UNWC

Mr. Nguyen Truong Giang was actively involved in the UNWC negotiation on behalf of Viet Nam. He presented about the convention’s relevance as a key contribution to improving TWM and codifying and advancing IWL (non-navigational uses).

He then recalled the history of the development of IWL: the “Harmon Doctrine”, invoked in the USA-Mexico dispute; the idea of absolute territorial integrity, raised in the Canada-US disputes, in which the US, as a downstream country, referred to a right to receive undiminished river flows, in both quantitative and qualitative terms. Finally, all states had to agree upon the principle of limited sovereignty, which led up to the development of equitable and reasonable use. In this context, he referred to a case in which China polluted an international watercourse shared with Russia and took responsibility for its actions based on customary law.

The concept of international watercourses, as defined in the UNWC, can apply to both the Red and Mekong basins. Even though the UNWC, as a global framework, cannot provide all satisfactory answers and explanation, it offers an overarching framework spelling out the basic duties and rights of watercourse states. More clarity can then be achieved on a case-by-case basis, through various means, information exchange, tools, procedures, and forums (negotiation, fact-finding, arbitration, judicial courts, etc.), some of which are covered by the convention. Viet Nam should thus rely on the international legal regime, as codified, clarified and developed under the UNWC, for protecting its rights and legitimate interests.
Mr. Giang highlighted some points and suggested steps to be taken following the workshop:

1. The Viet Nam government has taken a significant step by requesting MARD and MOFA to review and recommend appropriate steps for UNWC accession, but more concrete action is now required. MONRE and MOJ should also play a leading role going forward;

2. The Diplomatic Academy of Viet Nam has studied the UNWC and found that its substantive and procedural rules and norms are applicable and highly relevant.

3. Other international watercourses in the region require proper international legal regimes, and the UNWC could help achieve this.

4. Viet Nam should join even though China is not expected to do so in the short term. The US is not party to UN Convention on the Law of the Sea (UNCLOS), but complies with the applicable international customary norms.

5. Viet Nam should play a leading role in the ratification process, as an example for other Mekong countries to consider.

Comments and Questions:

- The procedures for ensuring balance between the right to development, equitable and reasonable use, and no-significant harm are important, as is the role of geopolitics in TWM. The challenge in getting all concerned parties to resort to peaceful means of dispute settlement must be met. To bring a state to the International Court of Justice (ICJ) or legally binding arbitration, in absence of an agreement to the contrary, requires consent by all states concerned and their recognition of the jurisdiction of that body. The dispute settlement mechanisms, especially unilateral fact-finding, provided under the UNWC should thus be considered seriously.

- Participants expressed concern over the quality of impact assessments produced for major river development measures. Multilateral Development Banks (MDB) impose higher social and environmental safeguards, but this is not always the case in projects funded through private and semi-private banks.

- Dialogue with China is mostly based on friendship principles; reliance on relevant international law principles, norms and rules would improve the quality of negotiations and their outcomes.

- Senior members of government agencies are not always aware of IWL principles, rules and procedures; hence, awareness raising, information sharing and stimulating discussion are important.
1.4 PERSPECTIVES FOR STRENGTHENING TRANSBOUNDARY ARRANGEMENTS IN THE MEKONG REGION

Dr. Alistair Rieu-Clarke provided examples of the application of IWL from which the Mekong countries can draw. He also presented the legal analytical framework for testing resilience of watercourse agreements, focusing on scope, substantive rules, procedural rules, institutional arrangement, and dispute settlement mechanisms. The presentation is provided as Appendix A10.

Comments:

- The participants took note of the different terms used. For example, in a Vietnamese statute, the term “international river” has been replaced by “transnational river”. It was understood that the term is important (parts of it located in more than one country), but the most important test is its actual scope – basin, drainage, river system, and watercourses, etc.

- The UNWC, like other international treaties and instruments, is the outcome of a compromise and may thus not fully satisfy all countries. Yet, a positive vote by 106 member countries is a sign of overwhelming support and acceptance of its provisions by the community of nations.

- Participants considered that, as the VNMC Secretariat has been moved to MONRE, proper transfer of role in coordinating the ratification process is needed. It was recommended that MOFA and the VNMC sign off on the proposed recommendations for further action and take a leading and coordinating role in their implementation.

1.4.1 International Water Resources and their Management in Viet Nam

Madam Do Hong Phan, member of the Viet Nam Water Partnership (VNWP), provided an assessment of water resources and river basin management in Viet Nam. She elaborated at length on the history of the Mekong cooperation, from 1957 to present day, and on key development projects proposed or implemented. She noted that Viet Nam and Laos have provided notifications from time to time, but Cambodia has not yet proposed any projects requiring notification. The growing list of projects being proposed and developed in all Mekong countries, however, calls for a proper institutional and organizational framework/international regime capable of improving coordination and facilitating benefit- and risk-sharing.

She was of opinion that China’s attitude towards the 1995 MA is not clear. The hydrological information for flood season provided to MRC countries is limited in scope, frequency and parameters. For proper understanding of project impacts (positive and negative), year-round information is required.

Madam Pham pointed out that lack of awareness by certain quarters in central and local governments about international agreements is a key stumbling block. She referred to numerous development projects. Viet Nam and Cambodia are a
typical case of being both upstream and downstream countries in the same river system. Mutual respect and due diligence in preventing harm and sharing benefits equitably are critical. She concluded that the UNWC, as a global legal instrument, should be on the national agenda more prominently.

Comments:

- A participant from MOJ explained the legal and procedural requirements for Viet Nam to conclude and join international treaties, as established by the Law on the Ratification of International Conventions. The process should start with MONRE preparing a justification document to the Minister. The Minister would then communicate with other relevant Ministers and the Prime Minister. Once the convention is approved internally, the next step would be the deposit of the accession instrument with the UN Secretary General.

- A question was raised about the reservations to the UNWC made by some contracting states. The documentation of that reservation should be made.

2.0 1995 MA AND PROCEDURES FOR SUPPORTING EQUITABLE UTILIZATION AND CASES FROM OTHER REGIONS

Dr. Pech presented on the application of Prior Notification and its legal and political influence on the implementation of the 1995 MA. The presentation is provided as Appendix A12, A13, and A14.

He was followed by Dr. Rieu-Clarke, who presented about the Gabcikovo-Nagymaros Project and the ICJ’s decision on the case between Hungary and Slovakia. The presentation is provided as Appendix A11. More than 11 years after the decision of the ICJ, there is still no clear sign of an agreement between the countries involved regarding the implementation of the Judgment.

Hungary and Czechoslovakia concluded a Treaty in 1977 on the joint utilization of the hydro-electrical potential of the Danube, involving the construction of a joint barrage system. The main components of that plant included the construction of a dam at Gabcikovo on the Czechoslovak side and one at Nagymaros, on Hungarian territory.

The legal battle commenced in 1989, when Hungary suspended the works at Nagymaros, invoking environmental concerns (or ‘ecological necessity’). Czechoslovakia, realizing Hungary’s reluctance to continue the joint project, started to work on a solution (“Variant C”) that enabled it to put the barrage system into operation unilaterally, which implied a significant departure from the original plans. Hungary responded with a 1992 decision to terminate the 1977 Treaty. Czechoslovakia then declared that Hungary’s purported treaty termination was unlawful and, in response, diverted 90% of the water of the
basin from its border river into the artificial canal feeding the works built on its territory. In January 1993, Czechoslovakia ceased to exist, and the new Slovak Republic was proclaimed. Slovakia and Hungary eventually agreed to refer the dispute to the ICJ.

The International Court of Justice declared unlawful both the suspension of works at Nagymaros, as well as the purported termination of the 1977 Treaty. According to the judgment, Czechoslovakia had the right to build Variant C unilaterally, but had acted unlawfully when it started divert the overwhelming majority of the flow of the Danube from its original bed, thereby depriving Hungary of its right to an equitable and reasonable share of the border watercourse. The Court proclaimed that the existing structures had to be jointly operated, but no further objects had to be created, and a sufficient amount of water had to be discharged to the original riverbed.

The Court emphasized that satisfactory solution had to be found for the amount of water to be discharged to the original river and the tributaries, so that it would satisfy the requirement of the equitable share of the frontier river. However, there is no agreement on the quantity of water resources needed to satisfy the needs of the environment – around 20% - 65%.

Comments:

The case confirms the international principle of “pacta sunt servanda”, i.e., "agreements must be kept". A state must prove beyond any doubt a fundamental change of circumstances, and a justification for ending the treaty based on ecological necessity. International law lacks clear guidance for better defining what would constitute a “significant change of circumstances” (clausula rebus sic stantibus).

2.1 SIMULATION EXERCISE:

Dr. Pech and Dr. Tu presented about the importance of good faith negotiations and the conditions needed for negotiating mutual gains agreements for international watercourses. The presenters also introduced the assignment for the group discussion and simulation exercise. The presentation is provided as Appendix A15 and Appendix A16.

2.1.1 Simulation Exercise:

The participants were grouped into two negotiation teams representing Country A and Country B in a bilateral negotiation on TWM. Each group:

1. Assessed if relevant conditions for productive negotiations were in place or needed to be established, such as interdependence, readiness to negotiate, means of influence or leverage; agreement on the issues and some interests; unpredictability of outcome from other means; sense of urgency and deadline; willingness to compromise; external factors favorable to settlement; and resources to negotiate.
2. Based on the outcomes of the above assessment, developed a strategy for solving the identified issues.

3. Prepared and presented an argument and counter-argument:

Participants were asked to assume that countries were not parties to any applicable treaties other than the UNWC, and pay particular attention to the following obligations thereunder:

- States are to use an international watercourse in a way that is “equitable and reasonable use”. What is equitable and reasonable in any given case may be determined only by taking into account all relevant factors and circumstances.

- States are to take “all appropriate measures” and act with due diligence and good faith to prevent “significant harm” to co-riparian states.

- States are to “consult” and provide prior “timely notification”, along with relevant technical information (EIA, mitigation plan, etc.).

Figure 2: Group Discussions

3.0 WRAP-UP

Dr. Dao Trong Tu presented the outcomes of a semi-structured survey with government officials, conducted in preparation for the workshop and to inform the Viet Nam country assessment of the UNWC’s role and relevance. Replies to
the survey showed a unanimous sense that Viet Nam should ratify the UNWC. He then thanked all organizers, noting that the WS was timely and useful.

The following is the summary of the plenary discussion on the value of the UNWC and ideas for an action plan with the next steps to be taken in the country:

Potential value added by the UNWC for Viet Nam and neighboring countries: Mekong Region.

- If all or most Mekong countries joined the UNWC, this would help to improve TWM in the region, in the Mekong basin and beyond.

- Viet Nam should engage the four LMCs in information exchange, joint capacity building, and coordination efforts regarding the UNWC’s ratification, including under the auspices of the MRC and other regional organizations (GMS, ASEAN, ADB, etc.). Efforts should be made towards incorporating the UNWC into those organizations’ policy agenda.

- To wait for other countries to ratify may prove time-consuming and counter-productive. Viet Nam may wish to lead by example, considering that other countries are likely to follow suit.

- Beyond the Mekong basin, the UNWC will strengthen the legal basis for cooperation on other international watercourses shared by Viet Nam. Ratification will provide a solid legal framework for TWM and integration across the region.

- Viet Nam’s commitment to the UNWC through its ratification, would demonstrate Viet Nam to the international community that the country respects and promotes the rule of law.

Pending concerns or burning questions regarding the UNWC:

- Challenge to ratify the UNWC: 3-4 years ago, it might have been easier. Xayabury makes thing more complicated. Ratification may take longer than expected and thus should be considered as a matter of urgency.

- Nominating a UNWC “champion” within Viet Nam’s government would be beneficial. Participants should also report to their colleagues at higher levels following the workshop. A related question pertained to how to obtain government order to relevant LAs - MONRE, MARD, MOFA and MOJ.

What are the next steps for advancing this awareness raising/capacity building process? And if appropriate, to trigger and complete the ratification process?
• A working group needs to set up as soon as possible to provide technical support and prepare and monitor the ratification process. Establishing a network with international experts is another important step. Once permission is granted by the Prime Minister, official regional and national meetings and exchanges can be organized as part of the decision-making and eventually the ratification process.

• Follow-up workshops with government representatives at higher levels should be organized, at both regional and national levels. Key members of parliament should also be involved and kept informed.

• Raise further awareness among other policy makers and stakeholders with moderate or little knowledge about the UNWC, with focus on costs and benefits, relevance, potential conflict with national system, etc.

• MOFA has prepared relevant justification for supporting the UNWC; however, low awareness among the LAs has slowed down the process. MONRE and MARD must be ready to lead and implement the necessary administrative procedures and requirements, which will include the preparation of a concise justification to inform the recommendation addressed to the competent ministers to trigger the ratification process.

What kind of support can WWF, Dundee and other actors provide?

• Capacity building and engagement of local universities for training of trainers;

• Organize more with North, South, Central Universities, and Mass Media;

• Press release;

• Translation of the UNWC Brochure in Vietnamese for dissemination among stakeholders;

• Convey message to relevant LAs, Government and National Assembly, through the booklet, policy briefs, etc.

Closing:

Dr. Tu thanked every participant, stating he’s looking forward to working closely with the relevant actors on next steps. He thanked every concerned party for organizing this very useful training workshop.

Ms. Phan Cẩm Nhung, WWF VN Office/GMS thanked the VNMC for hosting the workshop and training. WWF has offices in all Lower Mekong countries and China, and will soon be present in Myanmar. WWF has organized similar trainings in the Mekong countries. She recommended that a specific action plan should be developed for sharing with the VNMC, Government Agencies, WWF
and other development partners for furthering dialogue, awareness raising, capacity building and support for the ratification process, as required.

Alistair Rieu-Clarke, on behalf of the Water Law, Policy and Science, Dundee University, thanked the host and all participants for their active participation. The resource persons also learnt a lot from these contributions. Dundee can provide assistance in developing relevant materials, policy briefs, and examples from other countries that have gone through similar processes. The UNWC Users’ Guide (with commentary and explanation for each article) will be available in June 2012. A help-desk for providing technical assistance is in place and can be contacted with requests for information and clarification. Participants can email Dr. Rieu-Clarke if they have any questions or need assistance. Dundee also hosts a two-week long workshop on international water law, and is open to suggestions on hosting and fundraising for similar workshops in the region.

Dr. Tien, Deputy Director General of the VNMC, closed the workshop/training, underscoring the stated objectives have been achieved, i.e., increase understanding of the UNWC among the leading experts and officers dealing with TWM. The UNWC can become another legal framework for Viet Nam and, therefore, participants highly appreciated the workshop and agreed on the need for reactivating the ratification process. The workshop considered that the sooner VN ratifies, the better, suggesting that MONRE should cooperate with MOFA, MOJ, MARD and others to submit a request to the government. Regarding the next step, Dr. Tien recommended the following:

- More capacity-building and awareness-raising, including for high-level officials;
- All participants should report back to their senior management and raise awareness;
- Awareness- and capacity-building is a continuous process. One workshop/training is not enough. Additional activities should thus include a workshop/training chaired by the ministerial level and joined by all relevant managers at Department level;
- VNMC will report the results of workshop to the leaders for decision; and
- Consider the establishment of a working group and network.

Dr. Tien, on behalf of the VNMC, thanked WWF, Dundee, Hatfield, and international and national experts for their active contribution to the success of the workshop and training.
<table>
<thead>
<tr>
<th>No</th>
<th>Name</th>
<th>Position</th>
<th>Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Dr. Truong Hong Tien</td>
<td>Deputy Director General</td>
<td>Viet Nam National Mekong Committee</td>
</tr>
<tr>
<td>2</td>
<td>Mrs. Le Thi Huong</td>
<td>Programme Officer</td>
<td>Viet Nam National Mekong Committee</td>
</tr>
<tr>
<td>3</td>
<td>Mr. Thai Minh Quang</td>
<td>Officer</td>
<td>Viet Nam National Mekong Committee</td>
</tr>
<tr>
<td>4</td>
<td>Mr. Nguyen Dinh Sach</td>
<td>Officer</td>
<td>Diplomatic Academy of Viet Nam, MOFA</td>
</tr>
<tr>
<td>5</td>
<td>Mr. Lê Tuấn Thanh</td>
<td>Officer</td>
<td>Diplomatic Academy of Viet Nam, MOFA</td>
</tr>
<tr>
<td>6</td>
<td>Mr. Phạm Bá Việt</td>
<td>Officer</td>
<td>Department for Int'l Treaties and Laws, MOFA</td>
</tr>
<tr>
<td>7</td>
<td>Ông Nguyễn Trường Giang</td>
<td>Director</td>
<td>The National Boundary Commission - Ministry of Foreign Affairs</td>
</tr>
<tr>
<td>8</td>
<td>Ms. Lê Hồng Hải</td>
<td>Officer</td>
<td>Department for Int'l Law, Ministry of Justice</td>
</tr>
<tr>
<td>9</td>
<td>Mr. Nguyễn Sỹ Khởi</td>
<td>Senior Officer</td>
<td>Department for Water Resources Management, MONRE</td>
</tr>
<tr>
<td>10</td>
<td>Mr. Nguyễn Đức Long</td>
<td>Officer</td>
<td>Department for Int'l Cooperation, MARD</td>
</tr>
<tr>
<td>11</td>
<td>Ms. Trần Thị Nhung</td>
<td>Officer</td>
<td>Institute of Water Resources Planning, MARD</td>
</tr>
<tr>
<td>12</td>
<td>Ms. Nguyễn Thị Thu Hà</td>
<td>Officer</td>
<td>Institute of Water Resources Planning, MARD</td>
</tr>
<tr>
<td>13</td>
<td>Ms. Đào Minh Lộc</td>
<td>Expert</td>
<td>Viet Nam Large Dam Commission</td>
</tr>
<tr>
<td>14</td>
<td>Ms. Phan Cẩm Nhung</td>
<td>Programme Officer</td>
<td>WWF Việt Nam</td>
</tr>
<tr>
<td>15</td>
<td>Mr. Hà Quang</td>
<td>Expert</td>
<td>Irrigation Association</td>
</tr>
<tr>
<td>16</td>
<td>Mrs. Đỗ Hồng Phấn</td>
<td>Chairperson</td>
<td>Center for Promotion of Integrated Water Resources Management</td>
</tr>
<tr>
<td>17</td>
<td>Mr. Nguyễn Nhân Quảng</td>
<td>Director</td>
<td>Center for Promotion of Integrated Water Resources Management</td>
</tr>
<tr>
<td>18</td>
<td>Mr. Nguyễn Hồng Toàn</td>
<td>Director</td>
<td>Center for River Basin Management</td>
</tr>
<tr>
<td>19</td>
<td>Ms. Nguyễn Thị Diju</td>
<td>Expert</td>
<td>Viet Nam River Network</td>
</tr>
<tr>
<td>20</td>
<td>Mr. Hà Lương Thuận</td>
<td>Head of Office</td>
<td>Viet Nam Water Partnership</td>
</tr>
<tr>
<td>21</td>
<td>Mr. Đặng Ngọc Vinh</td>
<td>Deputy Director</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>22</td>
<td>Mr. Phan Thanh Toàn</td>
<td>Deputy Head of Division</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>23</td>
<td>Mr. Trần Thanh Xuân</td>
<td>Senior Officer</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>24</td>
<td>Mr. Đỗ Mạnh Hùng</td>
<td>Expert</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>25</td>
<td>Ms. Nguyễn Hồng Anh</td>
<td>Expert</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>26</td>
<td>Ms. Lê Thị Mừng</td>
<td>Staff</td>
<td>Center for Sustainable Water Resources Development and Adaptation of Climate Change</td>
</tr>
<tr>
<td>27</td>
<td>Mr. Nguyễn Văn Nghĩa</td>
<td>Programme Coordinator</td>
<td>Green Innovation and Development Centre (GreenID)</td>
</tr>
<tr>
<td>28</td>
<td>Ms. Nguyễn Thu Quyên</td>
<td>Officer</td>
<td>Viet Nam Television</td>
</tr>
<tr>
<td>No</td>
<td>Name</td>
<td>Position</td>
<td>Agency</td>
</tr>
<tr>
<td>----</td>
<td>--------------------------</td>
<td>------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>29</td>
<td>Mr. Nguyễn Xuân Chinh</td>
<td>Officer</td>
<td>Viet Nam Television</td>
</tr>
<tr>
<td>30</td>
<td>Mr. Trần Minh Đức</td>
<td>Officer</td>
<td>Viet Nam Television</td>
</tr>
<tr>
<td>31</td>
<td>Dr. Đào Trọng Tứ</td>
<td>National Specialist</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>Ms. Đào Hà Thanh</td>
<td>Interpreter</td>
<td></td>
</tr>
<tr>
<td>33</td>
<td>Ms. Flavia Rocha Lourves</td>
<td>Interpreter</td>
<td>WWF</td>
</tr>
<tr>
<td>34</td>
<td>Dr. Sokhem Pech</td>
<td>Hatfield Consultants</td>
<td></td>
</tr>
<tr>
<td>35</td>
<td>Dr. Alistair Rieu Clarke</td>
<td>University of Dundee</td>
<td></td>
</tr>
</tbody>
</table>
Appendix A2

National Awareness Workshop and In-Depth Training: Program
THE UN WATERCOURSES CONVENTION  
NATIONAL AWARENESS WORKSHOPS AND IN-DEPTH TRAININGS  

Hai Au Hotel  
Zone II, Do Son Beach  
Hai Phong City  
Viet Nam, May 14-16, 2012

TENTATIVE AGENDA AND PROGRAM

**NATIONAL AWARENESS WORKSHOP FOR DECISION-MAKERS AND OPINION MAKERS**

<table>
<thead>
<tr>
<th>Time</th>
<th>Activities</th>
<th>Key Persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 14 at 14.30</td>
<td>Bus leave from VNMC, 23 Hang Tre Street, Ha Noi</td>
<td>MS. Le Thi Huong, mobile: 84.912227440</td>
</tr>
</tbody>
</table>

**DAY 1 Haiphong, May 15, 2012**

**8:00 – 8:30** | **REGISTRATION**  
8:30 – 08.45 | Welcome and opening by senior official of Vietnam  
• Welcome and Opening by Dr. Truong Hong Tien, Deputy Director General, VNMC  
Welcome by Flavia R. Loures, WWF  

**10:00 – 10:30** | **COFFEE BREAK**  
10:30 – 11:30 | Plenary 1: International Water Law and the UN Watercourses Convention  
• 1997 UN Watercourses Convention: What role and relevance? By Flavia Rocha Loures  
• Q&A and General Discussion  
• The UNWC, International Water Law and the Vietnam perspective by Dr. Dao Trong Tu  
Discussion and Q&A facilitated by VNMC  

11:30 – 12:00 | Plenary 2: UNWC and International Water Law  
• Comparative analysis of Substantive, Procedural and Institutional norms of 1995 Mekong Agreement and 1997 UNWC, Dr. Sokhem Pech & Dr. Alistair Rieu-Clarke  

12:00 – 13:30 | **LUNCH**  
13:30 – 14:00 | 1997 UNWC and Vietnam - Analytical analysis by Mr. Nguyen Truong Giang, legal expert, MOFA.  
Transboundary Freshwaters Around the World and Mekong Region: Challenges & Opportunities by Sokhem Pech  
Facilitated discussion and Q&A  

14:00 – 15:30 | Perspectives for Strengthening transboundary arrangements in the Mekong Region, Dr Alistair Rieu-Clarke  

15:30 – 16:00 | **COFFEE BREAK**  
16:30 – 17:00 | Plenary Discussion:  
• Key Findings;  
• Suggested Next Step  

19.00 | Reception Dinner  

May 16, 2012

8:30 – 10:00 | Exchange experiences on how international legal frameworks (including UNWC) support national decision-making related to transboundary water resources development and management? By Ali (case studies from other parts of the World)  
Q&A and General Discussion
<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
</tr>
</thead>
<tbody>
<tr>
<td>10:00 – 10:30</td>
<td>COFFEE BREAK</td>
</tr>
<tr>
<td>10:30 – 11:15</td>
<td>PNPCA process by Dr. Sokhem Pech and Dr. Dao Trong Tu</td>
</tr>
<tr>
<td>11:15 – 12:00</td>
<td>General Discussion</td>
</tr>
<tr>
<td>12:00 -13.30</td>
<td>Lunch</td>
</tr>
<tr>
<td>13:30 – 15:00</td>
<td>Simulation Exercise:</td>
</tr>
<tr>
<td></td>
<td>Introduction by Sokhem and Tu - Equitable Use Legal Assessment Tool?</td>
</tr>
<tr>
<td></td>
<td>Successfully Negotiating Mutual Gains Agreements for International</td>
</tr>
<tr>
<td></td>
<td>Watercourses.</td>
</tr>
<tr>
<td></td>
<td>Team preparation for negotiation;</td>
</tr>
<tr>
<td></td>
<td>Negotiation process.</td>
</tr>
<tr>
<td>15:00 – 15:45</td>
<td>General Discussion:</td>
</tr>
<tr>
<td></td>
<td>Lessons learned and what we can do to improve things?</td>
</tr>
<tr>
<td></td>
<td>Next steps</td>
</tr>
<tr>
<td>15:45 – 16:00</td>
<td>Wrap-up:</td>
</tr>
<tr>
<td></td>
<td>• Summary notes – workshop note-takers</td>
</tr>
<tr>
<td></td>
<td>• Next steps – Flavia Loures</td>
</tr>
<tr>
<td></td>
<td>• Agreed recommendations</td>
</tr>
<tr>
<td></td>
<td>• Closing</td>
</tr>
<tr>
<td>16:30</td>
<td>Bus returns to Hanoi</td>
</tr>
</tbody>
</table>
Appendix A3

Presentation:
The UNWC: Why We Care?
The UN Watercourses Convention National Awareness Workshops and In-Depth Training: Viet Nam
from May 7-9, 2012
Hai Au Hotel, Hai Phong City, Viet Nam

Entry into force of the UN Watercourses Convention: Why should we care?
Flavia Rocha Loures

1. The role of international water law & the status of the legal governance of transboundary waters

2. The UN Watercourses Convention: background, relevance, content, reasons slowing down ratification, authority, legal objective, functions, effects on third parties (the case for entry into force)

3. WWF’s international water law initiative

Status of the legal governance of transboundary waters

FRAGMENTATION
GAPS
FAILINGS

Transboundary Water Resources: A Case for Multi-level Legal Governance

UN Watercourses Convention; ILC Draft Articles
Amazon Treaty
Agreements on the Mekong, Congo
National laws incorporating concerns with transboundary waters
Cooperation in border areas between local communities

No basin-wide agreement: SE Asia examples

- Red/ Hong/ Yuan Jiang (China, Laos and Vietnam)
- Irrawaddy or Dulong (China, Myanmar and India)
- Salween or Nu (China, Myanmar and Thailand)
- Saigon (Cambodia and Vietnam)
- Song Yum Co Dong (Cambodia and Vietnam)
- Pakchan (Thailand and Myanmar)
- Bei Jianh or His (China and Vietnam)
- Ma (Laos and Vietnam)
- Ca or Song Koi (Laos and Vietnam)
- Golok (Thailand and Malaysia)
The UN Watercourses Convention: Goals, objectives and content

“Ensure the utilisation, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations;” whilst “taking into account the special situation and needs of developing countries.” (Preamble)

The UN Watercourses Convention: reasons slowing down ratifications

- Lack of a champion in the int’l community
- Water status in the international agenda
- Little awareness by states of the convention’s content & role
- Misconceptions around some of its provisions
- Regional approach to transboundary water issues
- Specific value of the convention for certain states

The UN Watercourses Convention

Authoritative Instrument Evidentiary of the Law of the Non-Navigational Uses of International Watercourses

The UN Watercourses Convention: Legal Objective

- Codification of customary law
- Clarification of customary law
- Framework for the development of customary law

Non-ratification & non-entry into force: Legal Effects
The UN Watercourses Convention: Functions

- **A common denominator for**
  - Inspiring future watercourse agreements (new or revised)
  - Supporting existing agreements

The UN Watercourses Convention: Functions

- **In the absence of applicable watercourse agreements:**
  - A firm common ground governing or guiding interstate relations
  - A mandate for interstate dialogue

The UN Watercourses Convention: Functions

- **A mother convention for the development of global treaty law on emerging issues**

- **A foundation for international water cooperation in support of other multilateral environmental agreements**

The UN Watercourses Convention: Effects on non-parties

- **A stronger “soft-law” instrument with effects on non-parties**

- **Consolidation of additional provisions as customary law**

Thank you!

http://www.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/

Flavia Rocha Loures
Flavia.Loures@wwfus.org
Appendix A4

Presentation:
UNWC, International Water Law and the Viet Nam Perspective

To be added
Appendix A5

Presentation:
A Comparative Analysis of Substantive Norms
of the 1995 MA and the 1997 UNWC
Comparative analysis of Substantive norms of 1995 Mekong Agreement and UNWC 
by Sokhem Pech

Nature
- Both are framework agreements ➔ capability for adapting to legal developments and offering legal stability and predictability at universal level vs. LMB/MRB level; and
- Do not deal specifically with the distribution of water to the membe States.

Approved Procedures and Guidelines
- Procedures for Data and Information Exchange and Sharing, approved 2001
- Guidelines on Implementation of the Procedures for Data and Information Exchange and Sharing
- Procedures for Water Use Monitoring, approved 2003
- Guidelines on Implementation of the Procedures for Water Use Monitoring
- Procedures for Notification, Prior Consultation and Agreement, approved 2003
- Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement
- Procedures for Maintenance of Flows on the Mainstream, approved 2006
- Procedures for Water Quality, approved by the MRC council 26 January, 2011

Scope

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sustainable development......of the water and related resources of the Mekong River Basin including, but not limited to irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism (art. 1)</td>
<td>uses of international watercourses for navigation is not within the scope of the present Convention except insofar as other uses affect navigation or are affected by navigation (art. 1)</td>
</tr>
<tr>
<td>Water and related resources of the Mekong River Basin (art. 1)</td>
<td>Watercourse” means a system of surface waters and ground waters constituting by virtue of their physical relationship</td>
</tr>
</tbody>
</table>

Lack of consistency – water and related resources in art. 1, and then waters in art. 2. River Basin in art. 1.4, and then move to “River system” in art. 5 ➔ mainstream and tributaries etc. Is it for flexibility, compromise at the cost of consistency and predictability???.
Scope 2

Wet and Dry Seasons: The dates of the start and end of the wet and dry seasons vary throughout the basin due to regional variations. According to the preliminary analyses of the relatively long time series of hydro-meteorological data, the wet season may start during mid-May to mid-June and end from mid-November to mid-December.

JC will decide on the actual dates of the start and the end of the wet and dry seasons.

Mainstream of the Mekong River: The river flowing through six countries, namely China, Myanmar, Lao PDR, Thailand, Cambodia and Viet Nam to the sea via My Thuan and My Tho in Viet Nam.

Mekong Tributary: for PNPCA, a tributary as decided by the JC is a natural stream of the Mekong River System whose flows have a significant impact on the mainstream. —subject to be reviewed and agreed upon.

Characteristic (2)

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER V. ADDRESSING DIFFERENCES AND DISPUTES</td>
<td>Part IV = Protection, Preservation and Management (ecosystems, pollution, alien species, marine environment...)</td>
</tr>
<tr>
<td>CHAPTER VI. FINAL PROVISIONS</td>
<td>Part V – Harmful Conditions and Emergency Situations</td>
</tr>
<tr>
<td>Protocol</td>
<td>Part VI – Miscellaneous – during armed conflicts (\Rightarrow) A range of means, including an innovative mechanism of an impartial fact-finding commission</td>
</tr>
<tr>
<td>Part VII Final Clauses</td>
<td>Annex Arbitration</td>
</tr>
</tbody>
</table>

Although the 1997 UN Convention was concluded two years after the 1995 Mekong Agreement, the ILC’s draft articles influenced the drafting of the 1995 MA (McCaffrey, 2001). 1995 Mekong Agreement advances with the institutional frameworks, but fall short of the guiding framework.

Three main principles of customary international law on watercourses (2)

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prevention and Cessation of Harmful Effects (art.7)</td>
<td>Obligation not to cause significant harm (art. 7)</td>
</tr>
<tr>
<td>• To make every effort to avoid, minimize and mitigate harmful effects.</td>
<td></td>
</tr>
<tr>
<td>• To cease immediately activities causing substantial damage until such cause of harm is determined in accordance with Article 8.</td>
<td></td>
</tr>
<tr>
<td>Article 8. State Responsibility for Damages shall determine all relative factors; the cause, extent of damage and responsibility in conformity with the principles of international law, and to address and resolve all issues, differences and disputes as provided in Articles 34 and 35, and in conformity with the Charter of the United Nations.</td>
<td></td>
</tr>
<tr>
<td>Question: how to define substantial damage?</td>
<td></td>
</tr>
</tbody>
</table>

Characteristic

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995 MA</td>
<td>1997 UNWC</td>
</tr>
<tr>
<td>1995 MA</td>
<td>1997 UNWC</td>
</tr>
<tr>
<td>1995 MA</td>
<td>1997 UNWC</td>
</tr>
</tbody>
</table>

Three main principles of customary international law on watercourses

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reasonable and Equitable Utilization (art.5)</td>
<td>Equitable and reasonable utilization and participation (art. 5)</td>
</tr>
<tr>
<td>To utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances, the Rules for Water Utilization and Inter-Basin Diversions provided for under Article 26 and the provisions of A and B.</td>
<td></td>
</tr>
<tr>
<td>(i) on the Mekong mainstream or a tributary;</td>
<td></td>
</tr>
<tr>
<td>(ii) in the wet or the dry seasons; and</td>
<td></td>
</tr>
<tr>
<td>(iii) intra-basin use or outside of the Mekong basin (inter-basin diversion)</td>
<td></td>
</tr>
<tr>
<td>All relevant factors and circumstances Procedures for Notification, Prior Consultation and Agreement (PNPCA) prepared under Article 26 (\Rightarrow) Factors are not defined yet.</td>
<td></td>
</tr>
<tr>
<td>Factors relevant to equitable and reasonable utilization in Art. 6</td>
<td></td>
</tr>
</tbody>
</table>

Three main principles of customary international law on watercourses (2)

<table>
<thead>
<tr>
<th>1995 MA</th>
<th>1997 UNWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>PNPCA and Guidelines</td>
<td>Prior Notification on Planned Measures (art.11-19)</td>
</tr>
<tr>
<td>shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.</td>
<td></td>
</tr>
<tr>
<td>Links to table – A Comparison of the key issues covered in the UN Convention and 1995 MA.docx</td>
<td></td>
</tr>
</tbody>
</table>
Main differences

- UNWC defines ‘watercourse’ to include both surface waters (including tributaries) and groundwater (Article 2(a)).
- 1995 MA refers to the Mekong ‘basin’ and system but cannot define the terms ‘tributary’, dry and wet seasons etc.
- UNWC obliges states to provide the results of EIAs, if conducted, for all planned measures which may have a significant adverse effect upon other watercourse states (Article 12).
- UNWC includes factors relevant to equitable and reasonable utilization (Articles 5–6).
- UNWC includes an obligation not to cause significant harm (Article 7).
- UNWC does not differentiate between inter-basin and intra-basin diversions, nor does it differentiate regarding exchange of information and notification of planned measures related to such diversions (Articles 5 and 11–14).
- UNWC includes an obligation for protection and preservation of ecosystems, control of alien species and prevention, reduction, and control of pollution (Articles 20–21).
- UNWC explicitly requires parties to negotiate in good faith and pay reasonable regard to the rights and legitimate interests of other states (Article 17(2)).
- UNWC requires prevention and mitigation of harmful conditions whether resulting from natural causes or human conduct, such as floods, drought, erosion, siltation, water-borne diseases, desertification or salt-water intrusion (Article 27).
- UNWC includes detailed dispute settlement provisions for constructive resolution of emerging environmental challenges including the use of good offices, mediation, fact finding, conciliation, arbitration and reference to the ICJ (Article 33).

Thank you! Appreciate your comments.

Pech Sokhem
Chair, M-POWER SC
Manager, International Development Group
Senior Governance Specialist
Hatfield Consultants Partnership, Suite 200 – 850 Harbourside Drive, North Vancouver, British Columbia, Canada V7P 0A3
Office Tel: +1 604 926 3261
Office Fax: +1 604 926 5389
Cell: +1 778 318 6199
Email: spech@hatfieldgroup.com
www.hatfieldgroup.com, www mpowernet.org
Appendix A6

Presentation:
Procedural and Institutional Comparison
The importance of procedural and institutional mechanisms

"The substantive law on the utilisation of the waters of international drainage basins is defined in the vague language of the doctrine of 'equitable utilisation' and offers little guidance to states on how they may proceed lawfully with the utilisation of these waters in their territories. Shortcomings in substantive law, however, may be offset to some extent by a body of procedural law." (Prof. Bourne, 1996)


Duty to cooperate

Duty to cooperate provides the foundations for which more specific procedural rules can be adopted.

- Mekong Agreement and UN Watercourses Convention
- contain largely similar procedural rules
- setting out a general duty to cooperate.

Notification and Consultation

- The parties agree...
- Article 3 – Notice of Cooperation
- Article 4 – Notification of substantial damage
- Article 5 – Substantial damage resulting from development

Reasonable and Equitable Utilisation

- Article 2 – Reasonable and Equitable Utilisation
- Article 3 – Allocation
- Article 4 – Utilisation

Areas of Cooperation

- Article 1 – Areas of Cooperation
- Article 2 – Regional cooperation
- Article 3 – Joint cooperation

Substantive procedures

- Article 4 – Substantive procedures
- Article 5 – Substantive procedures
- Article 6 – Substantive procedures

Procedural rules

- Article 7 – Procedural rules
- Article 8 – Procedural rules
- Article 9 – Procedural rules

Comparative analysis of Procedural and Institutional Norms of the 1995 Mekong Agreement and UNWC

General Obligation to Cooperate

No Significant Harm and Procedure

Notification and Consultation

Regular Exchange of Data and Information

Joint Institutions

Dispute Settlement

No Significant Harm and Procedure

<table>
<thead>
<tr>
<th>1997 UN Watercourses Convention</th>
<th>1995 Mekong Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 1:</td>
<td>Article 2:</td>
</tr>
<tr>
<td>The parties agree:</td>
<td>The parties agree:</td>
</tr>
<tr>
<td>- Before a watercourse state is subject to notification, it shall be notified of the proposal in writing.</td>
<td>- Before a watercourse state is subject to notification, it shall be notified of the proposal in writing.</td>
</tr>
<tr>
<td>- The notification shall specify the nature and extent of the proposed development.</td>
<td>- The notification shall specify the nature and extent of the proposed development.</td>
</tr>
<tr>
<td>- The notification shall be accompanied by adequate technical data and information, including the results of any environmental impact assessment that has been conducted.</td>
<td>- The notification shall be accompanied by adequate technical data and information, including the results of any environmental impact assessment that has been conducted.</td>
</tr>
<tr>
<td>- The notification shall include the measures that will be taken to prevent or mitigate any adverse effects of the proposed development.</td>
<td>- The notification shall include the measures that will be taken to prevent or mitigate any adverse effects of the proposed development.</td>
</tr>
<tr>
<td>- The notification shall specify the procedures for consultation.</td>
<td>- The notification shall specify the procedures for consultation.</td>
</tr>
</tbody>
</table>

Dispute Settlement

Duty to cooperate

- Article RE1: Watercourse states shall in all cases comply with this Part unless they are subject to another convention |
- Article RE2: | Article 3: Notice of Cooperation |
- The parties agree: | The parties agree: |
- - Before a watercourse state is subject to notification, it shall be notified of the proposal in writing. | - Before a watercourse state is subject to notification, it shall be notified of the proposal in writing. |
- - The notification shall specify the nature and extent of the proposed development. | - The notification shall specify the nature and extent of the proposed development. |
- - The notification shall be accompanied by adequate technical data and information, including the results of any environmental impact assessment that has been conducted. | - The notification shall be accompanied by adequate technical data and information, including the results of any environmental impact assessment that has been conducted. |
- - The notification shall include the measures that will be taken to prevent or mitigate any adverse effects of the proposed development. | - The notification shall include the measures that will be taken to prevent or mitigate any adverse effects of the proposed development. |
- - The notification shall specify the procedures for consultation. | - The notification shall specify the procedures for consultation. |

Dr Alistair Rieu-Clarke

May 2012

Siem Reap, Cambodia from May 7-9, 2012

HELP Centre for Water Law, Policy & Science | under the auspices of UNESCO

Slide 4

Slide 5

Slide 6
Notification and Consultation

- UNWC provides more detailed guidance in terms of notification and consultation, e.g. periods to respond, consequences of no notification, no response, etc.

- Transboundary EIA now considered customary international law (Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ 20 April 2010)

- UNWC does not make a distinction between the mainstream and the tributaries

- 2003 PNPCA but questionable legal status and does it contain sufficient detail?

Regular Exchange of Data and Information

<table>
<thead>
<tr>
<th>1975 Mekong Agreement</th>
<th>1995 Mekong Agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 24</td>
<td>Broadly similar obligations to exchange data and information</td>
</tr>
<tr>
<td>Article 31</td>
<td></td>
</tr>
<tr>
<td>Article 32</td>
<td></td>
</tr>
<tr>
<td>Article 35</td>
<td></td>
</tr>
</tbody>
</table>

Joint Institutions

1997 UN Watercourses Convention

- Article 24 - General Obligation to Cooperate
- Article 31 - Request for Information
- Article 32 - Notification

1995 Mekong Agreement

- Article 24(1) - General Obligation to Cooperate
- Article 24(10) - Notification
- Article 24(11) - Request for Information

Decision on Transparency

- The decision on transparency shall be taken by a majority vote of the members of the Commission.
- The decision shall be submitted to the Council for further proceedings as may be necessary by them, to facilitate cooperation on the relevant measures and procedures in the light of experience gained through cooperation in other similar arrangements.

Decision on Cooperation

- The decision on cooperation shall be taken by a majority vote of the members of the Commission.
- The decision shall be submitted to the Council for further proceedings as may be necessary by them, to facilitate cooperation on the relevant measures and procedures in the light of experience gained through cooperation in other similar arrangements.

Dispute Settlement Mechanisms

- The Committee shall be comprised of members of the Commissions and shall be established by the Council.
- The Committee shall be established by a majority vote of the members of the Commissions.
- The Committee shall be established by a majority vote of the members of the Commissions.
- The Committee shall be established by a majority vote of the members of the Commissions.

Good faith and dispute settlement

- What is meant by ‘Good Faith’?

  - Conduct with honest intent, fairness and sincerity, and with no intention of deceit

  - Conduct negotiations in a manner that ‘the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating modification of it’ (Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Judgment of 25 September 1997 ICJ Reports 1997)

  - Negotiating in good faith ‘implies honesty, fairness, tolerance, lack of prejudice, consideration for the position, interests and needs of others, flexibility, willingness to seek a solution and, above all, cooperation’ (Shaffer 2011)
Summary

- Both UNWC and 95 Mekong Agreement are broadly complementary in terms of procedural and institutional aspects
- Both instruments:
  - emphasise the need for cooperation to satisfy the substantive requirements of equity and sustainability
  - oblige states to adopt the appropriate legal, administrative and regulatory framework to mitigate and prevent harm
  - oblige states to regularly exchange data and information
- The UNWC provides a stronger obligation to notify of planned measures within the tributaries of international watercourses
- The UNWC provides more detailed (legally binding) provisions relating to notification and consultation on planned measures
- The 95 Mekong Agreement provides more detail regarding institutional aspects
- Dispute settlement procedures vary slightly, but both instruments support the obligation to settle disputes peacefully and in good faith

www.dundee.ac.uk/water
Appendix A7

Handout: Comparison of the Key Issues Covered in the 1995 MA and 1997 UNWC
A Comparison of the key issues covered in the UN Convention and 1995 MA

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Preamble</strong></td>
<td>• Framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations. &lt;br&gt; • Rules of international law regarding non-navigational uses of international watercourses</td>
<td><strong>Preamble</strong></td>
<td>Adequate, efficient and functional joint organizational structure to cooperate and promote in a constructive and mutually beneficial manner in the sustainable development, utilization, conservation and management of the MRB water and related resources for navigational and non-navigational purposes</td>
</tr>
<tr>
<td><strong>Art 1. Scope</strong></td>
<td>The uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management of the uses of watercourses and their waters. &lt;br&gt; Applicable to the uses of international watercourses for navigation insofar as other uses affect navigation or are affected by navigation.</td>
<td><strong>Art. 1 Areas of Cooperation</strong></td>
<td>In all fields of sustainable development, utilization, management and conservation of the water and related resources of the MRB including, but not limited to irrigation, hydropower, navigation, flood control, fisheries, timber floating, recreation and tourism</td>
</tr>
<tr>
<td></td>
<td>No provisions specifically relating to navigation</td>
<td><strong>Article 9. Freedom of Navigation</strong></td>
<td>On the basis of equality of right, freedom of navigation shall be accorded throughout the mainstream of the Mekong River without regard to the territorial boundaries, for transportation and communication to promote regional cooperation and to satisfactorily implement projects under this Agreement. The Mekong River shall be kept free from obstructions, measures, conduct and actions that might directly or indirectly impair navigability interfere with this right or permanently make it more difficult.</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>Navigational uses are not assured any priority over other uses, but will be incorporated into any mainstream project. Riparians may issue regulations for the portions of the Mekong River within their territories, particularly in sanitary, customs and immigration matters, police and general security.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Article 3 Watercourse agreements</td>
<td>▪ Rights or obligations of a watercourse State arising from agreements in force; ▪ May, where necessary, consider harmonizing such agreements with the basic principles of the 1997 UNWC; ▪ May enter into one or more agreements applying and adjusting the provisions of the 1997 UNWC to a particular international watercourse or part of its.</td>
<td>Article 36. Entry Into Force and Prior Agreements</td>
<td>▪ Enter into force with no retroactive effect; ▪ Replace previous Mekong Agreements (1957 Statute as amended, 1975 Joint Declaration, 1978 Interim Mekong Declaration, and all Rules of Procedures adopted under such agreements. ▪ Shall not replace or take precedence over any other treaties, acts or agreements by and among any of the parties hereto ▪ Where a conflict in terms, areas of jurisdiction of subject matter or operation of any entities shall be submitted to the respective governments to address and resolve.</td>
</tr>
<tr>
<td>Article 4 1. Every watercourse State.</td>
<td></td>
<td>Article 39</td>
<td>Any other riparian State, accepting the rights</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>------------------------</td>
</tr>
<tr>
<td><strong>Parties to watercourse agreements</strong></td>
<td>2. A watercourse State whose use may be affected is entitled to participate in consultations or negotiation to becoming a party.</td>
<td><strong>Additional Parties to Agreement</strong></td>
<td>and obligations under this agreement, may become a party with the consent of the parties.</td>
</tr>
<tr>
<td><strong>Article 4. Sovereign Equality and Territorial Integrity</strong></td>
<td>To cooperate on the basis of sovereign equality and territorial integrity in the utilization and protection of the water resources of the Mekong River Basin.</td>
<td><strong>Article 5. Reasonable and Equitable Utilization</strong></td>
<td>To utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances, the Rules for Water Utilization and Inter-basin Diversions provided for under Article 26 and the provisions of A and B below:</td>
</tr>
<tr>
<td><strong>Article 5 Equitable and reasonable utilization and participation</strong></td>
<td>1. Shall in their respective territories utilize an international watercourse in an equitable and reasonable manner to attaining optimal and sustainable utilization thereof and benefits therefrom taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. 2. Shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.</td>
<td>A. On tributaries of the Mekong River, including the Tonle Sap, intra-basin uses and inter-basin diversions (Notification).</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>B. On the mainstream of the Mekong River:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>1. During the wet season:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>a) Intra-basin use (notification).</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>b) Inter-basin diversion (prior consultation).</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>2. During the dry season:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>a) Intra-basin use (prior consultation).</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>b) Any inter-basin diversion project (specific agreement).</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>----------------------</td>
</tr>
<tr>
<td><strong>Article 6</strong>&lt;br&gt;Factors relevant to equitable and reasonable utilization</td>
<td>1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including: (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) The social and economic needs; (c) The dependent population; (d) The effects of the use or uses; (e) Existing and potential uses; (f) Conservation, protection, development and economy of use and the costs; (g) The availability of alternatives.</td>
<td><strong>Article 5</strong> refers to all relevant factors and circumstances, the Rules for Water Utilization and Inter-basin Diversions provided for under Article 26. However, as of to date, such factors and circumstances are not available yet.</td>
<td></td>
</tr>
<tr>
<td><strong>Article 26.</strong>&lt;br&gt;Rules for Water Utilization and Inter-Basin Diversions</td>
<td>To agree on Rules for Water Utilization and Inter-Basin Diversions pursuant to Articles 5 and 6, including 1) time frame for the wet and dry seasons; 2) location of hydrological stations, and flow level requirements at each station; 3) criteria for determining dry season surplus water on the mainstream; 4) mechanism to monitor intra-basin use; and 5) mechanism to monitor inter-basin diversions from the mainstream.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Article 6.</strong>&lt;br&gt;Maintenance of Flows on the Mainstream</td>
<td>Maintenance of the flows on the mainstream from diversions, storage releases, or other actions of a permanent nature; except in the cases of historically severe droughts and/or floods: To adopt guidelines for the locations and levels of the flows, and monitor and take action necessary for their maintenance as provided in Article 26.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>----------------------</td>
</tr>
<tr>
<td>Article 7</td>
<td>Obligation not to cause significant harm</td>
<td>Article 7. Prevention and Cessation of Harmful Effects</td>
<td>To make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (eco-system) conditions, and ecological balance of the river system, Where one or more States is notified with proper and valid evidence that it is causing substantial damage, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8.</td>
</tr>
<tr>
<td>Article 8</td>
<td>General obligation to cooperate</td>
<td>Article 8. State Responsibility for Damages</td>
<td>Where harmful effects cause substantial damage, the party(ies) concerned shall determine all relative factors; the cause, extent of damage and responsibility in conformity with state responsibility, and to address and resolve all issues, differences and disputes as provided in Articles 34 and 35, and in conformity with the Charter of the United Nations.</td>
</tr>
<tr>
<td>Article 9</td>
<td>Regular</td>
<td>Article 2. Projects, Programs and Planning</td>
<td>Promote, support, cooperate and coordinate in the development of the full potential of sustainable benefits to all riparian States and the prevention of wasteful use, with emphasis and preference on joint and/or basin-wide development projects and basin programs.</td>
</tr>
<tr>
<td></td>
<td>1. shall on a regular basis exchange readily available data and information on the condition of the</td>
<td>Article 24. Functions of</td>
<td>The functions of the Joint Committee are: C. To regularly obtain, update and exchange</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>-----------------------</td>
</tr>
</tbody>
</table>
| **exchange of data and information** | watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature and related to the water quality as well as related forecasts.  
2. Shall employ its best efforts to comply with the request for additional information at cost.  
3. Shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States. | **Joint Committee** | information and data necessary to implement this Agreement.  
E. To assign tasks and supervise the activities of the Secretariat ………, including the maintenance of databases and information necessary. |
| **Article 10**  
Relationship between different kinds of uses | 1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.  
2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs | | |
| **Article 11**  
Information concerning planned measures | Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse. | | Comments: it is provided for in the Procedures on Notification, Prior Consultation and Agreement. |
| **Article 12**  
Notification concerning planned measures with possible adverse effects | Before implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof.  
Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures. | | Comments: it is provided for in the Procedures on Notification, Prior Consultation and Agreement. The requirement is differentiated based on type, location and season, of uses |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|------------------------------------------------------------------------------------------------------------------|
| Article 13 | Unless otherwise agreed:  
(a) shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;  
(b) This period shall, at the request of a notified State for which the evaluation of the planned measures poses special difficulty, be extended for a period of six months. |            | Comments: it is provided for in the Procedures on Notification, Prior Consultation and Agreement.                  |
| Article 14 | During the period referred to in article 13, the notifying State:  
(a) Shall cooperate by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation; and  
(b) Shall not implement or permit the implementation of the planned measures without the consent of the notified States. |            | Not available in 1995 MA and its procedures.  
It is also not clear whether notifying state can implement or permit the implementation of the planned measures without the consent of the notified States. |
| Article 15 | The notified States shall communicate their findings to the notifying State as early as possible within the period applicable pursuant to article 13.  
If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall attach to its finding a documented explanation setting forth the reasons for the finding. |            | Comments: it is partially provided for in the non-legally binding Procedures on Notification, Prior Consultation and Agreement. |
| Article 16 | 1. If, within the period applicable pursuant to article 13, the notifying State receives no communication under article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in |            | Not available in 1995 MA and its procedures.  
It is important to elaborate on it by the MRC countries. |

**Notes:**
- The 1995 MA and its procedures do not provide for the period for reply to notification. It is important to elaborate on this by the MRC countries.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Any claim to compensation by a notified State which has failed to reply within the period applicable pursuant to article 13 may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within that period.</td>
<td>Article 17 Consultations and negotiations concerning planned measures 1. If a communication is made under article 15 that implementation of the planned measures would be inconsistent with the provisions of article 5 or 7, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. 2. The consultations and negotiations shall be conducted on the basis …..in good faith. 3. During the course of the consultations and negotiations, the notifying State shall, if so requested ….. at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.</td>
<td>Comments: it is partially provided for in the non-legally binding Procedures on Notification, Prior Consultation and Agreement. The requirement is differentiated based on type, location and season, of uses. It is important to have it in 1995 MA.</td>
<td>Article 18 Procedures in the absence of notification 1. If a watercourse State has reasonable grounds to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth its grounds. 2. In the event that the State planning the measures</td>
</tr>
</tbody>
</table>
nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.  
3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period of six months unless otherwise agreed.

Article 19
Urgent implementation of planned measures
1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.
2. In such case, a formal declaration of the urgency of the measures shall be communicated without delay to the other watercourse States referred to in article 12 together with the relevant data and information.
3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

It is important to have it in 1995 MA.
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 20 Protection and preservation of ecosystems</td>
<td>Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.</td>
<td>Article 3. Protection of the Environment and Ecological Balance</td>
<td>To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.</td>
</tr>
<tr>
<td>Article 21 Prevention, reduction and control of pollution</td>
<td>1. 2. Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. 3. Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse.</td>
<td></td>
<td>It is partially defined in the non-binding Procedures on Water Quality.</td>
</tr>
<tr>
<td>Article 22 Introduction of alien or new species</td>
<td>Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.</td>
<td></td>
<td>Not included</td>
</tr>
<tr>
<td>Article 23 Protection and preservation of the</td>
<td>Watercourse States shall, individually and, where appropriate, in cooperation with other States, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including</td>
<td></td>
<td>Not included</td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>marine environment</td>
<td>estuaries, taking into account generally accepted international rules and standards.</td>
<td>Article 24 Management</td>
<td>The institutional framework for cooperation in the MRB ……shall be called the Mekong River Commission and shall, for the purpose of the exercise of its functions, enjoy the status of an international body…….</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 13. Assumption of Assets, Obligations and Rights</td>
<td></td>
</tr>
<tr>
<td>Article 14. Budget of the Mekong River Commission</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 15. Composition of Council</th>
<th>Article 16. Chairmanship of Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 17. Sessions of Council</td>
<td></td>
</tr>
<tr>
<td>Article 18. Functions of Council</td>
<td></td>
</tr>
<tr>
<td>Article 19. Rules of Procedures</td>
<td></td>
</tr>
<tr>
<td>Article 20. Decisions of Council</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 21. Composition of Joint Committee</th>
<th>Article 22. Chairmanship of Joint Committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 23. Sessions of Joint Committee</td>
<td></td>
</tr>
<tr>
<td>Article 24. Functions of Joint Committee</td>
<td></td>
</tr>
<tr>
<td>Article 25. Rules of Procedures</td>
<td></td>
</tr>
<tr>
<td>Article 26. Decisions of the Joint Committee</td>
<td></td>
</tr>
</tbody>
</table>

<p>| Article 28. Purpose of Secretariat | Article 29. Location of Secretariat |
|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Article 25    | 1. Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.                                                                                                                                                      | Article 30.   | Functions of the Secretariat                                                                                                                                                                                                 |
| Regulation    | 2. Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.                                                                                                                                                      | Article 31.   | Chief Executive Officer                                                                                                                                                                                                 |
|               | 3. For the purposes of this article, “regulation” means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.                                                                                                                                                  | Article 32.   | Assistant Chief Executive Officer                                                                                                                                                                                                                                            |
| Article 26    | JC shall prepare and propose for approval of the Council, inter alia, Rules for Water Utilization and Inter-Basin Diversions ……., including but not limited to: 1)establishing the time frame for the wet and dry seasons; 2) establishing the location of hydrological stations, and determining and maintaining the flow level requirements at each station; 3) setting out criteria for determining surplus quantities of water during the dry season on the mainstream; 4) improving upon the mechanism to monitor intra-basin use; and 5) setting up a mechanism to monitor inter-basin diversions from the mainstream. |
| Installations | 1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.                                                                                                                                                   | Comments:     | It is important to have this provision as more dams are being built and operated in the MRB.                                                                                                                                 |</p>
<table>
<thead>
<tr>
<th></th>
<th>2. Watercourse States shall, at the request of any of them which has reasonable grounds to believe that it may suffer significant adverse effects, enter into consultations …………….</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 27  Prevention and mitigation of harmful conditions</td>
<td>Watercourse States shall, individually and, where appropriate, jointly, take all appropriate measures to prevent or mitigate conditions related to an international watercourse that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.</td>
<td>Article 10. Emergency Situations</td>
<td>Whenever a Party becomes aware of any special water quantity or quality problems constituting an emergency that requires an immediate response, it shall notify and consult directly with the party(ies) concerned and the Joint Committee without delay in order to take appropriate remedial action.</td>
</tr>
</tbody>
</table>
| Article 28  Emergency situations | 1. For the purposes of this article, “emergency” means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as industrial accidents.  
2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.  
3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.  
4. When necessary, watercourse States shall jointly... | Comments: it is important to elaborate on this provision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Comments: it is important to elaborate on this provision, especially on the definition of emergency. Yali Falls dam incidence in 2000 (Cambodia and Viet Nam) is a case in point. |
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>develop contingency plans ..........</td>
<td></td>
<td>Not included</td>
</tr>
<tr>
<td>Article 29</td>
<td>International watercourses and installations in time of armed conflict Article 30 Indirect procedures Article 31 Data and information vital to national defence or security Article 32 Non-discrimination</td>
<td>Article 34, Resolution by Mekong River Commission</td>
<td>Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization .......... the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F.</td>
</tr>
<tr>
<td>Article 33</td>
<td>Settlement of disputes 1. In the event of a dispute between two or more parties concerning the interpretation or application of the present Convention, the parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the following provisions.</td>
<td>Article 35, Resolution by Governments</td>
<td>In the event the Commission is unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments to take cognizance of the matter for resolution by negotiation through diplomatic channels within a timely manner, and may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision. Should the Governments find it necessary or beneficial to facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation through an entity or party mutually agreed upon, and</td>
</tr>
<tr>
<td>-----------</td>
<td>------------------------</td>
<td>-----------</td>
<td>----------------------</td>
</tr>
<tr>
<td></td>
<td>thereby to proceed according to the principles of international law.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>If the parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.</td>
<td>Comment: Submitting the dispute to arbitration or to the International Court of Justice is not directly provided for in MA.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Subject to the operation of paragraph 10, if after six months from the time of the request for negotiations referred to in paragraph 2, the parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraphs 4 to 9, unless the parties otherwise agree.</td>
<td>Comment: Time-lines for moving from one means of resolution to next should be considered in MA framework.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. A Fact-finding Commission shall be established, composed of one member nominated by each party concerned and in addition a member not having the nationality of any of the parties concerned chosen by the nominated members who shall serve as Chairman.</td>
<td>MRC has recently practiced the panel of experts and limited form of fact finding visit (See BDP 2 and Xayabury dam case).</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5. If the members nominated by the parties are unable to agree on a Chairman within three months</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>......of the request for the establishment of the Commission, any party concerned may request the Secretary-</td>
<td></td>
<td>10. When ratifying, accepting, approving or acceding to the present Convention, or at any time thereafter, a party which is not a regional economic integration organization may declare in a written instrument submitted to the depository that, in respect of any dispute not resolved in accordance with paragraph 2, it recognizes as compulsory ipso facto, and without special agreement in relation to any party accepting the same obligation:</td>
<td></td>
</tr>
<tr>
<td>(a) Submission of the dispute to the International Court of Justice; and/or</td>
<td></td>
<td>(b) Arbitration by an arbitral tribunal established and operating, unless the parties to the dispute otherwise agreed, in accordance with the procedure laid down in the annex to the present Convention.</td>
<td></td>
</tr>
<tr>
<td>Article 34</td>
<td>The present Convention shall be open for signature by all States and by regional economic integration organizations from 21 May 1997 until 20 May 2000 at United Nations Headquarters in New York.</td>
<td></td>
<td>Article 36.</td>
</tr>
<tr>
<td>Signature</td>
<td></td>
<td></td>
<td>This Agreement shall:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A. Enter into force among all parties, with no retroactive effect upon activities and projects previously existing, on the date of consent to be bound by signature, ratification or approval by the appointed plenipotentiaries.</td>
<td></td>
</tr>
<tr>
<td>-----------</td>
<td>-------------------------</td>
<td>-----------</td>
<td>----------------------</td>
</tr>
</tbody>
</table>
| Article 35  
Ratification, acceptance, approval or accession | 1. The present Convention is subject to ratification, acceptance, approval or accession by States and by regional economic integration organizations. | | MA enters into force on the day of signature without explicitly requiring its incorporating into the national system. |
| Article 36  
Entry into force | 1. The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary General of the United Nations. 2......... 3..... | | |
| Article 37  
Amendments, Modification, Supersession and Termination | This Agreement may be amended, modified, superseded or terminated by the mutual agreement among all parties hereto at the time of such action. | | |
| Article 40. Suspension and Withdrawal | | | |
| Article 41. United Nations and International Community Involvement | | | |
| Article 37  
Authentic texts | The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations. | | |
<p>| Article 42. Registration of Agreement | This Agreement shall be registered and deposited, in English and French, with the Secretary General of the United Nations. | | |</p>
<table>
<thead>
<tr>
<th>ANNEX ARBITRATION</th>
<th>The arbitration pursuant to article 33 of the Convention shall take place in accordance with articles 2 to 14 of the present annex.</th>
<th></th>
<th>It can be of relevance to MRC.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Protocol to the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin for the Establishment and Commencement of the Mekong River Commission</td>
</tr>
</tbody>
</table>
Appendix A8

Presentation:
UNWC and Viet Nam: an Analytical Analysis

To be added
Appendix A9

Presentation:
Transboundary Waters:
Challenges and Opportunities
The UN Watercourses Convention National Awareness Workshops and In-Depth Training: Viet Nam from May 14-16, 2012
Hai Au Hotel, Hai Phong City, Viet Nam

Transboundary Freshwaters Around the World and Mekong Region: Challenges and Opportunities by Sokhem Pech

Map of transboundary rivers

263 international watercourses: generate about 60% of global freshwater flow and cover almost half the earth's land surface. cross the territories of 145 countries and are home to around 40% of the world's population.

Map of transboundary rivers

Transboundary Freshwater Systems: Crucial but Threatened

- These watercourses contain key freshwater supplies;
- Lack of coordination between states poses major threats to the people, ecosystems, and economic activities that rely on the long-term sustainability of those resources.
- E.g. changes in flow patterns and associated water elements, reduced water availability in most critical time or cause significant levels of pollution downstream.
- It can also prevent weaker states from developing or getting their fair share of the resource or hamper migratory fish.

Map of transboundary rivers

263 international watercourses and untold number of transboundary aquifers

Map of transboundary rivers

Diverse social, cultural, economic and climatic conditions!!!
Transboundary Freshwater Systems: Crucial but Threatened (3)

- Responsibility to protect transboundary freshwater ecosystems and to work together
  - sustainable and integrated manner; and
  - avoid conflict, respond cooperatively to threats such as climate change, and share fairly the related costs and benefits.
- Yet, transboundary cooperation raises major practical, legal, and political issues.

Major practical, legal, and political issues

- Congestion of several watercourse agreements, with their own different policies and obligations, which makes effective implementation more difficult.
- Many agreements have significant gaps or failings.

The increase in future water variability forecasted by most climate change scenarios is one form of change that may alter current hydropolitical balances, affecting in turn the ability of states to meet their water treaty commitments. This may raise serious questions about the adequacy of many existing transboundary arrangements and lead countries to set up new international water agreements (WB, 2010)

Global distribution of treaty and RBO mechanisms

- FAO identified more than 3,600 treaties relating to international water resources dating between AD 805 and 1984, the majority of which deal with some aspect of navigation.
- Since 1814, states have negotiated a smaller body of treaties which deal with non-navigational issues of water management, flood control, hydropower projects, or allocations for consumptive or non-consumptive uses in international basins.
- 145 treaties which govern the world's international watersheds, and the international law on which they are based, are just developing.
- More than half of these treaties include no monitoring provisions and, perhaps as a consequence, two-thirds do not delineate specific allocations and four-fifths have no compliance mechanism.
- Treaties which do allocate specific quantities, allocate a fixed amount to all riparian states, regardless of fluctuations.
- One problem hampering the development of sophisticated water treaties may have been the difficulty in acquiring information on similar settings.
- How to provide researchers and diplomats a useful tool to assess negotiating trends and workable treaty solutions in the future?
- Visit Transboundary Freshwater Dispute Database - http://www.transboundarywaters.orst.edu/

Astronaut photo of the Mekong taken from the International Space Station on January 9, 2011
Mekong Region


Many poor people

Hydro must assist alleviate poverty

Persons under national poverty line

- 10 %
- 10 - 19 %
- 20 - 39 %
- 40 - 59 %
- 60 % or more

Lao PDR only

non-poor

poor

very poor

Except for Mekong Basin, there are no other known agreement or institutions for other transboundary events!

Hydropower explosion
62 existing + 179 under study
Mekong Region power grid
Mekong River mainstream – 8+ China, 87 Laos transboundary implications – esp Cambodia

Irrigation
50% increase in food prices
Hun Sen’s “White Gold” New capital eg. Kuwait

Diversions
eg. South to North transfers in China
eg. Salween to Chao Phraya (Myanmar/Thailand)
eg. into NE Thailand (mainstream, Laos Thailand)

ASEAN and other Mekong Forum

Greater Mekong Sub-region (GMS)

• Jurisdiction covering whole territories of its member states/ province;
• Focus: energy & transport, trade, infrastructures, ICT, environment, tourism, and human resource development (HRD)

Mekong Regional Geopolitics

• Complex relationship among politics and geography, demography, and economics, especially with respect to the foreign policy. Countries may hold that the geographic, economic, and political needs justifies their actions.
• Isaac Newton “history as a process set in motion perhaps by God but left mostly to the decisions and actions of humanity.
• Karl Marx “History is governed by economic realities, by the way in which people produce and use wealth (natural resources) and struggle with each other for the control of the means of production ➔ an inevitable progress.
If conflict and crisis lead to progress or breakthrough? How GMS Kunming Summit’s common prosperity will be operationalized?
Who make decisions in the Mekong Region? And Who control means of production and resources ➔ geopolitics

Mekong Mainstream

• China plans 13 dams on Salween

Thailand:

- EGCO (Nam Theun 2)
- Ratchaburi (Nam Ngum 2-3)
- GMS Power (Nam Ngum 3, Thaen Hinboun, Taesong [MDX])
- Sai Thai (Ben Koun, Nam Theun 4)
- Thai-Lao Power (Nam Lin) (Koyaboun, Nam Ngum 2)

Vietnam:

- VRA (Power Season 2)
- Ninh Binh (Ha Long) Project
- Viet Nam-Laos Joint Stock Company (VLPC) (Salakham 1-3), Consortium includes:
  - Song Da
- China:
  - Sichuan (Nam Ngum 5, Pak Lay, Nam Ou, Kamchay, Salween)
  - China Southern Power Grid (Xian, Bing Cheep, Arrong, Nam Theun)
- Malaysia:
  - Megawatt Corporation (Don Sahong)
  - Gamuda (Nam Theun 1)
- Russia:
  - Region Oil (Sekong 4.5, Nam Kong 1)

1995 Mekong Agreement [MRC]

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

Cambodia

Vietnam

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

2000 Upper Mekong Navigation Agreement

• Jurisdiction covering Mekong Mainstream
• Focus: Navigation.

China

Myanmar

1995 Mekong Agreement [MRC]

• Jurisdiction covering whole area within hydrological boundary of MRB in its state parties;
• Focus: Sustainable water & its related resources development (irrigation, navigation, hydropower, flood control, fisheries, timber floating, and recreation and tourism)
Regional and global significance — Require integrated approach – but are we there yet?

**Upstream impacts and local mismanagement are one of greatest challenges to the sustainability of River Basin.**

- Another Example of Complexity at sub-catchment scale ➔ complexity is many fold more if we scale it up.

**Some Major Concerns The NT-NKD River Basin**

- How to mitigate the cumulative impacts from series of dam construction, mining, plantation & other point sources of land and water degradation inside the basin?
- How to bring into one development framework the uncoordinated physical infrastructure build ups & continuous landscape transformation inside the basin?
- How to strengthen the government regulatory and monitoring measures to implement IWRM under strong inter-agency coordination and collaboration?
- How to regulate problematic resource extraction activities, and on the other hand, enhance development opportunities inside the basin?
- How to unify and synergize various institutions’ development initiatives?
- How to organize, capacitate, and mobilize the local communities for collective action towards creating sustainable livelihood linked to nature conservation works in the Protected Areas?

What Opportunities UNWC and other Regional Institutions will bring? Will we achieve our objective?

Overall objectives of the WWF UNWC Mekong Project are:
- To raise awareness of relevant government officials, and regional and national opinion-makers involved in transboundary river basin management and governance;
- To provide an opportunity to get better understanding of the usefulness and relevance of the UNWC and other international water instruments; and,
- To identify and support interested governments through the ratification process.

Thank you! Appreciate your comments.
Appendix A10

Presentation: Perspectives for Strengthening Transboundary Arrangements in the Mekong Region
Perspectives for Strengthening Transboundary Arrangements in the Mekong Region

May 2012

Dr Alistair Rieu-Clarke

Legal Analytical Framework: Testing resilience

<table>
<thead>
<tr>
<th>Key Elements</th>
<th>Details</th>
</tr>
</thead>
</table>
| 1. Scope     | • Legal reach (what waters?)  
• Definitions (watercourse; uses)  
• Parties (States; RIEOs) |
| 2. Substantive Rules | • Legal duties & entitlements (equitable and reasonable utilisation; due diligence; protection)  
• Rules of substance (general or precise) |
| 3. Procedural Rules | • Rules of procedure (duty to cooperate as bridge)  
• Notification / exchange of information |
| 4. Institutional Mechanisms | • Joint bodies (RBOs)  
• Conference of the Parties (MoP; CoP)  
• Organisations / organs (Ministerial level; other) |
| 5. Dispute Settlement | • Dispute avoidance (consultation)  
• Dispute settlement (Art. 33 UN WC; other)  
• Compliance verification (reporting; facilitation) |

Scope

- „Watercourse“ – “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus” (Art 2(b))
- “Uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters” (Art. 3(1))

Scope - 1966 ILA Helsinki Rules

Art. II An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

Art. III A "basin State" is a state the territory of which includes a portion of an international drainage basin.

Scope – UN Watercourses Convention

- Article 20 – “Watercourse states shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses”
- “Ecosystem” – “an ecological unit consisting of living and non-living components that are interdependent and function as a community.”
Scope - 1998 Rhine Convention

**Article 1(1)**

"Rhine" The Rhine from the outlet of Lake Untersee and in the Netherlands the branches Bovenrijn, Biljards Kanaal, Pannerdensch Kanaal, IJssel, Nederrijn, Lek, Waal, Boven-Merwede, Beneden-Merwede, Noord, Oude Maas, Nieuwe Maas and Schelte and the Nieuwe Waterweg as far as the basis line as defined in article 5 in connection with article 11 of the UN-agreement on maritime law, the Ketelmeer and theisselmee.

**Article 2**

1. the Rhine
2. the ground-water interacting with the Rhine,
3. the aquatic and terrestrial ecosystems interacting with the Rhine or whose interaction with the Rhine could be re-established,
4. the Rhine catchment area, as far as its pollution adversely affects the Rhine
5. the Rhine catchment area, as far as it is of importance for issues of flood prevention and defence along the Rhine.


- "River basin" means the area of land from which all surface runoff flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta (Article 2(13))
- "River basin district" means the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters, which is identified under Article 3(1) as the main unit for management of river basins.

Member States shall ensure the appropriate administrative arrangements, including the identification of the appropriate competent authority, for the application of the rules of this Directive within each river basin district lying within their territory (Article 3(2)).

Substantive norms – theories of allocation

**Absolute territorial Integrity**
- No interference with the natural flow and conditions

**Absolute territorial Sovereignty**
- Unlimited use regardless of the needs of downstream states

**Limited territorial sovereignty**
- States must respect sovereignty of other states beyond their own use

**Community of interests**
- States manage a river as a single unit, and territorial boundaries become less relevant

Article 20, UN Watercourses Convention

Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.

1992 Biodiversity Convention

- "Ecosystem" – “means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit" (Article 2)
- Conference of the Parties, Decision V/6
  - "Calls upon Parties, other Governments, and international organisations to apply, as appropriate, the ecosystem approach"
  - "The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Thus, the application of the ecosystem approach will help to reach a balance of the three objectives of the Convention: conservation; sustainable use; and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources"
Regional practice and ecosystems

2000 Revised SADC Protocol, Art. 4(2)(a)
– “State Parties shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of shared international watercourses”

1992 UNECE Water Convention, Art (2)(b)&(d)
– “The Parties, shall in particular, take all appropriate measures:
(b) To ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection; ...
(d) To ensure conservation and, where necessary, restoration of ecosystems.”

Regional practice and ecosystems

2000 EU Water Framework Directive, Art. 1(a)
The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which... prevents further deterioration and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems.

Basin practice and ecosystems

• 2003 Protocol for Sustainable Development of Lake Victoria Basin
  – “The management of the resources of the Basin shall be guided by... the principle of the protection and preservation of the ecosystems of international watercourses whereby ecosystems are treated as units, all of whose components are necessary to their proper functioning and that they be protected and preserved to the extent possible” Art. 4(2)
  – “The Partner States shall take all appropriate measures, individually or jointly and where appropriate with participation of all stakeholders to protect, conserve and where necessary rehabilitate the Basin and its ecosystems” Art. 6(1)

Basin practice and ecosystems

1995 Mekong Agreement, Article 3 - Protection of the Environment and Ecological Balance
To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

Procedural norms

It is reasonable... that procedural requirements should be regarded as essential to the equitable sharing of water resources. ... In the absence of hard and precise rules of allocation, there is a relatively greater need for specifying requirements for advance notice, consultation, and decision procedures.

Compliance and implementation

- International agreements relating to natural resources date back to 19th century
- Significant development following 1972 and Stockholm Declaration on Human Environment
- By Rio Conference 1992 questions over extent to which agreements have actually been implemented
- Agenda 21 called for states, “to ensure the effective, full and prompt implementation of legally binding instruments.”

UN ECE Strategy and Framework for Compliance with Agreements on Transboundary Waters, March 2000

“failure to comply with the provisions of such instruments is rarely the result of deliberate policies, but rather the consequence of deficiencies in administrative, economic or technical infrastructure”

The UNECE Strategy

- compliance information system (monitoring, reporting, review and evaluation)
- compliance review system (regular meetings, positive incentive programmes, public participation, and non-confrontational compliance review responses)

Proposal for Implementation Committee

- 9 member serving in personal capacity
- Elected by Meeting of the Parties among candidates nominated by the Parties
- Meet at least one every 5 years
- Committee to:
  - Respond to requests from parties for advice about difficulties in implementing the Convention
  - Receive submissions by a Party that concludes that despite best efforts, it is or will be unable to comply fully with the Convention
  - Where it becomes aware of possible difficulties in implementation, including from information received from the parties, it may request the Party concerned to provide necessary information on the matter
- Committee may:
  - Request further information
  - With consent, undertake information gathering in the territory of a Party
  - Invite parties and non-parties to attend meetings, and seek expert advice
- Committee can decide to:
  - Recommend domestic regulatory regimes be set up or strengthened,
  - Assist in establishing transboundary agreements and strengthening cooperation,
  - Facilitate technical and financial assistance, including information and technology transfer, and capacity building, and
  - Assist in seeking support from specialised agencies and other competent bodies as appropriate
  - Request and assist states with an action plan to facilitate implementation
  - Invite party concerned to promote progress reports

Compliance and implementation

- What is implementation?
  - Enacting and promulgating relevant laws, regulations, policies and other measures and initiatives necessary for parties to meet their obligations under an international agreement (UNEP Guidelines on MEA Compliance and Enforcement)

- What is compliance?
  - A state of conformity or identity between an actor’s behavior and specified rules (Raustialia 2000).

1992 UN ECE Water Convention

- “Parties ... do not have a clear and permanent forum to resort to for advice and support in the case of a specific potential or ongoing problem of a procedural, legal and/or technical nature” (2009 5th Meeting of Parties)
- Proposal for institutional and procedural mechanism, 2012
  - “The mechanism shall be simple, non-confrontational, non-adversarial, transparent, supportive and cooperative in nature, building on the distinctive collaborative spirit of the Convention

2002 Framework Agreement on the Sava River Basin, Art. 21

1) The Parties agree to establish a methodology of permanent monitoring of implementation of the Agreement and activities based upon it.
2) The implementation monitoring methodology will include timely provision of information to stakeholders and the general public by the authorities responsible for implementation of the Agreement.
3) The Parties shall establish an implementation monitoring methodology within two years after the Agreement has entered into force.
1998 Rhine Convention, Arts. 11 & 16

- **Reporting**
  - Parties report to ICPR on implementation
  - Notification of non-compliance
- **Consultations**
  - Between contracting parties
- **Response**
  - ICPR may decide on measures of implementation
  - Negotiation or arbitration
  - Compulsory arbitration

Public Participation

1991 Rio Declaration (Principle 10)

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Public Participation

1999 UNECE Protocol on Water and Health

Art. 6(1) The parties shall “make appropriate practical and/or other provisions for public participation, within a transparent and fair framework, and shall ensure that due account is taken of the outcome of the public participation.”

2000 EU Water Framework Directive

Article 14(1): Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the River Basin Management Plans.

1997 Estonian-Russian Agreement for the Protection and Sustainable Use of Transboundary Waters

...the Parties encourage co-operation between agencies of executive power, local self-governments, scientific and public interests organisations, as well as other institutions in the field of sustainable development and protection of transboundary waters.

Legal Analytical Framework: State Practice

1. **Scope**
   - Rhine Convention; Danube; Mekong; Nile (water security)
2. **Substantive Rules**
   - 1992 UNECE Helsinki Convention
3. **Procedural Rules**
   - EU Water Framework Directive
4. **Institutional Mechanisms**
   - Mekong; Columbia; Colorado; Rhine; Danube
5. **Dispute avoidance / compliance**
   - Indus; Mekong; Canada/USA; EU; UNECE practice

Thank you!

www.dundee.ac.uk/water
Appendix A11

Presentation:
Case Study: Gabčíkovo-Nagymaros
Background to the case (1)

- Hungary and Czechoslovakia adopted a Treaty on a joint barrage system on 16 September 1977 (Budapest Treaty).
- Cross border barrage system between the towns of Gabčíkovo (Slovak Republic) and Nagymaros (Hungary).
- System designed to eliminate regular flooding, improve navigation and provide hydro-power.
- Part of river diverted into an artificial canal at Dunakiliti (Hungary) to a hydroelectric power plant (720MW) near Gabčíkovo.
- Canal return water into deepened original river bed and at Nagymaros a smaller dam and power plant (158MW) would be constructed.
- Gabčíkovo peak power plant, and Nagymaros limit fluctuations in water level.
- Costs and electricity produced to be shared equally.

Background to the case (2)

- 1981 Hungary asked to slowdown project due to economic problems
- 1984 Civil society movement in Hungary protested against the dam – objected to withholding of EIA and concerned over conservation and underground water reserves [supply 1 million with drinking water]
- 1989 Most of project completed in Slovakia
- Hungary unilaterally suspended works without notice
- 1991 Construction started on ‘variant C’. Reduced reservoir (70%) split at Čunovo dam, and hydropower production (20%). Would be possible to flood Čunovo dam when Dunakiliti dam built
Background to the case (3)

1992 Hungary tried to terminate the treaty, and both parties agreed to submit the dispute to the ICJ.

1993 Tripartite group of experts set up by parties and EC. Parties could not agree on recommendations.

1997 Court handed down a decision.

Three questions submitted to the ICJ

1. Was Hungary entitled to abandon works on the project?
2. Was Slovakia entitled to proceed with Variant C?
3. What were the legal effects of Hungary’s notification and termination of the 1977 Treaty?

Answer 1

• Hungary acted unlawfully when it suspended works on Nagymaros.
• Hungary relied on the ‘state of ecological necessity’ and ‘ecological risk’ to justify this act and the ICJ found that Hungary’s concerns were ‘an essential interest of the State’ but the potential environmental problems did not constitute a ‘grave and imminent peril’ which threatened the State’s interests.
• The Court held that the acts of Hungary were not justified by the exception of necessity relying on Article 25 of the 2001 Draft Articles on International Responsibility of States.

Answer 2

• Slovakia was entitled to proceed with building Variant C but acted unlawfully when it began operating the system and diverting the flow of the Danube.
• The ICJ based it reasoning on the law of state responsibility which requires a countermeasure to be proportional to the unlawful act and the Court found that Hungary was deprived of its right to an equitable and reasonable share of the watercourse.
• The Court also referred to the 1997 UN Watercourses Convention – especially Article 5 in support.

Answer 3

• Hungary was not legally entitled to terminate the 1977 Treaty.
• Both parties were found to have acted unlawfully, and the parties were obligated to enter into negotiations to implement the purpose and obligations of the 1977 treaty given the existing circumstances, which include the operation of Variant C.
• The ICJ also provided the option to bring the dispute back to Court if necessary.

Events since 1997

• More than 13 years after the ICJ decision the parties have been unable to reach a settlement.
• The parties started their negotiations regarding implementation of ICJ Judgment in 1997, several milestones have been achieved including:
  – A 2001 Draft Agreement on implementation of the Judgment, several joint Working Groups on legal matters, economic matters and water management and
  – a Strategic Environmental Assessment of the Bratislava-Budapest section of the Danube.
• but the parties are still unable to agree and proceedings are still pending in the ICJ.
• It is suggested that parties are very close to realising that they may need to ask for third party assistance which could include returning to the ICJ to request an additional judgment as provided for in the Special Agreement.
• However this will be complicated because Slovakia has already requested an additional judgement in 1998 although that procedure was suspended.
Conclusions

- Difficult to identify a winner
- Both States still need to find an equitable solution!
- First environmental case before the ICJ
- Scientific evidence presented by the parties ‘not necessary in order to respond to the questions put to it ... to determine which of those points of view is scientifically better founded’
- ICJ recognised equitable and reasonable utilisation as governing principle

Thank you!

www.dundee.ac.uk/water
Appendix A12

Presentation: Procedures for Notification, Prior Consultation and Agreement
The UN Watercourses Convention National Awareness Workshops and In-Depth Training from May 15-16, 2012
Viet Nam

Mekong River Commission Procedures on Notification, Prior Consultation and Agreement: by Sokhem Pech

Approved Procedures and Guidelines

- Procedures for Data and Information Exchange and Sharing, approved 2003
- Guidelines on Implementation of the Procedures for Data and Information Exchange and Sharing
- Procedures for Water Use Monitoring, approved 2003
- Guidelines on Implementation of the Procedures for Water Use Monitoring
- Procedures for Notification, Prior Consultation and Agreement, approved 2003
- Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement
- Procedures for Maintenance of Flows on the Mainstream, approved 2006
- Procedures for Water Quality, approved by the MRC council 26 January, 2011

PNPCA and Its Guidelines

- Preamble
- 1. Definitions of Key Terms
- 2. Objectives
- 3. Principles
- 4. Notification
  - 4.1 Scope of Notification
  - 4.2 Contents and Form/Format of Notification
  - 4.3 Institutional Mechanism for Notification
  - 4.4 Process for Notification
  - 4.5 Timing for Notification
  - 4.6 Absence of Notification
- 5. Prior Consultation
  - 5.1 Scope for Prior Consultation
  - 5.2 Contents and Form/Format of Prior Consultation
  - 5.3 Institutional Mechanism for Prior Consultation
  - 5.4 Process for Prior Consultation
  - 5.5 Timing for Prior Consultation
  - 5.6 Absence of Prior Consultation
- 6. Specific Agreement

PNPCA within equitable use and no-harm context

- Notification 1) intra-basin use and inter-basin diversion on the tributaries, including Tonle Sap; and 2) intra-basin use during the wet season on the mainstream.
- Prior Consultation aiming at arriving at an agreement (within 6 months extendable) for a) Inter-basin diversion from mainstream during wet season; b) Intra-basin use on the mainstream during the dry season; and c) Inter-basin diversion of the surplus quantity of water during the dry season.
- Specific Agreement for any inter-basin diversion project during the dry season from the mainstream.

Key Characteristics

- As a “framework” agreement, it leaves the finer details to subsequent rules, protocols, or procedures to be negotiated and agreed upon by the parties.
- The legal arrangements that preceded the 1995 MA (see e.g. the 1975 Declaration of Principles) required the consent/concurrence of all riparian countries for any (national) projects that affected the Mekong River.
- 1995 MA tries to balance between “no right to veto” and “no unilateral right to develop without due consideration of other rights”.
- Implementation of Article 5 – equitable use - is supported by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) prepared under Article 26.
- The applicable process depends on whether proposed water use is:
  i) on the Mekong mainstream or a tributary;
  ii) in the wet or the dry seasons; and
  iii) intra-basin use or outside of the Mekong basin (inter-basin diversion)

Integrating the Procedures

- Technical Guidelines to support Procedures is being driven by different Programmes with limited integration;
- Not been guided by a consistent view of their contribution to the intent of the 1995 Mekong Agreement (M-WRM, 2012);
- Technical guidelines have much more of the transboundary safeguards and support to support the transboundary cooperation and management;
- The applicable process depends on whether proposed water use is:
  i) on the Mekong mainstream or a tributary;
  ii) in the wet or the dry seasons; and
  iii) intra-basin use or outside of the Mekong basin (inter-basin diversion)

Multi-level engagement process – quite an effort for the MRC to engage, in spite of set-back!!

Is it over yet?

December 2011

??

5/30/2012
**Triggering 1st Prior Consultation**

- On 20 September 2010 the GoL submitted documents to the MRC about the proposed Xayaburi project.
- 22 October 2010 - after checks and clarifications, the submitted documents were circulated and received by all MRC Joint Committee members.
- JC set up a Working Group, which met three times between October 2010 and March 2011.
- MRCS supported the JC by reviewing, analysing and providing technical advice (MRCS Xayaburi Prior Consultation Project Review Report, dated 24 March 2011).
- Addressed the relevant thematic topics of the submitted project.
- Highlighting areas of uncertainty regarding those topics and outlined the need for further investigations to fill knowledge gaps.
- MRJC Joint Committee special session on 19 April 2011 – issues were forwarded to the Ministerial level for further discussion.
- 7–9 December 2011 MRC Council Meeting agreed in principle to implement the outcome of the verbal discussion by the Member Countries’ Prime Ministers at the 3rd Mekong-Japan Summit in Bali, Indonesia, in November 2011.
- A study on sustainable management and development of the Mekong river including impacts by mainstream hydropower projects.

**How have they fared so far?**

**MRCS Technical Review** highlights a number of areas of uncertainty and need for further information to address fully the extent of transboundary impacts and mitigation measures. …
- Significant differences between natural flow rates and expected slow movement within a future reservoir and possible negative impacts;
- Impact on between 23 and 100 species including five in the IUCN Red List of Threatened Species;
- Fish passage proposed design ineffective and gaps in knowledge (number of migratory fish species, their biomass and their ability to pass a dam and reservoir);
- Insufficient baseline data about people’s livelihoods to develop compensation programs;
- Fails to reflect either the MRCS Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin or international best practice for sediment management.

**Development Partners** – Urge Member States to provide the MRC with clear directions as to the next steps for the Xayaburi PNPCA (June 2011).

---

**Xayaburi PROJECT KEY FEATURES**

- Run-of-river hydropower scheme with installed Capacity of 1285 MW;
- 810m long and 32m high; Privately owned and financed for a concession period of 25 years;
- Mean annual production is 7405 GWh or electricity for 3.5 million people 99% to Thailand;
- Spillway will have 10 gates each 19m x 21m for a maximum discharge off 47'500 m3/s;
- Navigation lock, different fish pass facilities;
- Sediment flushing gates incorporated in the power plant;
- Investment cost = about 3.3 Billion USD.

---

**Are we there yet?**

- **Perkins Coie (U.S. law firm):** “Lao PDR’s unilateral action to prematurely terminate the PNPCA process, without allowing its neighbor countries to properly conclude that process, violates the Mekong Agreement, and therefore international law.” (Perkins Coie / S. J. Higgs 2011, p. 2)
- How and when can we consider that obligation has been met??

---

**How have they fared so far?**

Pöyry - one of the world’s leading engineering consulting firms in hydropower:

- On June 8, 2011, advised Laos that it is okay to proceed (full compliance with PNPCA), Laos informed Xayaburi company;
- But in its technical review, proposed significant technical improvements, and numerous studies, monitoring and modeling.

**WWF:** the report “misrepresents the content of the technical sections, provides a conclusion of overall compliance that is contradicted by its own technical analyses....”

International Rivers Lawyers – “Harm caused by Pöyry” - dam will set a precedent for how countries approach other proposed Mekong dams.


---

**The beginning of the beginning or...**

- The then MRCS CEO saw the PNPCA process as a test for (MRC) member countries’ commitment to sustainable development.
- Officials indicate that this process allows discussion of dam projects that have caused tensions in the past, local and regional groups, finds the process flawed.
The Begin or end

- Prior consultation: Timely notification plus additional data and information to discuss and evaluate the impact upon their uses of water and any other affects, which is the basis for arriving at an agreement.
- PC is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians’ rights.
- Guidelines footnote 16 defines obligation of due diligence → intent to reach agreement and no objection from notified parties, or to avoid perceived harm to the rights and interest of the notified parties. → multi-party benefits.
- Agreement under Article 5: A decision of the Joint Committee resulting from prior consultation.

What’s next?

- At least for 6 months for due diligence. JC may decide for an extension (PNPCA). It has been extended since late April 2011, but for how long??
- Will parties recourse to articles 34 and 35, 1995 MA:

  Article 34. Resolution by Mekong River Commission
  --- Whenever any difference or regarding any matters and interpretations of the Agreement and the legal rights of the parties, JC and Council first make every effort to resolve the issue as provided in Articles 18.C and 24.F.

  Article 35. Resolution by Governments
  --- unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments for resolution by
  - negotiation through diplomatic channels within a timely manner, and may communicate their decision to the Council for further proceedings
  - facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation, and
  - thereafter to proceed according to the principles of international law.
  - How long? How will this affect benefit beyond the river basin?

What’s Next? 1995 MA

- Article 7. Prevention and Cessation of Harmful Effects
  - To make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (eco-system) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharges of wastes and return flows.
  - Where one or more States is notified with proper and valid evidence that it is causing substantial damage to one or more riparians from the use of and/or discharge to water of the Mekong River, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8.

- Article 8. State Responsibility for Damages
  - Where harmful effects cause substantial damage to one or more riparians -----, the party(ies) concerned shall determine all relative factors; the cause, extent of damage and responsibility for damages caused by that State in conformity with the principles of international law relating to state responsibility, and to address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means.......
Thank you! Appreciate your comments.
Appendix A13

Handout: Procedures for Notification, Prior Consultation and Agreement
Procedures for Notification, Prior Consultation and Agreement

CONTENT

Preamble

1. Definitions of Key Terms

2. Objectives

3. Principles

4. Notification
   4.1 Scope of Notification
   4.2 Contents and Form/Format of Notification
   4.3 Institutional Mechanism for Notification
   4.4 Process for Notification
   4.5 Timing for Notification
   4.6 Absence of Notification

5. Prior Consultation
   5.1 Scope for Prior Consultation
   5.2 Contents and Form/Format of Prior Consultation
   5.3 Institutional Mechanism for Prior Consultation
   5.4 Process for Prior Consultation
   5.5 Timing for Prior Consultation
   5.6 Absence of Prior Consultation

6. Specific Agreement

7. Final Provisions

Annex I
Annex II (A)
Annex II (B)
Mekong River Commission
Procedures for
Notification, Prior Consultation and Agreement

PREAMBLE

Reaffirming the political will to continue to cooperate and promote in a constructive and mutually beneficial manner in the utilization and development of the Mekong River Basin water and related resources as recognized in the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, signed at Chiang Rai, Thailand on 5 April 1995, hereinafter referred to as “the Mekong Agreement”;

Pursuant to the Mekong River Commission (MRC) Council’s Resolution on the Water Utilization Programme of 18th October 1999, and the decision of the MRC Joint Committee (JC) in February 2003 on the Establishment of the Technical Drafting Group 4 for the Procedures for Notification, Prior Consultation and Agreement, hereinafter referred to as “the Procedures”;

Recognizing the adaptive approach to the development of water utilization rules and the nature of the Procedures which are an integral part of the Rules for Water Utilization and Inter-Basin Diversions;

Reconfirming the commitment to work together to address the protection of the environment and the ecological balance in the Mekong Basin including the prevention of harmful effects and taking actions in emergency situations as covered by other Rules/Procedures approved by the MRC Council;

We hereby approve the following Procedures for Notification, Prior Consultation and Agreement:

1. Definitions of Key Terms

Wet and Dry Seasons: The dates of the start and end of the wet and dry seasons vary throughout the basin due to regional variations. According to the preliminary analyses of the relatively long time series of hydro-meteorological data, the wet season may start during mid-May to mid-June and end from mid-November to mid-December. The MRC JC will decide on the actual dates of the start and the end of the wet and dry seasons, based on analyses by the MRC Secretariat together with the National Mekong Committees (NMCs) of long term mainstream flow data.

Mainstream of the Mekong River: The river flowing through six countries, namely China, Myanmar, Lao PDR, Thailand, Cambodia and Viet Nam to the sea via My Thuan and My Tho in Viet Nam.

Mekong Tributary: A natural stream of the Mekong River System. For the purposes of the present Procedures, a tributary as decided by the JC is a natural stream of the Mekong River System whose flows have a significant impact on the mainstream. This definition is subject to be reviewed and agreed upon after some time of implementation if any concern is raised.
**Water Use/Utilization**: For the purpose of the present Procedures, it means any use of water which may have a significant impact to the water quality or flows regime of the mainstream of the Mekong River System by any member State. The Joint Committee may review and revise this definition from time-to-time as required for effective implementation of the Procedures.

**Inter-Basin Water Diversion**: A diversion of water from the mainstream or a tributary of the Mekong River System into another basin.

**Relevant and Key Definitions from the Mekong Agreement**:

*Agreement* under Article 5: A decision of the Joint Committee resulting from prior consultation and evaluation on any proposed use for inter-basin diversions during the wet season from the mainstream as well as for intra-basin use or inter-basin diversions of these waters during the dry season. The objective of this agreement is to achieve an optimum use and prevention of waste of the waters through a dynamic and practical consensus in conformity with the Rules for Water Utilization and Inter-Basin Diversions set forth in Article 26.

*Notification*: Timely providing information by a riparian to the Joint Committee on its proposed use of water according to the format, content and procedures set forth in the Rules for Water Utilization and Inter-Basin Diversions under Article 26.

*Prior consultation*: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion under Article 26, that would allow the other member riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other affects, which is the basis for arriving at an agreement. Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians’ rights.

*Proposed use*: Any proposal for a definite use of the waters of the Mekong River system by any riparian, excluding domestic and minor uses of water not having a significant impact on mainstream flows.

2. **Objectives**

The objectives of the Procedures are:

a. To provide steps for the MRC member States to support the establishment of the Rules for Water Utilization and Inter-Basin Diversions.

b. To promote better understanding and cooperation among the MRC member countries in a constructive and mutually beneficial manner to ensure the sustainable development, management and conservation of the water and related resources of the Mekong River Basin;

3. **Principles**
The Procedures shall be governed by the following guiding principles:

a. Sovereign equality and territorial integrity;
b. Equitable and reasonable utilization;
c. Respect for rights and legitimate interests;
d. Good faith; and
e. Transparency.

4 Notification

4.1 Scope of Notification

4.1.1 In accordance with Article 5 of the Mekong Agreement, notification on any proposed use stipulated in 4.1.2 shall be timely submitted to the MRC JC consistent with the format and content, schedules and principles prescribed in the Procedures, as appeared in Annex I.

4.1.2 Notification requirement and procedures shall be applied to the following proposed uses:

a. intra-basin use and inter-basin diversion on the tributaries, including Tonle Sap; and
b. intra-basin use during the wet season on the mainstream;

4.2 Content and Form/Format of Notification

4.2.1 Content

The Notification shall include feasibility study report, implementation plan, schedule and all available data.

4.2.2 Form/Format

To facilitate the notification formulation, the form/format for notification is provided as Annex I of the Procedures.

4.3 Institutional Mechanism for Notification

Mechanism for handling Notification under the Procedures shall involve National Mekong Committees (NMCs) and MRC’s bodies with their respective roles/functions, responsibilities which are as follows:

4.3.1 The National Mekong Committee (NMC)

The roles/functions/responsibilities of each NMC under the Procedures are:
a. To inform the relevant line agencies of the scope, content and form for Notification of a proposed use as stipulated in 4.1 of the Procedures;

b. To review and check Notification received from line agencies concerned to ensure that data and information for Notification are complete and consistent with the content and form/format;

c. To assemble, record and transmit the Notification with appropriate documents to the MRC Secretariat for its submission to the MRC JC and transmission to the other NMCs.

4.3.2 The MRC Secretariat

The roles/functions/responsibilities of the MRC Secretariat under the Procedures are:

a. To receive, check for completeness, record and make files on the Notifications according to the form/format as appeared in Annex I;

b. To submit the Notification to the MRC JC and copy to each other NMCs;

c. To enter the relevant data and information into the MRC Secretariat Data and Information System; and

d. To place any comments on a Notification in the file, and submit to the MRC JC.

4.3.3 The MRC Joint Committee

The roles/functions/responsibilities of the MRC JC under the Procedures are to acknowledge any Notification submitted to it and take note of the comment, if any, submitted through the MRC Secretariat;

4.4 Process for Notification

Notification shall be transmitted by the relevant NMC to the MRC JC through the MRC Secretariat in conformity with their respective roles/functions/responsibilities as stipulated in 4.3 of the Procedures.

4.5 Timing for Notification

Notification of proposed use shall be transmitted to the MRC JC in a timely manner prior to implementation.

4.6 Absence of Notification
In case that the Notification has not been provided, the MRC JC will request the relevant NMC to fulfill its duties/responsibilities as provided in 4.3.1 of the Procedures.

5. Prior Consultation

5.1 Scope of Prior Consultation

Taking into account Article 5 of the Mekong Agreement and aiming at arriving at an agreement, the following proposed uses shall be subject to Prior Consultation:

a. Inter-basin diversion from mainstream during wet season;

b. Intra-basin use on the mainstream during the dry season; and

c. Inter-basin diversion of the surplus quantity of water during the dry season.

5.2 Content and Form/Format of Prior Consultation

5.2.1 Content

In addition to the data and information required for Notification, the notifying State shall timely provide the MRC JC with available and additional technical data and information on its proposed use of waters for an evaluation of impacts by the other riparian States, as appeared in Annex II (A).

5.2.2 Form/Format

The form/format and information checklist to be used by a notifying country is set out in Annex II (A).

5.2.3 Form/Format for Reply by Notified State(s)

The form/format to be used by the notified State(s) to reply to the proposed use is set out in Annex II (B).

5.3 Institutional Mechanism for Prior Consultation

The Institutional Mechanism for handling the Prior Consultation process under the Procedures shall involve the NMCs and the MRC’s bodies with their respective roles/functions/responsibilities which are as follows:

5.3.1 The National Mekong Committees (NMCs)

The roles/functions/responsibilities of each NMC under the Procedures are:
a. To inform the relevant line agencies of the scope, content and form/format required for Prior Consultation of a proposed use covered by the Procedures;

b. To receive, review and check documentation for any Prior Consultation submitted to it to ensure that it is complete and consistent with the content and form/format;

c. To assemble and transmit the proposal with appropriate documents to the MRC Secretariat for their submission to the MRC JC and transmission to the other NMCs;

d. To facilitate any consultations, presentations, evaluation and site visit as requested by the MRC JC for the proposed use; and

e. To record and transmit copies to respective line agencies or party(ies) making the proposal for a definite use of water through the Prior Consultation process of any comments or response received from the MRC Secretariat.

5.3.2 The MRC Secretariat

The roles/functions/responsibilities of the MRC Secretariat under the Procedures for Prior Consultation are:

a. To receive, check for completeness, record and make a file of the documents for Prior Consultation according to the form/format in Annex II (A) and replies from notified States according to the form/format in Annex II (B);

b. To submit the documents for Prior Consultation for the proposed use to the MRC JC and copy to each other NMCs;

c. To review, analyze and provide technical advice to the MRC JC as may be requested by it;

d. To supply available additional data and information and facilitate the meetings as requested by member State(s) concerned;

e. To provide available technical support for any evaluation. If required, the MRC JC may set up fact-finding team supported by the Secretariat to visit the project site; and

f. To enter the relevant data and information into the MRC Data and Information System.

5.3.3 The MRC Joint Committee
The roles/functions/responsibilities of the MRC JC under the Procedures for Prior Consultation are:

a. To acknowledge and review documents of any Prior Consultation submitted to it through the MRC Secretariat;

b. To review any comment submitted to it by any member State;

c. To carry out consultation on the proposed use among parties concerned with the support of the MRC Secretariat. The MRC JC, under Rule 4 of its Rules of Procedures, set up a Working Group to assist in the Prior Consultation process aiming to arriving at an agreement on the proposed use.

d. To make every effort to address any matters that may arise during the process of Prior Consultation.

e. To verify and unanimously confirm availability of surplus quantity of water on the mainstream in accordance with criteria approved by the MRC Council under Article 26 of the Mekong Agreement should there be a proposed use for inter-basin diversion in the dry season.

f. To verify and unanimously confirm availability of surplus quantity of water on the mainstream in accordance with criteria approved by the MRC Council under Article 26 of the Mekong Agreement should there be a proposed use for inter-basin diversion in the dry season.

5.3.4 The MRC Council

The function of the MRC Council under the Procedures is in accordance with the stipulation of the Mekong Agreement.

5.4 Process for Prior Consultation

5.4.1 Submission of documents for prior consultation

Documents for Prior Consultation on any proposed use specified in 5.2.1 and Annex II (A) shall be submitted by the NMC of the notifying State(s) to the MRC JC through the MRC Secretariat in a timely manner. The MRC Secretariat shall transmit copies of the documents to other member State(s) for their evaluation and reply.

5.4.2 Evaluation and Reply to proposed use

Upon receiving the documents from the notifying State(s) submitted to the MRC JC through the MRC Secretariat, the other member(s) should evaluate the proposed use and reply to the MRC JC through the MRC Secretariat according to the form/format in Annex II (B).
If necessary, through the MRC JC, the notified State(s) may request additional information, a consultation or presentation, and/or a field visit to the project site in order to evaluate the possible impacts of the proposed use and any other affects on their rights and to facilitate the aim of reaching an agreement by the MRC JC.

During the evaluation process period, the notifying State(s) shall provide, if requested, available data and information and facilitate an appropriate evaluation. If necessary, the MRC JC may direct the MRC Secretariat or appoint a working group or technical advisory team to assist in the evaluation of the proposed use and possible impacts on existing uses and rights of other riparian State(s).

5.4.3. Decision by MRC JC

The MRC JC shall aim to arriving at an agreement on the proposed use and issue a decision that contains the agreed upon conditions. That decision shall become part of the record of the proposed use and of the record of the use of the waters when commenced.

The notifying State(s) shall not implement the proposed use without providing the opportunity of the other member States to discuss and evaluate the proposed use. The MRC JC shall take note of replies and place in the record for the proposed use of any concerns or reservations made by the notified State(s).

5.5 Timing for Prior Consultation

5.5.1 The timeframe for Prior Consultation shall be six months from the date of receiving documents on Prior Consultation.

5.5.2 If necessary, an extended period shall be permitted by the decision of the MRC JC.

5.6 Absence of Prior Consultation

In case that the required documents for Prior Consultation has not been provided, the MRC JC will request the relevant NMC to fulfill its duties/responsibilities as provided in 5.2.1 of the Procedures.

6. Specific Agreement

Any inter-basin diversion project during the dry season from the mainstream shall be agreed upon by the MRC JC through a Specific Agreement for each project prior to any proposed diversion. Such a Specific Agreement, signed/approved by all members of the MRC JC, sets out agreed terms and conditions such as timing, quantity of diversion, etc. While the format and content of the Specific Agreement shall be established by the MRC JC on a case-by-case basis, the format and content for Notification and Prior Consultation shall apply.
7. Final Provisions

a. The Annexes shall form an integral part of the Procedures.

b. Reporting to the MRC Joint Committee

The MRC Secretariat will report annually to the MRC JC on relevant matters regarding the implementation of the Procedures, including necessary recommendations.

c. Amendments to the Procedures

Any amendment or revision to the present Procedures shall be approved by the MRC Council.

d. Entry into Force

The Procedures shall take effect among the member States on the date of the approval of the MRC Council.

Approved by the MRC Council on the thirtieth day of November of the year two thousand and three at its Tenth Meeting in Phnom Penh, Cambodia.
Mekong River Commission
Procedures for
Notification, Prior Consultation and Agreement
Form/Format of Notification

1. Notifying State: -----------------------------------------------------------------------------

2. Date of submission: ---------------------------------------------------------------------------

3. Notifying Ministry/Agency (name, address, telephone, fax, e-mail): ---------------

4. Contact person/address (name, address, telephone/fax/e-mail): ------------------------

5. Name of the project: ------------------------------------------------------------------------

6. Location of the project: --------------------------------------------------------------------

7. Nature of the proposed project:
   a) On tributary:
      i) Intra-basin uses
      ii) Inter-basin diversion
   b) On the mainstream:
      i) Intra-basin use during wet season

8. Purpose of the proposed project: -----------------------------------------------------------

9. Expected date of the implementation:
   a) Date for starting the construction ---------------------------------------------------------
   b) Date for finishing the construction ---------------------------------------------------------
   c) Date for the operation -----------------------------------------------------------------------

10. Duration of and timing for water use: --------------------------------------------------------

11. Description of the project: (i.e.: scope, scale, map, type, quantity, capacity and characteristic,
    etc.) -----------------------------------------------------------------------------------------

12. Attached documents: ---------------------------------------------------------------------------
Annex II (A)

Mekong River Commission
Procedures for
Notification, Prior Consultation and Agreement
Form/Format for Prior Consultation

1. **Proposing State(s):** 

2. **Date of submission:**

3. **Proposing Ministry(ies)/Agency(ies) (Name, mail/e-mail address, telephone, fax):**

4. **Contact person/facilitator (Name, mail/e-mail address, telephone, fax):**

5. **Name of the project:**

6. **Location of the project:**

7. **Nature of the proposed use:**
   - Inter-basin diversion from the mainstream during wet season
   - Intra-basin use on the mainstream during dry season
   - Inter-basin diversion of the surplus water from the mainstream during dry season

8. **Purpose of the proposed use:**

9. **Expected date for the implementation:**
   a) Date for starting the construction
   b) Date for finishing the construction
   c) Date for the operation

10. **Duration and timing for the utilization of the proposed use of water:**

11. **Description of the project** (scope, scale, site, type, quantity, capacity, and characteristic, etc.):

12. **Observation or comment:**

13. **Attached available data and information and/or documents, e.g. summary of feasibility study (FS), initial environmental evaluation (IEE), etc.:**
Mekong River Commission
Procedures for
Notification, Prior Consultation and Agreement
Form/Format for Reply to Prior Consultation

1. Replying State(s): -------------------------------------------------------
2. Date of reply: ----------------------------------------------------------
3. Replying Ministry(ies)/Agency(ies) (Name, mail/e-mail address, telephone, fax): -------
4. Contact person/facilitator (Name, mail/e-mail address, telephone, fax): --------------
5. Name of the proposed use/project: ----------------------------------------
6. Location of the proposed use: --------------------------------------------
7. Nature of proposed use:
   Inter-basin diversion from the mainstream during wet season
   Intra-basin use on the mainstream during dry season
   Inter-basin diversion of the surplus water from the mainstream during dry season
8. Date of receipt of the documents: -----------------------------------------
9. Reply to proposed use: --------------------------------------------------
Appendix A14

Handout: Guidelines for Implementing the Procedures for Notification, Prior Consultation and Agreement
Mekong River Commission
Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement

Pursuant to the Mekong River Commission (MRC) Council Resolution of 18 October 1999 on the Water Utilization Programme and its subsequent approval of the Procedures for Notification, Prior Consultation and Agreement on 13 November 2003 at its 10th Meeting, the MRC Joint Committee (JC) does hereby approve the following Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement (G-PNPCA) as a complimentary and supplementary document to the PNPCA. The purpose of these Guidelines is to facilitate the implementation of the PNPCA as well as to address issues or points of the PNPCA requiring clarification or elaboration and they are to be applied in conjunction with the PNPCA.

I. National Mekong Committee’s (NMC) preparation and submission of Notification, Prior Consultation and Agreement (NPCA) under PNPCA

A. Notification

1. Timely submission of notification by NMC to the MRC Joint Committee “prior to implementation” is required by Sections 4.1.1, 4.4 and 4.5.

Time of submission should be flexible, acknowledging that the MRC Secretariat requests up to one month in advance of intended implementation to allow for internal processing and distribution to the other member States.

2. Format and content of notification submission

The format/content of the submission is described in Section 4.2 using the form/format as set out in Annex I of the PNPCA.

---

1 It is understood that these and other MRC guidelines should not be “stand-alone” documents and must be read in conjunction with respective Procedures/Rules.
2 If some issues are raised that are not addressed in the PNPCA or these Guidelines, such as clarification or application of the terms “wet and dry season”, “water use/utilization” and “Mekong Tributary”, these would be resolved by the MRC Joint Committee on a case-by-case basis.
3 Notification is addressed in Section 4 of PNPCA. Only two issues need clarification as set out in the G-PNPCA – “timely submission” and “content of submission”; the other portions of Section 4 are self-explanatory.
4 The section numbers used in the G-PNPCA are as they appear in the PNPCA.
5 In actual practice since the first “notification” was submitted in November 1995 to the present, most all submissions were made 2-6 months in advance of the start-up dates of the proposed use project.
6 Section 4.2.1 identifies the content to “include feasibility study report, implementation plan, schedule and all available data.” with Section 4.2.2 providing the form/format in Annex I.
Submission is to be provided in English. Regarding the inclusion of the “feasibility study report”, a summary of the study and only relevant portions are acceptable as being sufficient and practical. The data required for Notification shall be “relevant available data”.

3. Roles/functions/responsibilities of the NMCs

The roles/functions/responsibilities to be followed by NMCs are set out in Section 4.3.1 include informing the relevant line agencies of notification application to a proposed use and requirements; reviewing and checking the Notification prepared by the line agencies for compliance with Sections 4.1 and 4.2; and, assembling, recording and transmitting the Notification and documentation to the MRC Secretariat on behalf of the MRC Joint Committee as specified in Section 4.4.

The NMCs may be requested by the MRC Joint Committee to provide additional assistance or data and information as may be asked for by members of the MRC Joint Committee.

---

7 In actual practice since the first “notification” submitted in November 1995 to the present, all submissions have been in English

8 It has been agreed that submissions should only include summaries of relevant matters from the feasibility studies, etc., (partly due to translation costs of entire reports). It was noted that most feasibility study reports already include an EIA or IEE; and in large-scale projects the EIA is prepared in a separate document. It was also noted that the format and content of the feasibility study conducted in one country may be different from another, and feasibility studies carried out for government or local projects may be different from that prepared for international support projects. A practical understanding of the phrase “and all available data” in Section 4.2.1 is that an effort be made to provide sufficient “relevant” data, meaning the data necessary for the notified parties to be informed of and to understand the proposed project and use of water to determine impacts upon them, e.g., data relevant to the notified parties, not the notifying party. If additional information or data is requested by a notified party(ies), it will be provided by the notifying party(ies) in the language of the notifying party if that information or data is not available in English. If a translation is requested by the notified party(ies), the cost will be borne by the requesting party(ies). If the Joint Committee considers that these Guidelines are inconsistent with the PNPCA, it is suggested that the PNPCA Section 4.2.1 be amended i.e. “1. summaries of the feasibility study and other relevant reports, and 2. relevant available data”.

9 Section 4.3 addresses the “Institutional Mechanism for Notification”. Aside from the brief clarification of the role of the NMCs noted in these Guidelines, Sub-sections 4.3.1, 4.3.2, and 4.3.3 are clear and need no further explanation. The MRC Secretariat internal procedures for processing submission under the PNPCA provide details on handling notification and prior consultation submissions within the MRC Secretariat and the data and records maintained. Sections 4.4, 4.5 and 4.6 are self-explanatory and need no further elaboration except as noted in Para. 1 above.

10 This is the first step in implementation of the PNPCA for types of proposed uses subject to notification. The responsibility of the NMCs is to inform relevant line agencies of what proposed uses and projects within their respective jurisdiction requires notification.

11 The primary responsibility for insuring the completeness of notification submissions to the MRC rests with the NMCs. After meeting requirements of Sections 4.1 and 4.2, the documentation would be submitted to MRC Secretariat.

12 By transmitting notification to MRC Joint Committee through the MRC Secretariat, the process of the NMCs under notification is completed. It does imply that NMCs put into place a systematic record of the Notifications at the NMC. A similar record system should be made of submissions made by other parties and copied to the NMC. The MRC Secretariat internal register for notifications and prior consultations will contain a systematic computerized database record of all notifications submitted; this or a modified system could be adapted by the NMCs for their internal use.
B. Prior Consultation

1. **Timely submission by NMC to the MRC Joint Committee through the MRC Secretariat of the prior consultation is required by Sections 5.2.1, 5.4.1 and 5.5. The submission will be subsequently provided by the MRC Secretariat to other member States for their evaluation and reply.**

Section 5.5.1 of the PNPCA allows at least 6 months from the date of receiving the documents for member States to review and carry out their “due diligence”. Therefore submission to the MRC Joint Committee must be at least 6 months prior to commencement of project implementation, preferably greater, acknowledging that the MRC Secretariat requests up to one month in advance of intended implementation to allow for internal processing and distribution to the other member States.

2. **Format and content for prior consultation submissions is described in Section 5.2.2.**

In addition to the same documentation and format in English as for notification described in I.A.2 above, submissions for prior consultation shall include:

a) Summary of the impact assessment documents, i.e. EIA or IEE; and,

b) Additional available technical data to enable the notified parties to carry out their

---

13 Types of proposed uses requiring prior consultation are set out in Section 5.1 as inter-basin diversions from the mainstream during the wet season, intra-basin uses from the mainstream during the dry season, and inter-basin diversions of surplus quantities of water during the dry season. No further details on the types of proposed uses under prior consultation category are necessary. Since there have been no submissions under prior consultation category as of the date of signing of these Guidelines, This Section 5 of the PNPCA should be intensively reviewed after several submissions have been made to determine its practicality and in meeting the principles set out in Section 3.

14 Due diligence is an internationally recognized legal standard of “appropriate carefulness” to limit liability or determine a potential cause harm to one’s rights and interest; it is the degree of care that a prudent person or state would exercise under the same or similar circumstances.

15 In effect, a prior consultation submission should at a minimum be at least 6 months before intended commencement of project implementation taking into account that the MRC Secretariat needs up to one month for its internal process. In actual practice, it is likely that projects for proposed water uses falling within the “prior consultation” category would be submitted far in advance of the intended start-up date because they are long-term large scale projects requiring considerable technical, economic, social and impact analyses (inter-basin diversions from mainstream in the wet season, intra-basin water uses during the dry season, and inter-basin diversion in the dry season of surplus waters).

16 This includes documentation required for notification and “available and additional technical data and information on its proposed use of waters for an evaluation of impacts by other riparian States” using the form/format set out in Annex II of the PNPCA. The documentation content for a prior consultation submission is more extensive than documentation required for notification. The rationale is that prior consultation category projects are more likely to have a significant impact on the mainstream of the Mekong River and should afford the other member States the opportunity to evaluate and comment on the proposed use, carry out their obligation to do “due diligence” to assess any adverse impacts upon their rights and interests as riparian States, and provide their reply to the MRC Joint Committee with the intent that an agreement will be reached and there is no objection to the project from notified parties or to avoid perceived harm to the rights and interests of the notified parties. The intent of the 1995 Mekong Agreement was also to afford the parties the opportunity in reaching an agreement in extending the multi-party benefits of proposed projects to achieve an optimum use and prevention of waste of water (note definition of “Agreement” in Chapter II, 1995 Mekong Agreement). This differs from the “specific agreement addressed in Section 6 of the PNPCA.”
evaluation and reply as described in Section 5.4.2 of the PNPCA.

3. **Roles/functions/responsibilities of NMCs for Prior Consultation**

The roles/functions/responsibilities of NMCs are set out in Section 5.3.1 and need no further clarification or elaboration.\(^{17}\)

**C. Specific Agreement**

The member State(s) which has/have the proposed inter-basin project during the dry season from the mainstream shall prepare the necessary request and documentation using the format and content of the prior consultation process for such a project and submit it to the MRC Joint Committee through the MRC Secretariat. The process initially applied would be that the country or countries would notify the MRC Joint Committee by letter and attached documentation requesting the MRC Joint Committee to initiate, on a case-by-case basis, the consultation process leading to a Specific Agreement. The MRC Joint Committee may request the notifying member State(s) for any assistance and facilitation during its deliberations in arriving at a Specific Agreement.

II. **MRC Secretariat roles and internal procedures**\(^ {18}\)

Provision of the PNPCA concerning the roles and functions of the MRC Secretariat on any submission under the Procedures is set out in the MRC Secretariat internal procedures.

MRC Secretariat shall prepare internal procedures relating to receiving, processing, recording and transmitting notification and prior consultation submissions and facilitating the MRC Joint Committee in carrying out its tasks as set out in Sections 4.3.3, 4.6, 5.3.3, 5.4.2, and 5.6, and reporting annually to the MRC Joint Committee on the PNPCA implementation process as set out in Section 7.b.

The MRC Secretariat will carry out further instructions or directives of the MRC Joint Committee to assist and facilitate implementation of the PNPCA in accordance with, but not limited to, the roles/functions/responsibilities listed in the PNPCA, and take a pro-active role to assist the MRC

---

\(^{17}\) As noted in footnote 10 above, this is also the first step in implementation of the PNPCA for types of proposed uses subject to prior consultation. The responsibility of the NMCs to inform relevant line agencies of what proposed uses and projects within their respective jurisdiction will require prior consultation. The primary responsibility for insuring the completeness of prior consultation submissions to the MRC Joint Committee rests with the NMCs. Only after meeting the requirements of Sections 5.1 and 5.2 should the documentation be transmitted to the MRC Secretariat. The process of prior consultation differs from notification in that other member States have the right and opportunity to comment on a proposed use under this process, and to request through the MRC Joint Committee: additional data and information, consultations with and presentations by the member State(s) proposing the use, evaluations by the notified State(s) or MRC Secretariat, and site visits. For these activities and other assistance, the respective NMC will respond to the request from the MRC Joint Committee. Since the prior consultation process may extend over a considerable period of time, the respective NMC would be actively involved until the MRC Joint Committee determines the submission complete, all parties satisfied with the proposed use, and a consensus or an agreement is reached by the MRC Joint Committee.

\(^{18}\) The detailed process to be followed internally by the MRC Secretariat for undertaking its roles/functions/responsibilities in sections 4.3.2 and 5.3.2 is set out in a separate document adopted by the MRC Secretariat and periodically reviewed and revised to assure optimum support to the MRC Council and Joint Committee in implementing the PNPCA.
Joint Committee and member States in the overall implementation of the 1995 Mekong Agreement.

III. MRC Joint Committee Roles and Functions for NPCA

The MRC Joint Committee will play roles and undertake functions under the PNPCA with the assistance of the MRC Secretariat and NMCs.

The MRC Joint Committee will decide the process for notification or prior consultation for the joint project shared by two or more member States.

Done on 31st August 2005 at the 22nd Meeting of the MRC Joint Committee in Vientiane, Lao People’s Democratic Republic.

Member of the MRC Joint Committee for the Kingdom of Cambodia

Member of the MRC Joint Committee for the Lao People’s Democratic Republic

Member of the MRC Joint Committee for the Kingdom of Thailand

Member of the MRC Joint Committee for the Socialist Republic of Viet Nam
Appendix A15

Presentation:
Simulation Exercise
1. Why Negotiate?

- Most common approaches used to make decisions and manage disputes – issues of law, politics, facts and science etc...
- Take two to tango!! 
  ➢ to identify issues about which they differ, educate each other about their needs and interests, generate possible settlement options and bargain over the terms of the final agreement.

Importance in the context of international water law

- To prevent and resolve many serious water problems;
- pave a way for cooperation in other domains, such as politics, economics, and environmental conservation,
- Negotiation and transboundary water agreements can help countries move away from view that water conflicts are a zero-sum game.
- If negotiation is successful, each party will benefit.

Key Characteristics (2)

- 1995 MA tries to balance between "no right to veto" and "no unilateral right to develop without due consideration of other rights".
- The legal arrangements that preceded the 1995 MA (see e.g. the 1975 Declaration of Principles) required the consent/concurrence of all riparian countries for any (national) projects that affected the Mekong River.
- Implementation of Article 5 – equitable use - is supported by the Procedures for Notification, Prior Consultation and Agreement (PNPCA) prepared under Article 26.
- The applicable process depends on whether proposed water use is:
  (i) on the Mekong mainstream or a tributary;
  (ii) in the wet or the dry seasons; and
  (iii) intra-basin use or outside of the Mekong basin (inter-basin diversion)

Conditions for productive negotiations

- Identifiable parties who are willing to sit down at the bargaining table is important if productive negotiations are to occur (to commit to good faith bargaining).
- Interdependence - the participants must be dependent upon each other to have their needs met or interests satisfied - each other’s goodwill, or restraint of negative action, for their interests to be satisfied. If one party can get his/her needs met without the cooperation of the other, there will be little impetus to negotiate.
- Readiness to negotiate - psychologically prepared to talk; adequate information is available; or a negotiation strategy has been prepared.
- Means of influence or leverage - means to influence the attitudes and/or behavior: power to threaten or inflict pain or undesirable costs, providing needed information, seeking the advice of experts, appealing to influential associates of a party, exercising legitimate authority or providing rewards.

Conditions for productive negotiations (2)

- Agreement on the issues and some interests - Parties must have enough issues and interests in common to commit themselves to a common decision-making process.
- Unpredictability of outcome from other means - if by going to court, a person has a 50/50 chance of winning, he or she may decide to negotiate rather than take the risk of losing.
- A sense of urgency and deadline - External constraints include: court dates, imminent executive or administrative decisions, or predictable changes in the environment. Internal constraints may be artificial deadlines selected by a negotiator to enhance the motivation of another to settle.
- A willingness to compromise - willingness to have less than 100 percent of needs or interests satisfied, may be necessary for the parties to reach a satisfactory conclusion. Settlements look good regarding substance, and possible to implement - able to establish a realistic and workable plan to carry out their agreement if the final settlement is to be acceptable.
- External factors favorable to settlement - views of associates or partners, the political climate, public opinion, or economic conditions.
- Resources to negotiate - interpersonal skills necessary for bargaining and, where appropriate, the money and time to engage fully in procedure dialogue. Inadequate or unequal resources may block the initiation of negotiations or hinder settlement.
Participants

Prepare

How and when we can consider

Based

Although

Please

States are to take “all appropriate measures”

On June

How have they fared so far?

MRCS Technical Review highlights a number of areas of uncertainty and need for further information to address fully the extent of transboundary impacts and mitigation measures. ...

- significant differences between natural fast flows and expected slow movement within a future reservoir and possible negative impacts;
- impact on between 23 and 100 species including five in the IUCN Red List of Threatened Species;
- fish passage proposed design ineffective and gaps in knowledge (number of migratory fish species, their biomass and their ability to pass a dam and reservoir);
- insufficient baseline data about people’s livelihoods to develop compensation programs;
- fails to reflect either the MRCS Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin or international best practice for sediment management.

need for an independent review against international safety standards.

ICEM, 2011 – report for MRC on Strategic Environmental Assessment of mainstream dam projects – recommended the moratorium for 10 years to study more in detail the impacts of these dams.

Development Partners – Urge Member States to provide the MRC with clear directions as to the next steps for the Xayaburi PNPCA (June 2011).

How have they fared so far?

Pöyry - one of the world’s leading engineering consulting firms in hydropower:

- On June 8, 2011, advised Laos that it is okay to proceed (full compliance with PNPCA), Laos informed Xayaburi company;
- But in its technical review, proposed significant technical improvements, and numerous studies, monitoring and modeling.

WWF: the report “misrepresents the content of the technical sections, provides a conclusion of overall compliance that is contradicted by its own technical analyses…..”

International Rivers Lawyers – “Harm caused by Pöyry” - dam will set a precedent for how countries approach other proposed Mekong dams.


Are we there yet?

- Perkins Coie (U.S. law firm):
  “Lao PDR’s unilateral action to prematurely terminate the PNPCA process, without allowing its neighbor countries to properly conclude that process, violates the Mekong Agreement, and therefore international law.” (Perkins Coie / S. J. Higgs 2011, p. 2)

- How and when we can consider that obligation has been met??

Assignment

- Assuming all four countries are not parties to an applicable treaty, their rights and obligations are governed by customary international law.

- Although not yet in force, this Convention is generally regarded as reflecting the fundamental rules of customary international law applicable in the field.  
  - States are to use an international watercourse in a way that is “equitable and reasonable use”.
  - This rule requires each riparian state to ensure, in an ongoing manner, that its use is equitable and reasonable vis-à-vis other riparian states.
  - What is equitable and reasonable in any given case may be determined only by taking into account all relevant factors and circumstances.
  - States are to take “all appropriate measures” - due diligence and good faith - to prevent causing “significant harm” to co-riparian states.
  - States are to “consult” and provide prior, “timely notification” along with relevant technical information (ESIA and mitigation plan etc.).

Plenary discussion:

- each delegation presents their findings on question 1 and 2;
- discussion and question;
- each delegation present its argument;
- other delegation may wish to react to that argument;
- Conclusion and clarification by resource persons.
Thank you! Appreciate your comments.

Pech Sokhem,
Chair, M-POWER S.
Manager, International Development Group,
Senior Governance Specialist,
Hatfield Consultants Partnership, Suite 200, 850 Harbourside Drive, North Vancouver, British Columbia, Canada, V7P 0A3
Office Tel: +1.604.926.3261
Office Fax: +1.604.926.5389
Cell: +1.778.318.6199
Email: spech@hatfieldgroup.com
Appendix A16

Handout:
Simulation Exercise
Simulation Exercise

Successfully Negotiating
Mutual Gains Agreements for International Watercourses

Negotiation is one of the most common approaches used to make decisions and manage disputes. Negotiation is a problem-solving process in which two or more people voluntarily discuss their differences and attempt to reach a joint decision on their common concerns. Negotiation requires participants to identify issues about which they differ, educate each other about their needs and interests, generate possible settlement options and bargain over the terms of the final agreement.

Negotiation is the principle way that people redefine an old relationship that is not working to their satisfaction or establish a new relationship where none existed before. Because negotiation is such a common problem-solving process, it is in everyone’s interest to become familiar with negotiating dynamics and skills, as well as with basic concepts of negotiation and to present procedures and strategies that generally produce more efficient and productive problem solving.

Negotiation is important in the context of international water law. International watercourses can be either a source of cooperation or conflict. Cooperation on transboundary water issues catalyzes regional cooperation which is important to the resolution of many serious water problems. This can then pave a way for cooperation in other domains, such as politics, economics, and environmental conservation. Negotiation and transboundary water agreements can help countries move away from the detrimental view that water conflicts are a zero-sum game. If negotiation is successful, each party will benefit.

Conditions For productive negotiations:
The following conditions generally make success in negotiations more likely:

1. **Identifiable parties who are willing** to sit down at the bargaining table is important if productive negotiations are to occur (to commit to good faith bargaining).

2. **Interdependence** - the participants must be dependent upon each other to have their needs met or interests satisfied - each other’s goodwill, or restraint of negative action, for their interests to be satisfied. If one party can get his/her needs met without the cooperation of the other, there will be little impetus to negotiate.

3. **Readiness to negotiate** - psychologically prepared to talk; adequate information is available; or a negotiation strategy has been prepared.

4. **Means of influence or leverage** - means to influence the attitudes and/or behavior: power to threaten or inflict pain or undesirable costs, asking thought provoking questions, providing needed information, seeking the advice of experts, appealing to influential associates of a party, exercising legitimate authority or providing rewards.
5. **Agreement on the issues and some interests** - Parties must have enough issues and interests in common to commit themselves to a common decision-making process.

6. **Will to settle** - For negotiations to succeed, participants have to want to settle.

7. **Unpredictability of outcome from other means** - if by going to court, a person has a 50/50 chance of winning, he or she may decide to negotiate rather than take the risk of losing. Negotiation is more predictable than court because if negotiation is successful, the party will at least win something.

8. **A sense of urgency and deadline** - External constraints include: court dates, imminent executive or administrative decisions, or predictable changes in the environment. Internal constraints may be artificial deadlines selected by a negotiator to enhance the motivation of another to settle.

9. **A willingness to compromise** - willingness to have less than 100 percent of needs or interests satisfied, may be necessary for the parties to reach a satisfactory conclusion. Settlements look good regarding substance, and possible to implement - able to establish a realistic and workable plan to carry out their agreement if the final settlement is to be acceptable.

10. **External factors favourable to settlement** - views of associates or partners, the political climate, public opinion, or economic conditions.

11. **Resources to negotiate** - interpersonal skills necessary for bargaining and, where appropriate, the money and time to engage fully in procedure dialogue. Inadequate or unequal resources may block the initiation of negotiations or hinder settlement.

---

**Negotiation of a make-believe Xayabury Dam**

The total hydropower potential of the Mekong River Basin is estimated to be 53,000 MW, with about 30,000 MW technically available in the four lower Mekong countries of Cambodia, Lao PDR, Thailand and Viet Nam (MRC, 2010, and M-POWER, 2010). At present, only about 19.7 percent of the total estimated hydropower potential in the Sub-region (10 percent for Lower Mekong) has been developed. By all estimates, Yunnan Province accounts for the largest share of the hydropower potential, followed by Myanmar, Lao and Viet Nam (Pech and Sunada, 2006b, ICEM, 2010, MRC, 2010b).

Lower Mekong mainstream hydropower proposals are not new. During the 1960s and 1970s, the Mekong Committee drew up plans for a cascade of seven large-scale dams for the lower mainstream. Then in 1994, the Mekong Secretariat released a study proposing a series of dams in 12 locations from Pak Beng, Oudomxay Province in Laos to Tonle Sap in Cambodia. The projects were identified without consideration of an appropriate regional planning environment.

---

1 The estimates of the hydropower potentials in the Mekong Basin/Region vary, depending on the applied feasibility criteria. The actual social, economic and environmental feasibility may be much lower.
within which they would need to sit. Now various companies have picked up and developed those and similar concepts and submitted proposals to the government power regulators. 12 hydropower schemes have been proposed for the Lao, Lao-Thai and Cambodian reaches of the Mekong mainstream. Ten proposals fall within Laos and two within Cambodia and Ten of the proposed projects would dam the whole of the river channel – the two exceptions are Don Sahong, which dams one channel of the mainstream, and Thakho which is a river diversion scheme.

On May 24, 2007, the Government of Laos signed the MOU with Ch. Karmchang Public Company of Thailand to develop the $3.8-billion Xayabury Dam. The proposed Xayaburi hydropower project in Lao PDR is the first mainstream project submitted for consideration by the MRC. Xayaburi, the third dam in the cascade is located about 150 km downstream of Luang Prabang town. The developer is SEAN and Ch. Karnchang of Thailand, with the bulk of the power destined for Thailand. A dam of 810 m long and 32.6 m high and a rated head of 18.3 to 24 m will be built. It is proposed to operate continuously. The primary function of the project is to provide hydropower generation capability comprising seven turbine-generator units of 175 MW capacity or a total of 1,225 MW for export to Thailand, and one unit of 60 MW for use in Lao PDR. It has a reservoir area of 49 km² (96% confined within the main channel). The latest estimate of people to be resettled is 2,130.

While appreciating Lao PDR’s commitment to the 1995 MA and PNPCA, Viet Nam called for a 10 years moratorium on the Mekong mainstream dams (VNMC Reply to Prior Consultation, 2011). Thailand’s government, together with that of Cambodia, think there should be further studies of the dam’s environmental impact (TNMC and CNMC replies to Prior Consultation, 2011). The MRC independent experts report “Proposed Xayaburi Dam Project: MRCS Prior Consultation Project Review Report” said there are “fundamental gaps in knowledge” about the environmental and economic impact of the dam, and casts doubts on the optimistic predictions of the Thai company in charge of planning and construction (MRC, 2011).

The Mekong Development Partners and Civil Society Organizations have expressed their concerns over the uncoordinated and poorly studied dam projects on the mainstream and tributaries (see e.g. Joint Development Partner Statement presented at the MRC Council on 26 January 2011). The earthquake near Xayaburi in February emphasised the need for an independent review of the project according to international safety standards. The risk of concentrated adverse impacts on large numbers of people by mainstream hydropower development is surely also of great concern to the Governments of the Mekong Region. Uncertainties remain relating to the nature, extent and distribution of benefits and impacts on vulnerable group of people (Dore and Lazarus, 2009, Pech et al, 2010).

Assignment for group discussion:

1. Participants will break out into four groups – Cambodia, Laos, Thailand and Viet Nam
2. Please use check-list above, to assessment if relevant conditions for productive negotiation are in place or need to be established?

3. Based on the outcomes of the above assessment, please work out your delegation’s strategy for solving the identifiable issues?

4. Prepare an argument and counter-argument:
Assuming all four countries are not parties to an applicable treaty, their rights and obligations are governed by customary international law. Currently, the best known multilateral international water law agreement is the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. Although not yet in force, this Convention is generally regarded as reflecting the fundamental rules of customary international law applicable in the field. The most basic of these are the following:

States are to use an international watercourse in a way that is “equitable and reasonable use” refers to a riparian state’s “basic right to an equitable and reasonable sharing of the resources of an international watercourse.” This rule requires each riparian state to ensure, in an ongoing manner, that its use is equitable and reasonable vis-à-vis other riparian states. What is equitable and reasonable in any given case may be determined only by taking into account all relevant factors and circumstances.

States are to take “all appropriate measures” to prevent causing “significant harm” to co-riparian states.

States are to “consult” with the other international watercourse states and provide prior, “timely notification” about any new use or change in an existing use of an international watercourse that could have significant adverse effects on co-riparian states, along with relevant technical information.

5. Plenary discussion:
   • each delegation presents their findings on question 1 and 2;
   • discussion and question;
   • each delegation present its argument;
   • other delegation may wish to react to that argument.
   • Conclusion and clarification by resource persons.