

# In-Depth Case Study for the Mekong River Basin: the 1995 Agreement on the Cooperation for Sustainable Development of the Mekong River Basin System<sup>1</sup>

*This case study on the Mekong River Basin System is one of a series that has been prepared as part of a Global Environment Facility (GEF) Good Practices and Portfolio Learning in GEF Transboundary Freshwater and Marine Legal and Institutional Frameworks Project International Waters Governance project.. The objective of these case studies includes providing insight into how various international waters agreements were negotiated and how well they are working. Each case study has been peer reviewed by one or more experts with direct knowledge of the agreement being analyzed.*<sup>2</sup>

## 1. Introduction

*The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (the 1995 Agreement or Treaty) is a treaty between Cambodia, Laos, Thailand and Vietnam, who are described as “the Lower Mekong River Basin States” (LMRBS), to provide a framework for co-operation in the sustainable development, utilization, conservation and management of the Mekong River Basin water and related resources.*<sup>3</sup> The 1995 Agreement also established the Mekong River Commission (MRC) as the organization responsible for co-ordinating water resources development in relation to the related natural resources and environmental protection in the Lower Mekong River Basin (LMRB).<sup>4</sup> The four parties all signed the 1995 Agreement that entered into force on April 5, 1995.

This case study describes (1) how existing flexibility within the Treaty has endeavoured to accommodate emerging interests over the years; and (2) what are the various rights, obligations and responsibilities of the parties if the Treaty is breached, terminated or continues.

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<sup>1</sup> Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin [“1995 Agreement”], signed and entered into force at Chiang Rai, Thailand on 5 April, 1995, *available at* <http://www.kellnielsen.dk/download/MekongAgreem.pdf>.

<sup>2</sup> This Case Study was prepared by researchers at the Good Practices and Portfolio Learning in GEF Transboundary Freshwater and Marine Legal and Institutional Frameworks Project at UBC. The support and encouragement of George Radosevich, Olivier Cogels, John Dore, John Metzger, Pech Sokhem, Maaria Curlier and Theressa Etmanski in helping to produce this paper is very gratefully acknowledged.

<sup>3</sup> For a detailed description of the provisions of the Mekong Treaty, please see *International Waters: Review of Legal and Institutional Frameworks*, UNDP-GEF INTERNATIONAL WATERS PROJECT, (Apr. 5, 2011), *available at* <http://iwlearn.net/publications/misc/governing-marine-protected-areas-getting-the-balance-right-main-report-lower-resolution-2mb>.

<sup>4</sup> Greg Browder, *Negotiating an International Regime in the 1990s for Water allocation in the Mekong River Basin* (1998) (unpublished Ph.D. dissertation, Stanford University) (on file with the author) at 2.

## 2. Background of the Agreement

### 2.1. Geographic Context

The Mekong River is the twelfth longest river in the world (4,173 km), and ranks tenth in terms of total volume (475 BCM/year). The Mekong River Basin covers 795,000 km<sup>2</sup> and encompasses six riparian countries. The Mekong River Basin consists of all the land area drained by all of tributaries that flow into the mainstream of the Mekong River. The headwaters of the Mekong River originate in the Tibetan Plateau (Qing Hai Province) of China, and flows through the Yunnan Province in China (called the Lancang in China) into Southeast Asia. The Mekong River forms the boundary between Laos and Myanmar, and then becomes the boundary between Thailand and Laos before veering off into Laos. The Mekong mainstream courses through Laos for approximately 500 km before once again



becoming the boundary between Laos and Thailand, where it then passes through the southwest corner of Laos, and flows through the heart of Cambodia. It is here that a very unique physical feature of the Mekong River system exists - the Tonle Sap River and Tonle Sap Lake (Great Lake). At Phnom Penh, the Tonle Sap River enters the Mekong, and shortly below the City, the Mekong mainstream branches into the larger Tien River and the smaller Bassac River; this complex system is known as the Chatamuk, or junction of four rivers. Both flow into Vietnam, join at Van Nau Pass, and empty out through the Mekong Delta of Vietnam into the South China Sea.

**Figure 1.** The Mekong River Basin<sup>5</sup>

The LMRB comprises geographic areas of each of the four members to the predecessor Mekong Committee and Interim Mekong Committee, and the present Mekong River Commission. The Mekong Regime is an international water governance system for water management and development in the LMRB. Its member states include Thailand, Vietnam, Laos and Cambodia. China and Myanmar, the two upper Mekong River Basin states are not members of the Regime, but became official “dialogue partners” in 1996.

The Mekong Regime has existed since 1957, but the 1995 Mekong Agreement introduced a new era of the Spirit of Mekong Cooperation with water allocation as a major issue.<sup>6</sup> The Mekong Agreement governs the LMRB that drains parts of Vietnam, nearly one-third of

<sup>5</sup> Image available at <http://www.mekongdeltatours.net/>

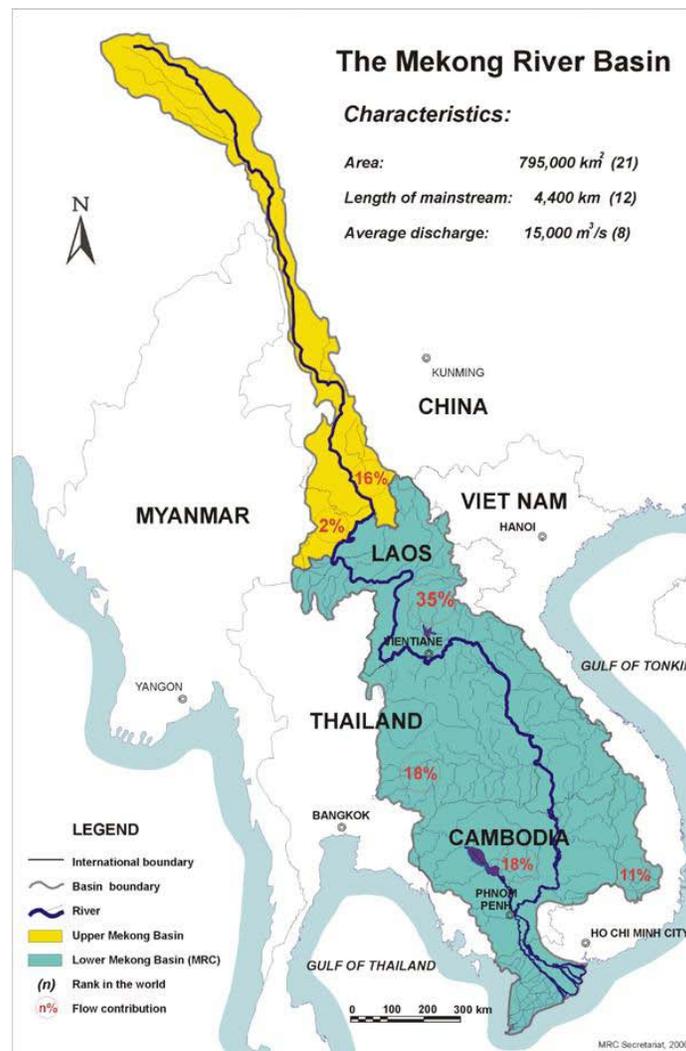
<sup>6</sup> Id.

Thailand, and most of Laos and Cambodia.<sup>7</sup> Figure 1 shows the Basin. It consists of two main tributary systems: left-bank tributary systems that contribute to wet-season flow, and right-bank tributary systems that drain low relief areas with lower rainfall.<sup>8</sup> During the wet season, the flow of the Tonle Sap reverses and the Great Lake fills and becomes a natural storage reservoir that releases its flows in the dry season, mainly to the benefit of the Mekong Delta. In the Delta there is also a unique feature wherein the Tien and Bassac further divide into the "Nine Dragons" to deliver essential water and valuable nutrient-laden sediment through the Delta. The Lower Mekong Basin experiences a tropical monsoon climate which results in extreme seasonal variations in water availability. During the wet season, typically from July to October, torrential monsoon rains result in high flows in the Mekong with regional flooding. The dry season, usually from January to May, in contrast, has extremely dry conditions, with almost no rainfall and low flow rates at the most downstream locations.

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<sup>7</sup> *About the Mekong River Commission*, MEKONG RIVER COMMISSION, available at <http://www.mrcmekong.org/about-the-mrc/> (last visited Feb. 12, 2012).

<sup>8</sup> *Annual Flood Report 2005*, MEKONG RIVER COMMISSION, at 6, available at <http://www.mrcmekong.org/assets/Publications/basin-reports/Annual-Mekong-Flood-Report-2005.pdf> (last visited Feb. 10, 2012).



**Figure 2. The Mekong River Basin**<sup>9</sup>

A striking characteristic of the Mekong River is the extent to which the River is “international” in nature. Not only is it a boundary river for over 1,000 km, but it also constitutes essentially all of the water resources of Laos and Cambodia, as well as those of the northeast Thailand and the Vietnamese “Rice Bowl” in the Mekong Delta. Another noteworthy factor at the time the Mekong Agreement was being negotiated was that as a result of longstanding Regional conflict and various geo-political barriers, there were no structures on the Lower Mekong mainstream in spite of 37 years of investigations and planning by these riparian countries. China, contributing 16% of the Mekong River flows through nearly half of the rivers length in its country, completed its first dam on the River in the year the Mekong Agreement was signed, and has since completed another three of

<sup>9</sup> *Mekong River Water Share*, HALCROW (2011), available at <http://www.halcrow.com/Our-projects/Project-details/Mekong-River-water-share/>.

the 20+ dams planned for the Lancang or Upper Mekong. These are hydro-power dams that basically redistribute high wet season flows during the dry season downstream.”<sup>10</sup>



Figure 3. Map of Mekong Basin, with dams<sup>11</sup>

## 2.2. Historical Context

The 1995 Agreement was the outcome of over 40 years of regional and supra-regional efforts to cooperatively manage the Mekong River water and related resources. Throughout this period, there was extensive planning and feasibility studies that were undertaken at considerable cost by the international community. This became an area of significant interest at the height of the Cold War, and drove investment from the West in order to support regional cooperation and development in a strategy of trying to halt the expansion of communist influence in the Region. However, with the ascension of the Pol

<sup>10</sup> George E. Radosevich, *Mekong River Basin, Agreement & Commission Case Study*, NEGOTIATE CASE STUDIES, (2009), available at <http://www.iucn.org/about/work/programmes/water/resources/toolkits/negotiate/> (last visited Feb. 10, 2012). This article was initially prepared for a World Bank Third Workshop on River Basin Institution Development held on June 24, 1999, in Washington, DC entitled “EXISTING AND EMERGING BASIN ARRANGEMENTS IN ASIA: Mekong River Commission Case Study”, by Dr. George E. Radosevich and Mr. Douglas C. Olson, World Bank Water Resources Projects Task Manager. A lot has been edited out and new text added for NEGOTIATE (herein referred to as “UNCL Mekong River Basin Report”).

<sup>11</sup> Michael Richardson, *Dams in China Turn the Mekong Into a River of Discord: Rivers Know No Borders, But Dams Do*, *The Asia-Pacific Journal*, Vol. 35-1-09, August 31, 2009, available at <http://www.japanfocus.org/-Michael-Richardson/3210>.

Pot regime, Cambodia withdrew from international cooperation on the Mekong River. Nonetheless, the early years of the Mekong Committee led to the development of the nine hydrologic and meteorological monitoring stations on the mainstream that continue to be used at present with the addition of several more stations (now 21) and water quality monitoring.

After the Second World War, the United Nations established a number of Regional bodies, including the Economic Commission for Asia and the Far East (ECAFE) that included the Mekong River Basin (MRB). ECAFE's Bureau of Flood Control investigated the potential for integrated development in the LMRB and outlined in a 1952 report the Basin's water resource development potential.<sup>12</sup> In 1954, Cambodia, Laos and Viet Nam achieved independence from France pursuant to the Geneva Accords. The United States Bureau of Reclamation issued a follow-up report in 1955, confirming ECAFE's findings, and urged the formation of an international river basin organization.<sup>13</sup> Initially in the mid-1950s, the United Nations and the US sent teams to study Mekong water management issues. Western governments hoped that a Mekong Basin regional development program would assist in integrating Vietnam, Cambodia, Thailand and Laos and discourage the spread of communism in Southeast Asia.

The UN Report provided a conceptual framework for development of the Mekong River Basin as an integrated system through the collaboration of riparian countries and a permanent apparatus to oversee Mekong Basin development. In May 1957, Lower Mekong state representatives from Thailand, Cambodia, Vietnam and Laos met in Bangkok to discuss the UN report.<sup>14</sup> On September 17, 1957 these parties adopted the *Statute of the Committee for the Coordination of Investigations of the Lower Mekong Basin* (the "1957 Statute"), 'the first constitutional document for the Mekong Regime' and the first UN attempt to directly and continuously support planning and development of an international river basin.<sup>15</sup> Article 4 of the 1957 Statute empowered the Mekong Committee to coordinate development of the Mekong River Basin.<sup>16</sup> The 1957 Statute was followed by the January 31, 1975 signing of the *Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin* (the "Joint Declaration").<sup>17</sup> This document described the Mekong as 'a resource of common interest' and empowered

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<sup>12</sup> UN ECAFE, PRELIMINARY REPORT ON TECHNICAL PROBLEMS RELATING TO FLOOD CONTROL AND WATER RESOURCES DEVELOPMENT OF THE MEKONG: AN INTERNATIONAL RIVER (New York: United Nations, 1952).

<sup>13</sup> See Radosevich, *supra* note 10, at 3.

<sup>14</sup> ECAFE, CAMBODIA, LAOS, THAILAND AND VIETNAM JOINT MEETING ON THE LOWER MEKONG BASIN, 20-23 MAY 1957: CONCLUSIONS AND RECOMMENDATIONS (Bangkok: United Nations, 1957).

<sup>15</sup> Browder & Ortolano, *The Evolution of an International Water Resources Management Regime*, at 505, in INTERNATIONAL WATERS: REVIEW OF LEGAL AND INSTITUTIONAL FRAMEWORKS, UNDP-GEF INTERNATIONAL WATERS PROJECT ["International Waters"], (Apr. 5, 2011) at 262, available at <http://iwlearn.net/publications/misc/governing-marine-protected-areas-getting-the-balance-right-main-report-lower-resolution-2mb>.

<sup>16</sup> *Id.*

<sup>17</sup> Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin ("Joint Declaration") (Jan. 31 1975) art. 10, in *Treaties concerning the non-navigational uses of international watercourses - Asia*, FAO Legislative Study 55, at 15 available at <http://www.fao.org/legal/legstud/l55-ef.pdf>.

each party with an effective veto over the prospective use by another party of the Mekong waters.<sup>18</sup> In addition, after intensive negotiations, the Mekong Committee members agreed that all mainstream, major tributary and inter-basin diversions would require the unanimous approval of the Mekong Committee prior to implementation. Upon the rise of the Khmer Rouge to power, Cambodia decided to pursue a policy of "self-reliance," and dropped out of the Mekong Committee (among other international organizations).<sup>19</sup>

In its absence, on January 5, 1978, Thailand, Laos and Vietnam signed the *Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin* (the "Interim Mekong Committee Declaration") in Vientiane, Laos.<sup>20</sup> However, as a result of the new communist victory in the Vietnam War, the United States withdrew their funding for that organization in 1975.<sup>21</sup> The term "interim" was used in the Declaration because it was hoped that Cambodia would at some time in the future rejoin the Mekong Regime.<sup>22</sup>

After the defeat of the Khmer Rouge following Vietnam's invasion of Cambodia and the signing of the Paris Peace Accords in 1991, the geopolitical tensions that had precluded an agreement by Laos, Vietnam and Thailand with Cambodia diminished, paving the way for negotiations for a more inclusive and comprehensive Lower Basin-wide Agreement. The new Cambodian administration requested reactivation of the former Mekong Committee. Cambodian readmission in 1991 led to the famous "impasse," and enabled a new agreement to be drafted by the four LMRB riparians through UNDP assistance. After 21 months of negotiations, the 1995 Agreement and Protocol replaced the prior agreements and created the Mekong River Commission (MRC). The MRC thus became the replacement mechanism for the former Mekong Committee and the Interim Mekong Committee.

### 2.3. Socio-political Context

The potential benefits of a Mekong Basin-wide agreement were quite clear for the LMRBS as a result of the extensive planning and feasibility studies that had been conducted during the early stages of the Mekong Committee. Each party had distinct issues that could only be resolved through co-operative development of the LMRB. These issues can be summarized as follows:

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<sup>18</sup> Art. 17 of the Joint Declaration states: "The Basin State or States, whether territorial or not, which undertake the project shall present well in advance to the other Basin States for formal agreement prior to project implementation a detailed study on all possible detrimental effects including short and long-term ecological impacts which can be expected with the territory of other Basin States as a result of the proposed mainstream project."

<sup>19</sup> DAVID CHANDLER, *THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945* 122-92 (Yale University Press, 1991).

<sup>20</sup> See International Waters, *supra* note 15, at 244.

<sup>21</sup> Aaron Wolf & Joshua Newton, *Case Study Transboundary Dispute Resolution: The Mekong Committee*, Appendix C in JERRY PRISCOLI & AARON T. WOLF, *MANAGING AND TRANSFORMING WATER CONFLICTS* (Cambridge University Press, 2008).

<sup>22</sup> See Browder, *supra* note 4, at 59.

1. Thailand and Vietnam, the two Southeast Asian regional powers, wanted to reach agreement on water allocation to promote the larger goal of regional cooperation and solidarity after the Cold War ended in the early 1990s. After decades of ideological discord and war in the Region, Thailand and Vietnam did not want disputes about water to threaten a more general accord in the Region.
2. Reservoirs in China, (which in 1995 were either under construction or in the advanced planning stage), on completion, could significantly increase Mekong flows in the dry season. As one of the main water-related challenges in the Mekong Basin is water scarcity in the dry season, projected increased flows on the Mekong resulting from the Chinese dams was the catalyst for negotiation of opportunities to decide how to share the increased dry season water. This was despite the fact that there was no data or general knowledge of the impacts of the Chinese dams on dry season flows.
3. International development agencies were willing to continue funding and providing technical services to the LMRBS to cooperate in managing and developing their common water resources to the MRC. Such assistance was particularly important to Cambodia and Laos, the two least developed states of the group.

#### 2.4. Environmental (Water Resource Management) Context

Each of the four countries in the LMRB faced issues regarding inconsistent seasonal water flows on the Mekong in the pre-Mekong Agreement stage. Management to obtain a more constant and dependable flow on the Mekong could achieve the individual and collective goals of all the parties. The individual interests of the various states are as follows:

- Vietnam's highest priority was to protect the Mekong Delta which is the 'rice bowl' of that country. There had been a considerable expansion of the rice farming industry over the latter half of the 20th century in Vietnam. However, in order to support this industry, significant amounts of water needs to be diverted from the Mekong to irrigate the rice farms. While this could be easily accomplished during the wet season, the Vietnamese needed to maintain as a minimum the existing dry season flows into the delta to prevent salinity intrusion from seawater and to provide for irrigation. For this reason, Vietnam was in favour of dams on the Mekong mainstream because they provided more water availability during the dry season and reduced damaging flooding in the wet season. If dams were in other countries, they wanted a guarantee of minimum dry season flows.<sup>23</sup>

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<sup>23</sup> Vietnam's stance in regards to dams has since changed dramatically since this period. At the time of writing, Vietnam was in favour of imposing a 10 year moratorium on mainstream dams.

- Thailand wanted to ensure access to its share of the Mekong Basin’s water. Although in the early 1990s Thailand used hardly any of the Mekong’s natural dry season water, it wanted to expand irrigation to the poor north-eastern Issan province of Thailand through the Khong-Chi-Mun project.<sup>24</sup> Thailand also wanted to divert water from the Mekong into the Chao Phraya Basin in central Thailand. The major policy issue for Thailand was that it did not want these or any other projects to be subject to prior agreement through the Mekong Committee, which the Thai people thought would make their life more difficult.
- The major water concern of Laos was to maintain the Mekong in a natural state as a navigable river, because the Laotians use it extensively for navigation. This is vital for Laos because it is a landlocked country, with all its major urban centres located on the Mekong, and land transportation is still undeveloped in Laos. The hydroelectric potential and the related revenue that could be generated on the Mekong was also a primary interest of the Laotian government.
- Cambodia’s highest Mekong water priority was to ensure protection of the Tonle Sap, also known as the Great Lake, which is central to Cambodian culture. The Tonle Sap Lake and River is tributary to the Mekong mainstream, and during the wet season, high water flows reverse the direction of the river to fill the Lake where it is stored until the dry season, when the river flow is again reversed. In this process, the lake expands in area by a multiple of five, from 2,000 sq. km to 10,000 sq. km., and temporarily stores 15-20% of the Mekong’s annual flow of 475 billion cu.m. Accordingly, Cambodia was concerned that upstream water projects such as dams in China, Laos and Thailand would damage the Tonle Sap, which also is of major environmental importance because it “represents one of the largest wetland biodiversity reservoirs in Southeast Asia and is among the most productive fishing grounds in the world.”<sup>25</sup>

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<sup>24</sup> Comment from John Metzger, Advisor in Water Utilization Programme (Apr. 6, 2011).

<sup>25</sup> Malee Traisawasdichai, *The Wet Heart of Cambodia Braces for Thai Project*, THE NATION (Bangkok), Jun. 2, 1995 in Browder, *supra* note 4, at 159.

## 3. Negotiation of the Agreement

### 3.1. Development of the Agreement

Following Cambodia's decision to participate once again in efforts to co-operate on multilateral Mekong River issues with the other three members of the LMRBS, how this new co-operative platform would operate became a threshold issue, as is pointed out in the following comment:

*When Cambodia's readmission threatened to reactivate the Mekong Committee's constitutional framework—which required approval by the Mekong Committee for all proposed projects—the Thai government called for negotiations to restructure the Mekong regime.*<sup>26</sup>

Thailand at this time was lobbying hard for a new, less stringent system of rules regarding prior notification. As a result of this contentious issue, Thailand cancelled a meeting in Chang Rai in early 1992 when the other participant states proposed rules that would require prior agreement on development (as had been the case under the protocols of the Interim Mekong Committee (IMC)).<sup>27</sup>

In addition, issues over which countries would be involved in the meetings became matters of contention. For example, Thai delegates were lobbying hard for the inclusion of their Chinese and Myanmar counterparts in the negotiations. But this suggestion was opposed by Vietnam in particular. Instead Vietnam wanted a constitution for Mekong River management to be agreed upon by the four downstream countries before presenting it to Myanmar and China, the two countries in the upper reaches of the Basin.

The role of the incumbent of the Secretariat office became an issue as the Thai delegation believed that he was biased in favour of the LMRBS.<sup>28</sup> The Secretariat favoured a form of increased cooperation among the four states, which would involve limiting each participant country's sovereignty over their respective portions of the Mekong. The Secretariat was excluded from the negotiations and reactivation of the Mekong Committee came to a standstill.

The UNDP was heavily invested in the Project, and was committed not to see it fail. To save the stalled negotiations, it provided neutral assistance in facilitating a solution to the impasse among the parties by proposing an informal consultation, which took place in Hong Kong on October 6, 1992.<sup>29</sup> The success of that meeting led to the historic follow up meeting in Kuala Lumpur in mid-December. At this meeting, the four parties drafted the

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<sup>26</sup> See Browder, *supra* note 4, at 117.

<sup>27</sup> *Id.* at 104.

<sup>28</sup> *Id.* at 108.

<sup>29</sup> See Radosevich, *supra* note 10, at 4.

key points that form the basis for, and express the commitment of each party to work out a future framework for Mekong cooperation, which was expressed in a Communiqué and Guidelines, which were officially approved in Hanoi on 5 February 1993 at a meeting of the Mekong Working Group (MWG)-1. The UNDP agreed to provide technical and financial assistance in formulating a new agreement; Dr. George Radosevich was selected by the four countries as the Senior Advisor for negotiating and drafting the document to be approved by the four participating LMRBS.

This "mandate" of the MWG served to guide the preparation of the Draft Agreement among the parties, along with the various subsequent papers and discussions. In the Communiqué of 17 December 1992, the commitment of each country was reaffirmed "to continue to cooperate in a constructive and mutually beneficial manner for the sustainable utilization of the Mekong river water resources, "recognizing changes have taken place since the original agreements were adopted, and agreeing to continue the dialogue to create an acceptable "future framework of cooperation."<sup>30</sup> The Guidelines drafted in Kuala Lumpur, contain many important provisions of common interest and mutual acceptance to the parties. Acknowledging the "great political, economic and social changes" that have taken place in the sub-region, the countries are "part of the most economically dynamic region of the world," but also "faced with major challenges of natural resources management and environmental protection." Recognizing that "certain elements of cooperation already exist" that may need redefining, six elements for the future framework of coordination" were set out:

- A set of principles for the sustainable utilization of water resources of the Mekong river system;
- An institutional structure and mechanism for coordination;
- A definition of the functions and responsibilities of the structure and mechanism;
- The legal basis for the governance and financial operation of the structure and mechanism;
- Future memberships of the structure; and
- Management of the structure.<sup>31</sup>

Representation issues were settled at the Hong Kong meeting in October 1992, when officials from the four LMRBS decided not to include China and Myanmar in the negotiations. However, they did agree to negotiate a new framework of cooperation that would be conducive to eventual Chinese and Burmese participation.<sup>32</sup> This negotiation protocol was finalized at the MWG-I meeting in February 1993, and the negotiation agenda was adopted at the next MWG-II meeting in April 1993. The negotiations and drafting of the new agreement thus lasted 23 months, and there were moments when it was unclear if these Mekong efforts would survive. However, each participant country

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<sup>30</sup> George E. Radosevich & Douglas C. Olson, *EXISTING AND EMERGING BASIN ARRANGEMENTS IN ASIA: Mekong River Commission Case Study*, at 8, prepared for a World Bank Third Workshop on River Basin Institution Development held on June 24, 1999.

<sup>31</sup> *Id.* at 8.

<sup>32</sup> See Browder, *supra* note 4, at 155.

realised that the best alternative to a negotiated agreement was probably far less desirable than coming to an agreement. This unhappy scenario no doubt encouraged them to make the necessary concessions in order to reach mutual consensus for a framework for co-operation on the Mekong.

### *The Absentee Riparian Nations*

China and Myanmar, whose territories are included in the Upper Mekong Basin, are not parties to the 1995 Agreement, but as MRB riparians are bound by international customary water law principles. In 1996, as provided for in the Mekong Agreement and explained below, China and Myanmar became official “dialogue partners.” Accordingly, these two countries may send representatives to a special one-day a year meeting in the fall of each year, which is held by the Joint Committee (JC).<sup>33</sup> Should China and Myanmar decide to become parties to the 1995 Agreement - which many believe is necessary in order for the 1995 Agreement to realize its goals<sup>34</sup> - they potentially may do so.<sup>35</sup> The 1995 Agreement specifically recognizes “that there are six riparian countries in the Mekong River Basin, and that the current parties wish to explicitly provide an appropriate means for adding new parties under the 1995 Agreement.”<sup>36</sup> In addition, the 1995 Agreement also provides for the addition of new parties: “[a]ny other riparian State, accepting the rights and obligations under this Agreement, may become a party with the consent of the parties.”<sup>37</sup>

In addition to member states and dialogue partners, some international organizations have the right to attend and participate in Joint Committee and Council meetings. The Asian Development Bank, the Association of Southeast Asian Nations (“ASEAN”), the International Union for Conservation of Nature, the United Nations Development Programme, the United Nations Economic and Social Commission for Asia and the Pacific, the World Bank, and the World Wildlife Fund all possess observer status.<sup>38</sup> All donors have an opportunity of dialoguing with the MRC through the Donor Consultative Group (DCG) established by the MRC to facilitate donor interactions and coordination.

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<sup>33</sup> See Browder & Ortolano, *supra* note 15, at 526.

<sup>34</sup> See, e.g., Aaron T. Wolf and Joshua T. Newton, *Case Study Transboundary Dispute Resolution: the Mekong Committee*, (2007) at 7, available at [http://www.transboundarywaters.orst.edu/research/case\\_studies/Documents/mekong.pdf](http://www.transboundarywaters.orst.edu/research/case_studies/Documents/mekong.pdf); Ellen Bruzelius Backer, *The Mekong River Commission: Does It Work, and How Does The Mekong Basin’s Geography Influence Its Effectiveness?*, 4 SÜDOSTASIEN AKTUELL 31, 46 (2007).

<sup>35</sup> Both dialogue partners were formally invited by the other countries at the April 2010 PM Summit at Hua Hin.

<sup>36</sup> George E. Radosevich, Draft Commentary and History of the Making of the Mekong Agreement (“Radosevich Commentary”) (October 22, 1993) (Unpublished manuscript) at 29.

<sup>37</sup> 1995 Agreement, *supra* note 1, art. 39.

<sup>38</sup> Ellen Bruzelius Backer, *Paper Tiger Meets White Elephant?: An Analysis of the Effectiveness of the Mekong River Regime* (“Backer, Paper Tiger Paper”), THE FRIDTJOF NANSEN INSTITUTE, (Aug. 2006) at 37, available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?id=47649&lng=en>.

### 3.2. Negotiation Process

The negotiations that led to the 1995 Agreement were guided by the principles of international customary water law and the rights and needs of each of the four riparian countries.<sup>39</sup> The four countries established a Mekong Working Group (MWG) of five representatives from each country (including at least one from the Ministry of Foreign Affairs). The MWG would hold five “formal” meetings (flags, neckties, seating arrangements and minutes kept) and two “informal” (no flags, no ties and no minutes) technical drafting group meetings that would prove crucial to the success of the process.<sup>40</sup> See Table 1-1 below for the timeline of the key events in the negotiations.

The national Mekong Working Groups (MWGs) needed to negotiate a new international framework that would protect the fundamental water resource interests of each member state. None should benefit at the expense of any other state. The objective was to have them all ‘win’ or at least not ‘lose’ by cooperating.<sup>41</sup>

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<sup>39</sup> See Browder, *supra* note 4, at 157.

<sup>40</sup> See Radosevich, *supra* note 10, at 5.

<sup>41</sup> See Browder, *supra* note 4, at 157-160.

<b>Date</b>	<b>Event</b>	<b>Significance</b>
December 16-18, 1992	Meeting in Kuala Lumpur, Malaysia	Signalled political commitment to establish a new framework of cooperation.
February 4-5, 1993	MWG-I meeting Hanoi, Vietnam	Formally established the national MWGs, and finalized the negotiation protocol.
April 4-5, 1993	MWG-II meeting Bangkok, Thailand	Adopted the negotiation agenda and agreed to prepare National Position Papers.
June 28-29, 1993	MWG-III meeting Vientiane, Laos	Formulated the working draft agreement, and decided on the organizational structure of the MRC.
August, 17-20, 1993	Technical Drafting Meeting-1 UNDP, Bangkok	Refined the draft agreement and proposed new approach to Article 5 (Reasonable and Equitable Water Utilization).
October, 7-8 1993	MWG-IV meeting Phnom Penh, Cambodia	Lack of Agreement on Article 5 halted progress.
January 6-7, 1994	Technical Drafting Meeting 2, Vientiane, Laos	Vietnam introduced a new Article 5 proposal, rift widens and MWG-V meeting is indefinitely postponed.
April, 1994	Thai Prime Minister meets Vietnamese Prime Minister in Hanoi	Political will to reach an agreement is reaffirmed.
May 7, 1994	Vietnamese, Lao, and Cambodian MWGs meet in Ho Chi Minh City, Vietnam	Indochinese states formulated a proposal on Article 5 for Thailand's consideration. The SA discussed the proposal with Thai MWG, Article 5 completed
November 27-29, 1994	MWG-V Meeting Hanoi, Vietnam	Draft Agreement initialled by members of the national MWGs.
April 5, 1995	Signing Ceremony for the Mekong Agreement and Protocol Chiang Rai, Thailand	A new framework of cooperation is established and the Mekong River Commission is established to replaced the Mekong Committee and Mekong Secretariat.

**Table 1: Summary of Key Events in the Mekong Negotiations**

### 3.3. Main Issues that Arose in the Negotiations

#### *Compensation*

The first major issue that arose in the negotiations was with respect to article 8 and compensation for damages. The Thai delegation was primarily concerned with the use of the term “compensation,” because such a term would trigger the need for parliamentary approval/ratification of such an action. Instead, the Thai delegation suggested that the document should use the term “responsibility for damages.” The other three country delegations were extremely opposed to this proposal by Thailand, but were eventually convinced as a result of the assurance of Radosevich, that it would in essence mean the same thing.<sup>42</sup> As a result, the Thai suggested terminology was adopted.

#### *Dispute Resolution*

The second major issue in the negotiations was about the dispute resolution mechanisms in the Agreement. The Lao officials proposed that disputes that could not be resolved through either the MRC or by the respective governments should be referred to the International Court of Justice (ICJ) or to binding arbitration.<sup>43</sup> However, the Thai government was extremely opposed to this proposal, thinking that it restricted their bargaining power vis-à-vis Thai developmental goals. This was resolved in Article 35, without naming the ICJ, by stating if the parties could not resolve the matter through their Governments, they would proceed according to the principles of international law, i.e., through the UN system and the ICJ.

#### *Minimum Flows*

Article 6 of the Agreement covers several issues related to water levels throughout the year. Provision A of Article 6 mandates a minimum level of natural dry season flow. In addition to this provision, the Cambodian delegation was able to ensure agreement on an acceptable natural reverse wet season flow (in Provision B) that would be sufficient to fill Tonle Sap to a level necessary to sustain it through the dry season wherein it again flows back down the Tonle Sap River to the Mekong River. Due to difficulty that the parties encountered in coming to an agreement on the formula that would govern the minimum flow during the dry season, this issue was left to be determined by the MRC at a later date.<sup>44</sup> The minimum dry and wet seasons flows in the Agreement addressed both the Vietnamese concerns about saltwater intrusion and Laotian concerns about navigability in the summer. The 1995 Agreement also addressed the concerns of Cambodia about Tonle Sap. The Thai government was willing to make these concessions in order to foster greater regional co-operation and goodwill. Thai representatives also realized that the forthcoming Chinese dams would increase the amount of flow in the dry season, thus making this a more palatable concession for Thailand.<sup>45</sup>

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<sup>42</sup> *Id.* at 165.

<sup>43</sup> *Id.* at 166.

<sup>44</sup> *Id.* at 170.

<sup>45</sup> *Id.* at 172.

### *Power to review*

The most difficult issue to resolve in the negotiations related to the power to review proposed water uses (Article 5). Laos, Cambodia and Vietnam were in favour of a system wherein mainstream projects and diversions of water from the Mekong should be subject to prior agreement by the MRC, (as had been the case during the IMC). However, Thailand was adamantly opposed to other states having veto power over its proposed projects in the Mekong, and accordingly they made this issue the primary concern of their delegation.<sup>46</sup> Rather than these kinds of issues be subject to a veto by another country, the Thais were in favour of the approach incorporated in the ILC rules, which required states to notify and consult with states that would potentially be harmed by the project, and if necessary, to negotiate an agreement with the party/parties. In addition, the Thai delegation was aware of the fact that the adoption of the ILC rules would make it more palatable for the Chinese to join the MRC, which the Thai delegation keenly favoured.

In order to make progress on this issue, the Vietnamese delegation proposed a conceptual framework matrix for Article 5 (see the table below for the wording of the Article 5 matrix that was eventually agreed upon). Afterwards Cambodia was able to get the Tonle Sap classified as a tributary as the Upper Riparian states were not concerned due to its downstream position. Vietnam knew that it was of crucial concern, but its delegation was pre-occupied with the perceived more immediate Thai projects.<sup>47</sup> The intent of prior consultation and agreement were not difficult to reach agreement on. However, the intent of notification was contested between Thailand, who wanted it to include “without any discussion necessary,” and the Vietnamese, who were uneasy about this suggested inclusion. In the absence of consensus about this provision, this section of the definition was eventually left out of the 1995 Agreement.

Throughout these negotiations, Thailand was willing to forgo the requirement of prior agreement in dry season flows, whereas the other three states were in favour of requiring such an agreement. After several negotiating sessions, the sides were gradually coming closer to an agreement on this issue until a Thai newspaper article was published which mentioned a plan of the Thai Cabinet to draw water out of the Mekong for use in Thailand without the approval of the other states. This caused a stir in Vietnam, emboldened their demands and caused a slight impasse in the negotiations.<sup>48</sup> However, at a subsequent informal meeting of the Laos, Cambodian and Vietnamese delegations several months afterwards, that group of three countries was able to come to a consensus on a proposal that was accepted by the Thai delegation soon thereafter. It provided for the following:

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<sup>46</sup> Id. at 173.

<sup>47</sup> Id. at 181.

<sup>48</sup> Id. at 186.

Mainstream	Use Type	Notification	Prior Consultation (Aims at Agreement)	Specific Agreement
Dry Season	Inter-Basin Use			XXX
	Intra-Basin Use		XXX	
Wet Season	Inter-Basin Use		XXX	
	Intra-Basin Use	XXX		
<u>Tributaries</u> (wet and dry)		XXX		

**Table 2: Summary of the 1995 Mekong Agreement Article 5 Provisions<sup>49</sup>**

This agreement satisfied the Thai delegation because it would not threaten their proposed projects and limited the scenarios where prior agreement was required before a project could proceed. For the LMRBS, it ensured that projects which threatened their interests at the most vulnerable time (i.e., during the dry season) needed prior agreement.<sup>50</sup>

### *Basin Development Plan (BDP)*

The Vietnamese delegation wanted the BDP to be an overarching ‘master plan’ that would co-ordinate water utilization to avoid harmful effects and promote solutions to water shortage through the construction of storage reservoirs. The Thai delegation was interested in the BDP being used to promote water resources development on the mainstream of the Mekong.<sup>51</sup>

National Government	Water Resource Implications	
	Benefits	Concessions
<b>Thailand</b>	<ul style="list-style-type: none"> <li>• Can proceed with Khong-Chi-Mun, and Mekong-Chao Phraya schemes</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum dry season flows</li> <li>• MRC procedural requirements</li> </ul>
<b>Vietnam</b>	<ul style="list-style-type: none"> <li>• Protect Mekong Delta</li> <li>• MRC procedural requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Prior agreement not required</li> </ul>
<b>Laos</b>	<ul style="list-style-type: none"> <li>• Protect dry season navigation on the Mekong River</li> <li>• MRC procedural requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Not critical</li> </ul>
<b>Cambodia</b>	<ul style="list-style-type: none"> <li>• Protect Tonle Sap</li> <li>• MRC procedural requirements</li> </ul>	<ul style="list-style-type: none"> <li>• Prior agreement not required</li> </ul>

**Table 3: Water Resource Implications for the Mekong Agreement<sup>52</sup>**

<sup>49</sup> See Radosevich, *supra* note 10, at 8.

<sup>50</sup> Inter-basin use involves the transfer of water out of the Mekong River basin into another river basin, while intra-basin implies that the water is used within the Mekong River basin.

<sup>51</sup> See Browder, *supra* note 4, at 191-2.

<sup>52</sup> *Id.* at 200.

### *Key Factors that Led to the Successful Negotiation of the Mekong Agreement*

The historical relationships among the LMRBS were a major factor in the successful outcome of the negotiations that produced the 1995 Agreement. The participant nations had nearly 37 years of interaction and evolved into what is recognized as the “Spirit of Mekong Cooperation.”<sup>53</sup> This experience helped to create a strong desire and sense of commitment among these countries to continue their joint efforts to come to an agreement. Of critical importance was the fact that the LMRBS also had the benefit of shared data and information that had been collected over the course of the life of the Mekong Committee.

The background of the 1994 draft ILC report, the 1966 Helsinki Rules, other international water treaties, and customary international law provided solid legal foundation that also that was influential throughout the course of the negotiations. This international legal platform not only provided a framework for negotiations, but also became a fall-back position when the parties could not come to an agreement on a particular issue.<sup>54</sup> Reliance on these international legal norms was aided by the fact that the some members of the MWG had received training on international issues through their participation in a Legal Studies Group in the Mekong Secretariat. Other key members of the MWG were also active members of the ILC’s working group for the formulation of the Law of Non-Navigational Uses of International Watercourses, and a Senior Advisor provided for the negotiations was also an international water law expert.<sup>55</sup>

Several negotiation approaches were utilized to help develop consensus in the negotiations. In order to disengage the participants from their beliefs and perceptions, a “one-nation basin” scenario was adopted as a hypothetical theoretical framework to guide negotiations. Under this scenario, it was assumed there was only one nation in the LMRB and all discussions were to be conducted within that shared one nation framework. Each participant in turn would play the roles of other representatives in the discussions, in order to create greater empathy at the negotiating table in the effort to work towards an optimum utilization and protection of the water and related resources in the one nation basin.<sup>56</sup> National boundaries were overlain in a later scenario to adjust interests.

This whole process helped the participants to better understand each other’s concerns.<sup>57</sup> Another useful negotiating approach utilized by the parties to their great advantage was to first discuss and evaluate various options about the kind of agreement and basin organization that they believed would be desirable and suitable, and then proceed to the

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<sup>53</sup> See Radosevich, *supra* note 10, at 1.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.* at 5-6.

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.*

second stage of discussions about the options relating to the range of objectives, principles, specific issues, processes, etc. that would be included in the agreement and ultimately implemented by the organization that was to be established. The parties had agreed to disagree, and it was possible to get to the real concern of each party. The shared objective in these negotiations was to seek the highest common mutually acceptable option – the HCD and HCN.<sup>58</sup>

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<sup>58</sup> Id. at 6.

## 4. The 1995 Agreement

### 4.1. Main Elements<sup>59</sup>

#### *Dispute Resolution*

The 1995 Agreement provides four steps for resolving disputes. The MRC has responsibility for addressing the disagreement first, pursuant to Articles 18.C and 24.F.<sup>60</sup> If the MRC cannot resolve the dispute at this stage, the issue is to be referred to the respective governments, and is to be resolved through diplomacy.<sup>61</sup> If this also proves unsatisfactory, countries may refer the issue to a third party for mediation, such as international organization, an international professional group, or an individual.<sup>62</sup> Finally, if all else fails, countries may refer to international law principles.<sup>63</sup>

#### *Financing*

The Commission's budget consists of contributions from member countries on an equal basis,<sup>64</sup> though this refers primarily to the administrative costs for running the Commission itself. The MRC relies heavily on international donors to fund its projects. For example, in 2009, riparian contributions to the MRC totalled \$1,444,608 (US), whereas donations from development partners totalled \$21,538,387 (US).<sup>65</sup> In recognition of this essential donor involvement, Article 41 of the Agreement specifically acknowledges the contributions of the UN and the international community, and expresses the desire to continue their relationships.

#### *Data and Information Exchange*

Data and information exchange had been ongoing for the LMRBS for the previous 40 years in the lead up to the MRC. However, the new Agreement had served to cement this important task going forward. The responsibilities related to data information sharing, exchange, and harmonization were split among members of the JC and the Secretariat. The JC is to "regularly obtain, update and exchange information and data necessary to implement this Agreement" and to "conduct appropriate studies and assessments for the protection of the environment and maintenance of the ecological balance of the Mekong River Basin."<sup>66</sup> The Secretariat is directed to "[m]aintain databases of information as

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<sup>59</sup> Please see *International Waters: Review of Legal and Institutional Frameworks*, UNDP-GEF INTERNATIONAL WATERS PROJECT, (Apr. 5, 2011), available at <http://iwlearn.net/publications/misc/governing-marine-protected-areas-getting-the-balance-right-main-report-lower-resolution-2mb>.

<sup>60</sup> 1995 Agreement, *supra* note 1, art. 34.

<sup>61</sup> *Id.* art 35.

<sup>62</sup> See Radosevich, *supra* note 36, at 27.

<sup>63</sup> 1995 Agreement, *supra* note 1, art. 35.

<sup>64</sup> *Id.* art. 14.

<sup>65</sup> *Income and Expenditure Statement for the year ended 31 December 2009*, MEKONG RIVER COMMISSION, at 3, available at <http://www.mrcmekong.org/assets/Publications/governance/IncomeExpenditure2009.pdf> (last visited Feb. 12, 2012).

<sup>66</sup> Agreement, *supra* note 1, art. 24.

directed.”<sup>67</sup> So in this sense, the Agreement only calls for data collection in the most general terms.

### *Flexibility of the Agreement*

Designing an agreement that was flexible was important to those involved in the negotiations.<sup>68</sup> The purpose of the MRC was to establish a basis of cooperation under an institutional framework that would be robust enough to make operational decisions under a variety of future conditions.<sup>69</sup> Conscious of the need to maintain ecological integrity as well as to ensure territorial sovereignty, the provisions of the Agreement that concern the use of Mekong River waters offer considerable flexibility for varying objectives, while maintaining the protection for the fundamental interests of the LMRBS through its procedural requirements. For example, Article 5 of the Agreement, which refers to “reasonable and equitable utilization” of the Mekong, prescribes a dynamic operational decision-making process, rather than a static legal agreement.<sup>70</sup> Countries are to provide notification<sup>71</sup> or prior consultation<sup>72</sup> to the JC of an intended use for the Mekong and its tributaries depending on the season/use, or to come to a prior agreement if such a proposed use is within the most sensitive scenarios (see Table 3 above). This kind of prior consultation enables all parties to assess and mitigate or to minimize any harmful effects of each other’s actions. Though this mechanism places some constraints on individual country behaviour, it is a useful compromise that reflects both sovereign interests and hydrological perspectives.<sup>73</sup>

Of particular importance is the recognition by the parties that specifically acknowledges in this Article, and throughout the Agreement, that the use of waters governed by the Agreement excludes natural domestic and minor uses of water that do not have a significant impact upon the mainstream flows. This eliminates the doubts and anxieties about unreasonable restrictions in the Agreement upon riparian rights and normal uses by domestic inhabitants, and lays to rest any hypothetical concerns that not a drop of water can be used by a riparian party without some action or approval process involving the Mekong River Commission.

The approach of Article 5 is based upon the universally accepted reasonable and equitable utilization doctrine and the need to maintain certain flows on the mainstream as provided

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<sup>67</sup> *Id.* art. 30.

<sup>68</sup> See Radosevich, *supra* note 36, at 31.

<sup>69</sup> See Radosevich, *supra* note 10, at 7.

<sup>70</sup> See Radosevich, *supra* note 36, at 29.

<sup>71</sup> Agreement, *supra* note 1, Ch II Definitions of Terms, defines Notification as: “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.”

<sup>72</sup> Agreement, *supra* note 1, Ch II *Definitions of Terms*, defines Prior Consultation as: “timely notification plus additional data and information to the Joint Committee...that would allow the other member riparians to discuss and evaluate the impacts of the proposed use...Prior consultation is neither a right to veto...nor the unilateral right to use water by any riparian without taking into account the other riparians’ rights.”

<sup>73</sup> See Radosevich, *supra* note 36, at 8.

in Article 6. The purpose of this legal framework is to provide a realistic means for co-operation by all riparians who are provided with the practical opportunity to maximize options for trade-offs, exchanges, or releases from other sources (i.e., lower tributaries from the same riparian country) to protect the flow levels, while optimizing the sharing and use of waters during the two seasonal variations. This also takes into consideration inter-Basin impacts on the basin of origin. In theory, it provides certainty, security and flexibility to all riparians under what may be termed a "super-fairness" doctrine. The Agreement is a basin treaty, not a watercourse treaty. In addition, Article 37 of the Agreement provides that the Agreement may be "amended, modified, superseded or terminated" by mutual agreement of all parties, thereby contemplating and allowing for flexibility in the Agreement to address future needs.<sup>74</sup>

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<sup>74</sup>Agreement, *supra* note 1, art. 37.

## 5. Implementation and Monitoring

### 5.1. Operational Management

#### *Structure of the MRC<sup>75</sup>*

There are three organs of the MRC: the Council, the JC, and the Secretariat. The Council meets once a year and is responsible for overall governance of the MRC. It consists of one member at the ministerial or cabinet level from each participant state, and it meets once a year. The JC is responsible for implementation of Council decisions and policies, and it functions as a management board. The JC is comprised of one person appointed by each country who is recruited from a rank that is no less than a Head of Department level. The Secretariat provides technical, logistic, and administrative assistance to the other MRC organs, and is directed by a Chief Executive Officer (CEO), appointed by the Council. The MRC CEO is responsible for day-to-day operations of the MRC.

Other functional entities supplement the work of the three main MRC bodies but are not structures of the MRC. The National Mekong Committees (NMCs) coordinate MRC activities at national levels, and link the MRC Secretariat to national ministries and agencies. Though they are not officially included, China and Myanmar are Dialogue Partners to the MRC. China currently provides water level data during flooding season from stations located on the Upper Mekong within its boundaries. The DCG provides funding for MRC activities and programmes within the Mekong. It meets with the MRC following Council meetings to discuss strategies and donor harmonization.

#### *Monitoring Mechanisms*

As the main operational organ of the MRC, the JC is responsible for the implementation of the Mekong Agreement and the BDP, including periodic ongoing assessments of their successes. In terms of environmental monitoring, Article 26 of the Agreement requires the JC to prepare rules for, *inter alia*, improving monitoring mechanisms for intra-basin use and diversions from the mainstream. In 2003, MRC countries agreed to a new Procedure for Water Use Monitoring, which is intended to provide an adaptive and comprehensive framework for the implementation of water use and diversion monitoring.<sup>76</sup> It defines the roles of the MRC JC, the Secretariat, and the National Mekong Committees within this new Monitoring System. A set of Guidelines on Implementation of the Procedures for Water Use Monitoring, developed by a technical committee, provides further input into the operation of the Monitoring System. These procedures are supplemented by guidelines, which form the internal rules of the MRC to implement article 26. However, some critics view the precise legal statuses of the Procedure and its

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<sup>75</sup> *Organizational Structure*, MEKONG RIVER COMMISSION, available at <http://www.mrcmekong.org/about-the-mrc/organisational-structure/> (last visited Feb. 12, 2012).

<sup>76</sup> Agreement, *supra* note 1, Ch II *Procedures for Water Use Monitoring*.

Guidelines as unclear and as a result, weakening their influence on state behaviour.<sup>77</sup>

## 6. Assessment of the 1995 Agreement

### 6.1. Accomplishment of Objectives

#### *Effective implementation*

Amazingly, three months after the Draft Agreement had been finalized, all four nations had ratified it.<sup>78</sup> However, in contrast to the relatively rapid rate at which the Agreement was ratified, the MRC itself has attracted some criticism from some parties as a result of the fact that the implementation of the Mekong Agreement through MRC activities has occurred somewhat slowly in their view. The BDP (the main vehicle through which activities in the basin are planned and carried out), outlined in the 1995 Agreement, did not commence operation until 2001 and subsequently encountered delays in implementation.<sup>79</sup> In addition, the MRC is seen by many critics as reactive, rather than proactive in its approach, particularly with respect to economic development. As a result of this approach, there is a widely held perception that the work of the MRC has not resulted in sufficient tangible benefits for the Member countries.

#### *Monitoring*

Despite the legal uncertainty regarding the monitoring mechanisms in the 1995 Mekong Agreement, the MRC does perform a fair amount of environmental monitoring on the Mekong. The MRC routinely monitors water quality, and in 2008, the MRC published a River Report Card on Water Quality.<sup>80</sup> The Commission also publishes annual flood reports that provide hydrological statistics for the flood seasons as well as provide analysis and recommendations for disaster management.

The MRC also monitors the successes of its BDP and its Strategic Plan through its regular reports. In addition to the more general Annual Reports, the MRC publishes yearly Work Programmes, which are used for monitoring as well as planning purposes.<sup>81</sup> Monitoring of project progress is done through the regular meetings that are held by the Joint Committee, as well as through consultations with stakeholders, technical experts and donors.

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<sup>77</sup> Philip Hirsch & Kurt M. Jensen, *National Interests and Transboundary Water Governance in the Mekong*, UNIVERSITY OF SYDNEY, (May 2006) at 31, available at [http://sydney.edu.au/mekong/documents/mekwatgov\\_mainreport.pdf](http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf).

<sup>78</sup> See Radosevich, *supra* note 10, at 7.

<sup>79</sup> The Final Report of the BDP Phase 1 project noted that decision-making processes turned out to be “lengthier than originally anticipated”, which was a factor contributing to the plan’s extension. Tue K. NIELSON, *BASIN DEVELOPMENT PLAN COMPLETION REPORT FOR PHASE 1 2001-2006* at 50 (Vientiane, 2006).

<sup>80</sup> See *The Mekong River Report Card on Water Quality (2000-2006)*, MEKONG RIVER COMMISSION, Vol. 1, September 2008, available at <http://www.mrcmekong.org/assets/Publications/report-management-develop/EP-Water-Quality-Report-Card-2008A.pdf>.

<sup>81</sup> *MRC Work Programme 2010*, MEKONG RIVER COMMISSION, (December 2009) at 13, available at [http://ns1.mrcmekong.org/download/programmes/work\\_program\\_10.pdf](http://ns1.mrcmekong.org/download/programmes/work_program_10.pdf).

Recently, two water monitoring stations in the lower reaches of the Lancang-Mekong in Yunnan Province of China have been established pursuant to an agreement that facilitates cooperation and data exchange with China. In addition, the MRC has nearly completed the upgrading of 20 historical monitoring stations on the mainstream of the Mekong that will be equipped with automatic readers and will produce telemetric transmission of data.<sup>82</sup> This new equipment will improve the ability of the MRC to mitigate flood and droughts on the Mekong, among other objectives.

The data and information sharing system is widely considered to be the most effective output of the MRC and the expansion of the system into the Chinese portions of the Mekong will serve to further build upon this success.

### *Stakeholder involvement*

Although in theory, the MRC processes are open to external participation,<sup>83</sup> it is frequently noted that MRC engagement with NGOs and other stakeholders could be considerably improved. Several factors have impeded effective stakeholder involvement in MRC processes. Out of respect for national sovereignty, the National Mekong Committees operate on an autonomous basis in relation to the MRC. In view of the fact that each member country allows varying degrees of political freedom of its subjects, the MRC has found it difficult to ensure sufficient stakeholder involvement in its activities to satisfy the aspirations of some of its NGO critics. However, some areas of the MRC operations have made more headway in this respect than others. For example, whereas in Thailand there has been a significant space for negotiation and expression of societal and community-level concerns about the work of the MRC, a similar opportunity for discourse is relatively absent in Vietnam and Laos, and still embryonic in Cambodia.<sup>84</sup>

The nature of external stakeholder involvement within MRC processes is also unclear.<sup>85</sup> MRC documentation is predominately in English, which has meant that much of this reporting output is inaccessible to local stakeholders.<sup>86</sup> As a result of these and other weaknesses, there has been significant pressure from a variety of NGOs and donor organizations to improve the reporting system. In response, the MRC has enacted formal mechanisms of participation within its governance practices and decision-making institutions.<sup>87</sup> Other examples of improvements in the accessibility to the public of the

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<sup>82</sup> See Radosevich, *supra* note 10, at 10.

<sup>83</sup> See Nielson, *supra* note 79, at 59.

<sup>84</sup> P. Hirsch, *Water Governance Reform and Catchment Management in the Mekong Region*, 15.2 THE JOURNAL OF ENVIRONMENT & DEVELOPMENT 184, 199 (2006).

<sup>85</sup> *Mid-term Review of the Mekong River Commission Strategic Plan 2006-2010*. MEKONG RIVER COMMISSION, (March 2009) at 12, available at

[http://ns1.mrcmekong.org/download/Reports/2\\_MTR\\_FinalReport\\_Main\\_report\\_Jan09.pdf](http://ns1.mrcmekong.org/download/Reports/2_MTR_FinalReport_Main_report_Jan09.pdf).

<sup>86</sup> *BDP: Stakeholder Participation*, MEKONG RIVER COMMISSION, (November 2005) at 38-39, available at <http://cde.asia.org/mekong/03%20MRC%20Background%20Information/BDP%20Public%20Participation.pdf>.

<sup>87</sup> C. Sneddon & C. Fox, *Rethinking Transboundary Waters: A Critical Hydropolitics of the Mekong Basin*, 25.2 POLITICAL GEOGRAPHY 181, 198 (2006).

work of the MRC are the regional Stakeholder Consultation forums on Hydropower and the BDP that have been organized by the MRC.

Though China and Myanmar remain Dialogue Partners rather than MRC members, they have increased their level of technical cooperation with the MRC, and have continued to attend all major MRC regional meetings.<sup>88</sup> China also continues to provide flood data to the MRC during the rainy seasons, and is very much involved with the MRC Strategic Environmental Assessment of the Mainstream Dams. In addition, in 2009 the MRC visited Chinese flood facilities on the Yangtze River operated by the Yangtze River Basin Commission as a capacity-building exercise. However, as China continues to alter the flow of the River through its development of new hydroelectric dams, it is crucial for the overall success of the Regional efforts to work in co-operation on the Mekong to further increase Chinese involvement with the MRC.

### *Sustainability of Financing*

The MRC's reliance on external donors weakens its capacities in several ways. First, it has slowed implementation of the 1995 Agreement. For example, after it was established in 1995, the MRC identified the creation of the BDP a top priority. However the MRC was unable to obtain sufficient funding for the BDP from outside donors until 2001. Furthermore, most external partners donate funds for specific projects, which has served to create the impression that the MRC is merely a vehicle for managing external donor grants, rather than a multilateral political water governance organization.<sup>89</sup> The fact that external donors tend to contribute for specific projects rather than ongoing operational funding has had the effect of increasing the MRC administrative duties and costs to coordinate these projects. At times donors have held views that conflict with those of the MRC regarding the future role of the MRC in the Mekong.<sup>90</sup>

Conflict in particular has arisen over the primary objectives of the MRC itself. Many of the donors are focused on the sustainable management of the MRB, which has conflicted with the priorities that the member countries of the MRC would put on the need for more hydropower production, and the de-emphasis of member countries on the negative ecological effects that such power generation might create. The concern is that this strong donor presence in the work of the MRC may encourage a weaker commitment from national riparian countries. Donor relations with the MRC are not without some tension, recently seen when the MRC released its Strategic Plan and second phase of the BDP. Donors objected to what they perceived as a lack of adequate consultation with them, and this debate highlights the different perceptions of the MRC's role within the Mekong River Basin.<sup>91</sup>

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<sup>88</sup> This may be evidence of China seeing a change in the organisation from environmental protection (anti-dam) to a more balanced approach to mutual-gains basin management and development that is more attractive.

<sup>89</sup> See Hirsch and Jensen, *supra* note 77, at 61.

<sup>90</sup> *Id.* at 64.

<sup>91</sup> *Id.* at 62-63.

## 6.2. Assessments of the MRC

Though the MRC appears to have made progress with respect to many of its objectives, it has nevertheless been criticized by both member countries and the international community for not being sufficiently effective. Member countries find the work of the MRC to be lacking in tangible results, particularly with respect to economic development and the BDP. Since the formation of the MRC, the BDP has become the centrepiece to the MRC's work and is seen by both the Mekong governments and international donors as a "primary rationale for the institutional existence of the MRC."<sup>92</sup> However, progress on the BDP has been slow in the minds of many critics, and member countries of the MRC have expressed some frustration with the time that the MRC took to determine the nature of the BDP, and the subsequent delays in transitioning to its second phase.<sup>93</sup> Furthermore, some critics believe that much of the subject matter of the BDP to date has been largely conceptual, and is not aligned well enough with member countries' real needs and aspirations.<sup>94</sup> The MRC itself noted that delays in the BDP's development may have contributed to perceptions that the MRC procedures are restraining, rather than facilitating mechanisms.<sup>95</sup> In particular, the BDP has experienced difficulty in anticipating and guiding the discussion on mainstream dams, an area that has become a focal point of the MRC efforts at present.

One source of the difficulty in the operation of the MRC is the institutional structure of the MRC, which often pits the interests of the donors in the Secretariat against those of the member countries in the Council.<sup>96</sup> Generally speaking, the Secretariat has served as a liaising body in between the MRC and donor countries, and in the minds of critics, too often the work of the Secretariat has reflected the policies of donor organizations, whereas the work of the JC and Council has represented the interests of the member countries. When the donors approach the Secretariat with their project assistance plans (that the JC and Council might not agree with), the Secretariat is put into the position wherein it must convince the JC and the Council that donor priorities for project funding will not trump member countries' economic development goals, particularly those involving the development of more hydroelectric dams.<sup>97</sup> International donors, while not always possessing a unified perspective, have not necessarily been opposed to the further construction of dams. However, they have been adamant about the need for these dams

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<sup>92</sup> Chris Sneddon & Coleen Fox, *Power, Development, and Institutional Change: Participatory Governance in the Lower Mekong Basin*, WORLD DEVELOPMENT 35, NO. 12 (2007) at 2168, in Oliver Hensengerth, *Transboundary River Cooperation and the Regional Public Good: The Case of the Mekong River*, 31.2 CONTEMPORARY SOUTHEAST ASIA: A JOURNAL OF INTERNATIONAL AND STRATEGIC AFFAIRS 326, 336 (2009).

<sup>93</sup> *Mid-term Review of the Mekong River Commission Strategic Plan 2006-2010*, MEKONG RIVER COMMISSION, (March 2009) at 9, available at [http://ns1.mrcmekong.org/download/Reports/2\\_MTR\\_FinalReport\\_Main\\_report\\_Jan09.pdf](http://ns1.mrcmekong.org/download/Reports/2_MTR_FinalReport_Main_report_Jan09.pdf).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 7.

<sup>96</sup> Oliver Hensengerth, *Transboundary River Cooperation and the Regional Public Good: The Case of the Mekong River*, 31.2 CONTEMPORARY SOUTHEAST ASIA: A JOURNAL OF INTERNATIONAL AND STRATEGIC AFFAIRS 326, 332 (2009).

<sup>97</sup> *Id.* at 333.

being built in conformance with the recommendations of the World Commission on Dams. These different viewpoints about priorities in development may lead to high profile disagreements. The recent example of the controversy surrounding the Nam Theun 2 Dam project has illustrated this internal conflict prominently.<sup>98</sup>

The path that the MRC has taken in its work to date has been largely shaped by the interactions of donors, the member countries, whose interests were rarely the same. It is in this potentially conflicting environment that the CEO has had the difficult job of charting a course for the MRC. In the first decade of existence, following under the direction of CEOs Yasunobu Matoba and Joern Kristensen, the MRC Secretariat focused on environmental protection, with an emphasis on the process in planning in decisions,<sup>99</sup> and often viewed the construction of dams for energy development and large-scale irrigation in a critical light.<sup>100</sup> Kristensen was succeeded by Oliver Cogels, who served as CEO from 2004-7. Cogels, a world-renowned expert in water resources management, re-oriented the focus of the organization more towards facilitation of economic benefits and investment. The current CEO, Jeremy Bird, has continued to focus on increasing Regional investment in the area of hydropower development.<sup>101</sup> This shift in emphasis from CEOs Kristensen (environmental protection) to Cogels and Bird (economic development) may serve to better advance the immediate goals of the respective national governments members. But this emphasis also may pose a greater longer-term risk to those who depend on the River for fishing and other resource-based livelihoods. This is especially true with respect to people who are most at risk of being negatively impacted by these decisions, and whose interests may not have been adequately represented within the scope of decision-making of the MRC.

Under Cogels, this new orientation of the MRC towards economic benefits and investment facilitation was widely welcomed by the member nations, as well as potential member China. It is believed by most (including within the UNDP) that China would be much more open to a greater co-operative role in the hydropower and navigation sectors in the Basin if there was a stronger country-ownership of the direction of the MRC.<sup>102</sup> Evidence to support this view comes from experience when the idea of a major Basin-wide investment program that would be open to China as well was proposed. However, the donors voiced objections to this increased co-operation with China, expressing “*concern about the direction towards increased emphasis on MRC becoming an organization that drives investments,*” that “*the investment facilitation role should be limited to the screening of projects*” and that the MRC should “*not undertake pre-feasibility studies.*”<sup>103</sup> To ensure that this did not happen, Danida (the international aid organization of Denmark) voiced major objections if other donors (i.e., China) funded more than 25% of the second phase

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<sup>98</sup> *Id.*

<sup>99</sup> See Hirsch, *supra* note 84, at 194.

<sup>100</sup> See Hensengerth, *supra* note 96, at 342.

<sup>101</sup> *Id.* at 329.

<sup>102</sup> Personal Communication with Olivier Cogels, former CEO of MRC, (April 11, 2011) (on file with the author).

<sup>103</sup> See Hirsch and Jensen, *supra* note 77.

BDP formulation at the time. The member states in the MRC were upset when faced with this outside pressure from Danida, but were also worried about losing donor money from organizations like Danida if they did not bow to some extent to the wishes of the donors about the proper balance between development and environmental protection in the Basin. The major consequence has been loss of the MRC's reputation as a truly independent organization. Critics within the member states slag the MRC as an NGO-type of "Environment Protection Agency" in the hands of the donor community, instead of a "Development Agency" working for the benefit of the Region.<sup>104</sup>

One of the major successes of the MRC has been the development of the Water Utilization Programme (WUP), which was designed to give effect to the water allocation framework that was included in the original agreement. This GEF-funded program which started in 2000 has been a key factor contributing to the success of the organization. Project activities under this program included basin modeling and knowledge base programs, environmental and trans-boundary analysis, rules for water utilization and management, and institutional strengthening.<sup>105</sup> Some of the accomplishments arising from this programming include the following: (1) the ability to assess impacts of proposed developments, to monitor, to tailor and to minimize negative impacts and to ensure more consistent dry season flow (in dam development);<sup>106</sup> (2) good working relationships were developed through the experiential learning-based drafting processes of several of the main water utilization and technical guidelines (i.e., data and information sharing); (3) the programs have spurred institutional growth of various multilateral working groups that are needed to implement the procedures developed under the plan.

As the WUP illustrates above, thus far, the MRC's major strength has been its abilities to generate shared data and other information regarding the Mekong. In addition to information about water quality and flow monitoring, the MRC developed a flood forecasting system, development scenarios, technical directions for scenario analysis, a comprehensive hydropower database, and other technical databases.<sup>107</sup>

The achievements in improving water monitoring have also increased environmental awareness within the riparian agencies and local authorities in the Region. The Fisheries Programme of the MRC has conducted extensive research that is providing valuable information that needs to be considered in the planning of future developments. This shared information flowing from the work of the MRC is the essential basis to build science-based fishery management plans needed to ensure successful management of this resource on which so many people in the Basin are dependent. The approach that is being used in this respect is to coordinate the programs of each of the member states in order to help them implement sustainable fisheries management and development at the

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<sup>104</sup> See Cogels, *supra* note 102.

<sup>105</sup> *Water Utilization Programme: Implementation Completion Report*, MEKONG RIVER COMMISSION, 4 (2008).

<sup>106</sup> *Id.* at 5-6.

<sup>107</sup> Mekong River Commission, *Mid-term Review of the Mekong River Commission Strategic Plan 2006-2010*, March 2009 at 7, available at [http://ns1.mrcmekong.org/download/Reports/2\\_MTR\\_FinalReport\\_Main\\_report\\_Jan09.pdf](http://ns1.mrcmekong.org/download/Reports/2_MTR_FinalReport_Main_report_Jan09.pdf).

local, national and regional levels.<sup>108</sup>

In summary, one can imagine the potential for conflict in the Mekong Basin if there were no such regional entity through which the member states could engage in ongoing communication, information sharing, consensus building and co-management systems. As one informed observer opined in a recent interview, the mere presence of a forum such as the MRC has been a major contributor to peace and stability in the Region, and “while we don’t know if it is possible to quantify this benefit, but it alone might just justify the USD15m/yr annual budget.”<sup>109</sup>

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<sup>108</sup> *Fisheries Programme*, MEKONG RIVER COMMISSION, available at <http://www.mrcmekong.org/about-the-mrc/programmes/fisheries-programme/> (last visited Feb. 12, 12).

<sup>109</sup> Personal Communication with John Metzger, (on file with the author).

## 7. Conclusions

In the 37 years prior to the 1995 Agreement, the LMRBS had been able to cooperate with each other to varying degrees on the management of the Mekong River Basin within their territories. This history helped make the negotiations of the MRC run much smoother than would otherwise have been the case. In addition to this “Mekong Spirit” (of co-operation), the negotiations leading to the Agreement were helped along by several other operative factors: (1) a senior highly experienced UNDP consultant helped facilitate the negotiations and helped the parties to eventually find common ground when the respective member state delegations were in disagreement; (2) the delegations appeared to have had a strong grasp of international law which served as an important starting point for negotiations on the main issues; (3) the best alternative to a negotiated agreement (‘BATNA’) for each country was less palatable than what could be gained through agreement. As a result of these factors, the countries were willing to make the concessions necessary to accommodate each delegation’s primary interests and eventually to come to an agreement. Considering the lack of other multilateral bodies operating in the Region, and the breadth and importance of the issues in discussion, the four nations were able to reach consensus in remarkably short amount of time.

While the 1995 Agreement was an important achievement in that it provides a legal and institutional framework to facilitate development in the Basin, it is the actual programs developed through this framework that will be the real determinant of the success of the Agreement. Some of the major successes of the MRC have been in the areas of fisheries, navigation, flood management and especially the Water Utilization Programme. Major conflicts have occasionally presented themselves between the respective national governments, who have been pursuing large scale hydroelectric development, and the donors, who appear to be more concerned with the ecological issues arising from these proposed projects.

There has also been a relative dearth of public participation in the functioning of the MRC, and this absence of consultation has become an area of particular focus for improvement by the MRC. This issue is especially concerning, considering the segments of society that has the most to lose from large scale hydroelectric development are often the ones with no say in these matters.

Undoubtedly one of the biggest concerns for the MRC going forward will continue to be the fact that China and Myanmar, the two riparian countries in the upper reaches of the River, are not members of the MRC. While there has been an increasing amount of information that has been shared between the MRC and these two official “Dialogue Partners,” more co-operation with these two states is needed in order to be able to manage the River more effectively.

In view of the fact that China is exhibiting a growing interest in being perceived as a responsible citizen in the international community, it is reasonable to predict that increased participation by China in the MRC may be a reality in the foreseeable future.

However, before this scenario comes to fruition, China would need to be persuaded that the MRC will be sensitive to the best interests of all the riparian countries (including China) in the way that the MRC facilitates the management and development of the Mekong.

A major obstacle to embracing this more inclusive view of the role of China and Myanmar in the work of the MRC is the objections to this increased role being voiced by the donor nations that have supported the MRC in the early stages of its life. But over time, the MRC may need to become more independent of these influences from **outside** the Region in order to do a better job performing its optimal future role **in** the Region.

It is conceivable that the current member states in the next decade will embark on another push to broaden its member base to include the two nations in its Upper Basin.

There is no doubt that the LMRBS could all benefit from increased co-operation with China, especially in relation to the potential climate changes and the increased dry season flows that the Chinese dams may provide for their downstream neighbours.<sup>110</sup> The institutional memory (described above) of how the four original members of the MRC forged their Agreement in 1995 might provide some key lessons about how to proceed for an increased role for China and/or Myanmar in the work, and ultimately, in the membership and governance of the MRC.

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<sup>110</sup> Id.