



MEKONG RIVER COMMISSION

WORKING DOCUMENT

PNPCA COMMENTARY

By

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ACRONYMS

ADB	Asian Development Bank
CNMC	Cambodia National Mekong Committee
DFAT	Department of Foreign Affairs and Trade
DPs	Development Partners (donor countries and organizations)
ECAFE	UN Economic Commission for Asia and the Far East (now called UNESCAP)
ICJ	International Court of Justice
IWRM	Integrated Water Resources Management
LAs	National Line Ministries/Agencies
LMB	Lower Mekong Basin
LNMC	Lao National Mekong Committee
LMCM	Lancang-Mekong Cooperation Mechanism
MA	Mekong Agreement - the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin signed in Chiang Rai, on 5 April 1995
MCs	Member Countries – MRC countries - Cambodia, Lao PDR, Thailand and Vietnam
MONRE	Ministry of Natural Resources and Environment (Lao PDR, Vietnam, Thailand)
MOWRAM	Ministry of Water Resources and Meteorology (Cambodia)
MRC	Mekong River Commission
MRC JC	MRC Joint Committee
MRC JP	MRC Joint Platform set up by the MRC Joint Committee
MRCS	Mekong River Commission Secretariat
PC	Prior Consultation
PNPCA	Procedures for Notification, Prior Consultation and Agreement
TNMC	Thai National Mekong Committee
UN	The United Nations
UNESCAP	The United Nations' Economic and Social Commission for Asia and the Pacific
UNWC	The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997
VNMC	Vietnam National Mekong Committee
WUP	MRC Water Utilization Programme funded by WB/GEF
G-PNPCA	Guidelines on the Implementation of the PNPCCA

DEFINITIONS OF KEY TERMS FROM 1995 MEKONG AGREEMENT AND RELEVANT MRC PROCEDURES

The following definitions have been extracted from the 1995 Mekong Agreement (MA), related Procedures, and Guidelines. It has been agreed that the relevant MRC Working Groups and Joint Committee (JC) Joint Platform will finalise pending issues, including the definitions of key terms. Hence, this list of definitions will be updated periodically.

1. **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. (**1995 MA, Chapter II**).

Commentary: It is also known as a specific agreement under the PNPCA. To date, such an agreement has not been discussed or approved by the JC.

2. **Inter-Basin Water Diversion:** The diversion of water from the mainstream or a tributary of the Mekong River System into another basin (**PWUM, 2003 Section 1**).
3. **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 (**PNPCA, 2003, Section 1**).
4. **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 of implementation if any concern is raised (**PNPCA, 2003, Section 1**).

Commentary: To date, no major issues or differences have arisen from these definitions of inter-basin diversion, mainstream and tributary. There was an issue with Don Sahong, where it was not considered as mainstream due to its topology (distributary). These definitions are expected to be reviewed/confirmed as necessary.

5. **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. (**1995 MA, Chapter II**).
6. **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. (**1995 MA, Chapter II**).

Commentary: Definitions 4, 5 and 6 above are further clarified in the PNPCA and G-PNPCA. According to the 1999 MRC Council Resolution and the PNPCA (approved by the MRC Council in 2003), the PNPCA and other procedures "are an integral part of the Rules for Water Utilization and Inter-Basin Diversions" required under the 1995 MA.

7. **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. (**1995 MA, Chapter II**).

8. **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 (**PNPCA, 2003, PWUM, 2003 Section 1**).

Commentary: In the definitions in the 1995 MA, 2003 PNPCA and PWUM, the proposed water uses or water use refers to any use of water that potentially has a significant impact on mainstream flows (excluding domestic and other uses having no significant impact). The definitions in the PNPCA and PWUM expands this to include those uses having a significant impact on water quality or flows regime of the Mekong mainstream. Since 1995, the MRC practices have broadened the scope of “proposed use”. However, those practices have not been reflected in any relevant MRC documents such as the PNPCA, other procedures or the MRC Council or JC Decision. On occasions, Member Countries have submitted notification of a bridge across the Mekong out of consideration that it might affect other equitable and reasonable uses, such as freedom of navigation (articles 5 and 9) etc. In principle. The PNPCA should not only be for maintaining flows (Article 6) but also for maintaining water quality and ecological balance (Article 3), avoiding, minimising and mitigating potential impacts (Article 7), and maintaining freedom of navigation (Article 9). As such, the extent to which notification or prior consultation on the proposed uses – for example, bridges and power-lines or other uses that are likely to significantly affect the flow, quality, river health or other beneficial uses – need to be expanded/included.

9. **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 (**PNPCA, 2003, Section 1**).

Commentary: Relevant MRC working groups and the Joint Platform are entrusted in further developing the definitions of key terms – pending issues.

10. **“Acceptable/Good Water Quality”** means water of the quality capable of meeting the beneficial uses identified by the Member States (**PWQ, 2011, Section 1**).

PREFACE

Friendly and mutually beneficial transboundary cooperation among the Lower Mekong Basin (LMB) Nations has spanned over 60 years. Building on the Mekong Spirit and its legal and pragmatic traditions, the Mekong Countries have overcome several hurdles and managed to achieve mutually beneficial cooperation for the sustainable benefit of the Mekong peoples from this natural-resource rich international river basin.

The 1995 Mekong Agreement (MA) is an international treaty and contains all relevant international water legal principles and norms that are found in the international water treaties and legal documents, and the decisions of the International Court of Justice (ICJ). Being a framework agreement, the 1995 MA leaves the finer details to subsequent rules, protocols, or procedures to be negotiated and agreed upon by the parties.

The Preliminary Procedures for Notification, Prior Consultation and Agreement (PNPCA) was approved by the MRC Council in November 2002 for initial implementation until the adoption of the PNPCA by the MRC Council in November 2003. The Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement (G-PNPCA) were approved by the MRC Joint Committee in August 2005. The PNPCA and other MRC Procedures and Guidelines form an integral part of the 1995 Mekong Agreement.

Some legal experts rightfully observed that the 1995 MA and the PNPCA represent leading-edge practice internationally. It has been a crucial platform and procedural tool for water diplomacy for sustainable development and transboundary cooperation.

By August 2018, there were about 11 hydropower development projects on the Lower Mekong Mainstream at different stages of development, from the early stage of feasibility studies to the construction phase, and the MRC Secretariat have received a significant number of notifications, including four Prior Consultation processes (PC) for Xayabury, Don Sahong, Pak Beng and Pak Lay Projects. More proposed use projects potentially triggering PC, or even the specific agreement processes, are expected in the coming years.

The MRC Member Countries are conscious that this commentary helps them to learn from their PNPCA implementation experiences to improve subsequent implementation, and provides greater certainty and clarity for all member countries and other key stakeholders on the PNPCA process and its implementation. It is important to emphasize that the Commentary is not meant to amend the existing Procedures or Guidelines, but to support a more effective, constructive and mutually beneficial PNPCA implementation process for sustainable development, utilization, conservation and management of the Mekong River Basin's (MRB) water and related resources. It reconfirms a common understanding of, and commitment for, the PNPCA and identifies areas for further improvement.

The PNPCA Commentary has been developed, carefully planned, and implemented by the MRC in a highly consultative and participatory process. The Commentary Note covers 19 key Commentaries ranging from the key principles and objectives of the 1995 Mekong Agreement and the PNPCA and its Guidelines to the key procedural norms and provisions related to Notification, Prior Consultation, and Specific Agreement, as well as the roles and responsibilities of the MRC and NMCs, and external stakeholders.

The Commentary presents the MRC governance bodies, its Member States, and other key stakeholders with an opportunity to strengthen confidence and demonstrate global leadership in the cooperative management of a major international basin. In this connection, I wish to express my sincerest thanks to the NMCs, national experts, and the MRCS for their active contribution and support without which this important milestone would not have been possible.

As Chairperson of the MRC JC for 2019, I am grateful to the JC for having endorsed this Commentary Note as a working document for the MRC, NMCs and other key stakeholders, including developers, to contribute to a more effective and satisfactory outcome from the implementation of the 1995 MA and achievement of the national development aspirations for prosperity, peace, harmony and sustainability for all.

More concerted efforts from all key MRC bodies, including relevant working groups and the MRC Joint Platform (MRC JP), are needed to promote further clarity and common understanding, consistency among key principles, objectives, and provisions, as well as the definition of key terms. It is best to deal with these matters through a coordinated approach to all relevant Procedures and Guidelines by the MRC JP.

Date: (day) (month), 2019

(Signature)

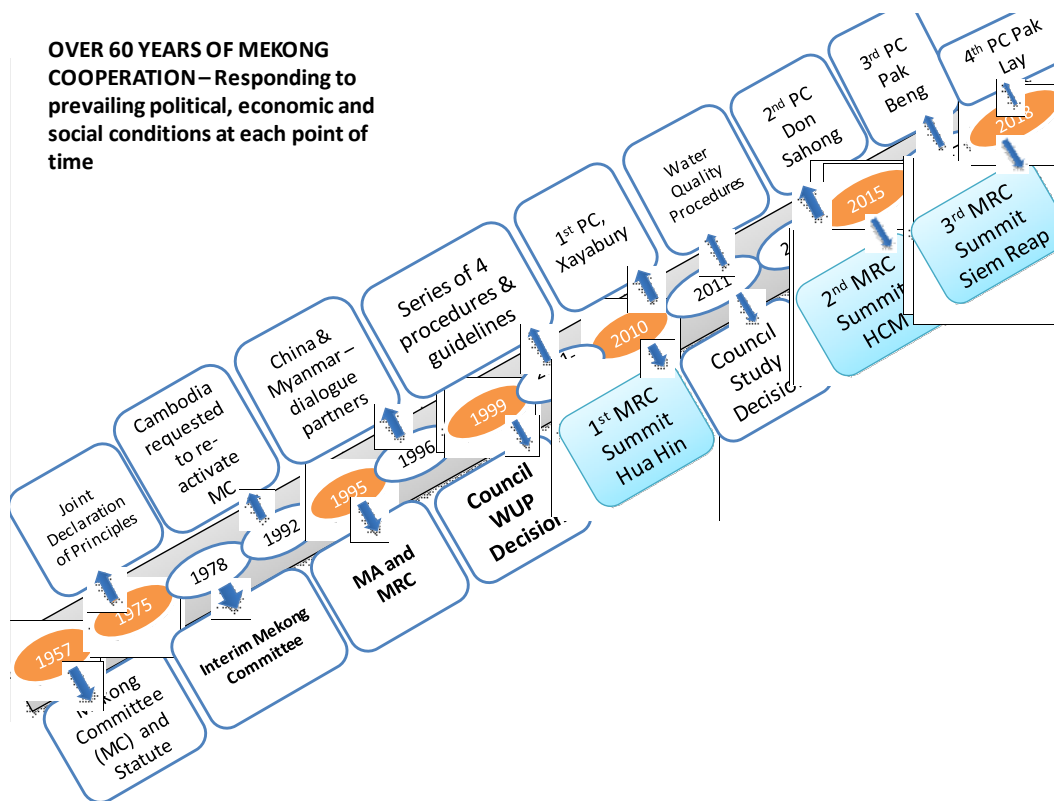
Chairperson of the MRC Joint Committee for 2019

1.0 INTRODUCTION

1.1 OVER 60 YEARS OF MEKONG COOPERATION

Friendly and mutually beneficial transboundary cooperation – well-known as “the Mekong Spirit” – among the four Lower Mekong Basin (LMB) Nations has spanned over 60 years. It was formally started in 1957 when the then ECAFE (now called UNESCAP) assisted the four countries in the Lower Mekong – Cambodia, Laos, Thailand and Vietnam in establishing the Committee for Coordination of Investigation of the Lower Mekong Basin - Mekong Committee (Mekong Secretariat, 1989). The main aim was to generate economic benefits through coordinated efforts in the development of hydropower, navigation, irrigation, drainage and flood control (Mekong Secretariat, 1989).

Figure 1-1 Over 60 Years of Mekong Cooperation (1957-2018)



1.2 THE 1995 MEKONG AGREEMENT

After more than 21 months of negotiation, Cambodia, Lao PDR, Thailand and Viet Nam signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin on 5 April 1995 (the 1995 Mekong Agreement – 1995 MA)¹ in Chiang Rai, Thailand. The 1995 MA reaffirmed and expanded the globally known "Spirit of the Mekong Cooperation" nurtured since 1957 by setting forth the framework for cooperation in a constructive and mutually beneficial manner for the sustainable development, utilization, conservation and management of the Mekong River Basin (MRB) water and related resources.

The 1995 MA is an international treaty,² and as a framework agreement it contains 42 articles, grouped into six chapters. It superseded all three prior agreements including the 1957 Mekong Committee Statute, the

¹ China and Myanmar (upper Mekong) are dialogue partners to the MRC. Article 39 of the Agreement provides that China and Myanmar may become parties to the 1995 MA when they accept the rights and obligations under this agreement, and may become a party with the consent of the parties.

² The Convention on the Law of Treaties was signed at Vienna on 23 May 1969 and entered into force on 27 January 1980 (United Nations, *Treaty Series*, vol. 1155, p. 331). Article 2 - Use of terms 1, defines “treaty” as “an international agreement concluded

1975 Joint Declaration, the 1978 Interim Mekong Committee Declaration³ and all rules of procedure adopted under the past agreements (1995 MA Article 36.B).

The 1995 MA is characterized by the following features: i) stipulating general principles (Articles 1 and 10); and, ii) providing a flexible framework and continuous process of dialogue, negotiation and peaceful conflict management processes (Articles 11-33 and 34-35).

The 1995 MA contains relevant international water law principles and norms that are found in the international water treaties and legal documents and the decisions of the International Court of Justice (IJC). The major principles of the 1995 MA are: reasonable and equitable utilization of Mekong waters; no substantial harm and state responsibility for substantial damages; dispute management; freedom of navigation; and environmental integrity of the Mekong River, including maintenance of its acceptable flows and water quality.

The 1995 MA State Parties also signed the Protocol to establish the Mekong River Commission (MRC), consisting of three permanent bodies: Council, Joint Committee and Secretariat, “with the full authority and responsibility set forth under the Agreement” as a joint permanent mechanism to implement the far-reaching provisions of the 1995 MA for the benefit of all its people.

The MRC Summit that has met every four years since 2010, is the highest political level platform (a new and highly welcomed addition to the MRC Governance) for confirming and reaching key agreements on Mekong cooperation.

Being a "framework" agreement, the 1995 MA leaves the finer details to subsequent rules, protocols, and procedures to be negotiated and agreed upon by the parties. The Preliminary PNPCA was approved by the MRC Council at its 9th Meeting in Ho Chi Minh City on 12 November 2002 for initial implementation pending the adoption of the PNPCA by the MRC Council at the 10th Meeting on 29-30 November 2003. The Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement (G-PNPCA) were approved by the MRC JC on 31 August 2005. The PNPCA and other Procedures form an integral part of the 1995 Mekong Agreement.⁴

1.3 OBJECTIVE AND PROCESS OF THE PNPCA COMMENTARY

Some legal experts observed that the 1995 MA and the PNPCA represent leading-edge practice internationally. They have been a crucial platform and procedural tools for water diplomacy for sustainable development and transboundary cooperation.

between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. Its Article 11 defines “means of expressing consent to be bound by a treaty” can be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

³ Statute of the Committee for Coordination of Investigations of the Lower Mekong Basin of 1957 as amended, the Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin of 1975, and the Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin of 1978.

⁴ The related Procedures and Guidelines include:

- Procedures for Data and Information Exchange and Sharing, approved 2001
- Procedures for Water Use Monitoring, approved 2003
- Procedures for Notification, Prior Consultation and Agreement, approved 2003
- Procedures for the Maintenance of Flows on the Mainstream, approved 2006
- Procedures for Water Quality, approved 2011

Technical Guidelines

- Guidelines on Implementation of the Procedures for Data and Information Exchange and Sharing, 2002
- Guidelines on Implementation of the Procedures for Water Use Monitoring, 2006
- Guidelines on Implementation of the PNPCA 2005
- PMF Technical Guidelines are being tested
- PWQ Technical Guidelines, 2016.

Since the adoption of the PNPCA in late 2003 up to August 2018, the MRC Secretariat has received 68 notifications including three Prior Consultation (PC) projects. It is likely that there will be more water-use projects that will trigger PC, and even the specific agreement process in the coming years.

The MRC has rightly noted that implementation of the PNPCA, particularly for the Prior Consultation, has drawn a lot of attention and involvement from stakeholders. Several lessons, pending issues and challenges have been documented. The Matrix of Lessons Learnt, Challenges and Pending Issues for the PNPCA that was developed by the MRCS and Joint Platform has been used as a working document.

The Member Countries found that it was important to learn from this experience to improve subsequent implementation and to provide greater certainty and clarity for all Member Countries and other key stakeholders about the PNPCA process and its implementation.

This Commentary Note is not meant to amend the existing Procedures or Guidelines, but to facilitate the effective Implementation of the PNPCA process through promoting a common understanding on the PNPCA.

The PNPCA Commentary was based on:

- 1) Systematic analysis of all relevant provisions and practices contained in:
 - a. Various MRC documents such as the 1995 MA, PNPCA, G-PNPCA, and other Procedures and Guidelines etc.⁵
 - b. Other practical international best practices.
- 2) Clarification of key substantive provisions in the 1995 MA.
- 3) Clarification of the procedural aspects, such as the starting/commencement date, duration and grounds for decisions on extension, access to and adequacy of information, and key terminology. The clarification was also informed by the recent MRC's "established practices" in its latest prior consultation processes, and the lessons learned workshop and its follow-up.
- 4) Taking stock and clarifying the roles and responsibilities of relevant institutional actors and stakeholders of the PNPCA during each phase or step as stated in the existing G-PNPCA and Pak Beng PC's lessons learned.
- 5) Confirming many key guidelines currently embodied both in the main text and footnotes of the G-PNPCA.

2.0 KEY PRINCIPLES OF THE 1995 MA AND INTERNATIONAL PRACTICES AND NORMS

The PNPCA Commentary's national consultations in all four Member Countries have concurred that a better awareness and common understanding of the 1995 MA's preamble, principles and objectives are very important for better and mutually satisfactory outcomes from implementation of the PNPCA and 1995 Mekong Agreement, as well as other related MRC Procedures and Guidelines.

It is important to bear in mind that for inspiration, the Commentary Note looks into international experiences and practices for reference only – it does not mean those international treaties are binding without the countries' expressed consent.

⁵ The PNPCA Commentary outlines and contents are drawn from and inspired by the MRC related works and other international examples; e.g. UN Watercourses Convention User's Guide 2012; ILC's Commentary on the 1994 Draft Articles on the Law of the Non-Navigational Uses of International Watercourses; Helsinki Rules on the Uses of the Waters of International Rivers in 1966 (with comments); Guide to Implementing the Convention on the Protection and Use of Transboundary Watercourses and International Lakes; and Guidance on the Practical Application of the ESPOO Convention on Environmental Impact Assessment in a **Transboundary** Project etc.

1995 MA

Preamble:

... PROCLAIMING further the following specific objectives, principles, institutional framework and ancillary provisions in conformity with the objectives and principles of the Charter of the United Nations and international law:

Article 38. Scope of Agreement

This Agreement shall consist of the Preamble and all provisions thereafter and amendments thereto, the Annexes, and all other agreements entered into by the Parties under this Agreement. Parties may enter into bi- or multi-lateral special agreements or arrangements for implementation and management of any programs and projects to be undertaken within the framework of this Agreement, which agreements will not be in conflict with this Agreement and will not confer any rights or obligations upon the parties not signatories thereto, except as otherwise conferred under this Agreement.

2.1 ENTIRETY AND COHERENCE

Commentary 1: Treating the 1995 Mekong Agreement and PNPCA in their Entirety

Lessons learned: Tendency in selective application and implementation of articles such as Article 4 of the 1995 MA on sovereign equality and territorial integrity has been observed, and the PNPCA is still interpreted differently.

Relevant Provisions of the 1995 MA and MRC Procedures:

The 1995 MA Preamble and Article 38 require the application of the 1995 MA in its totality, paying utmost attention to the inter-linkage among all relevant 1995 MA provisions, including its protocol/annexes and subsequent agreements, Procedures and Guidelines developed under the 1995 MA.⁶ This approach is in line with the international practice and general rule of interpretation as set out in Article 31 of the Vienna Convention on the Law of Treaties⁷.

The need to interpret and implement the Agreement in light of its objectives and purpose and in its entirety is confirmed in the PNPCA and G-PNPCA. Its Preamble confirms PNPCA as an integral part of the Rules for Water Utilization and Inter-Basin Diversions and highlights the need of the Member Countries to work together to address the protection of the environment

and ecological balance (Article 3); prevention and cessation of harmful effects (article 7); state responsibility, including measures for mitigating and compensating for the harmful damage (Article 8); and taking action in emergency situations (Article 10). The G-PNPCA explains that “these and other MRC guidelines should not be “stand-alone” documents and must be read in conjunction with respective Procedures/rules” (G-PNPCA, Footnote 1).

Relevant International norms and practice: The Convention on the Law of Treaties stipulates that an agreement/treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose.” If its meaning is still ambiguous, obscure, manifestly absurd or unreasonable after reading the full treaty text and any other agreements which may have been made between the Parties about the treaty, then other interpretative aids may be used, such as the preparatory works or negotiation records.

Specific recommendation: The duty to interpret and implement the Agreement in the light of its objectives and purpose and in its entirety is well defined. Hence a more comprehensive and coherent interpretation and implementation of all key provisions and principles should be promoted, since their lack is a major constraint. It is firmly believed that through this Note and further joint actions, this coherence and consistency can be further strengthened.

⁶ The Member States desire “to enable this Agreement to serve as an “umbrella” accord in the efforts of the parties to promote joint cooperation and coordination in the sustainable development of the water and related resources of the Mekong River Basin” (1995 MA Commentary and History).

⁷ The Convention on the Law of Treaties was signed at Vienna on 23 May 1969 and entered into force on 27 January 1980 (United Nations, *Treaty Series*, vol. 1155, p. 331).

2.2 THE PURPOSE OF MEKONG COOPERATION

1995 MA

CHAPTER I. PREAMBLE

RECALLING the establishment of the Committee for the Coordination of Investigations of the Lower Mekong Basin on 17 September 1957

NOTING the unique spirit of cooperation and mutual assistance that inspired the work of the Committee for the Coordination of Investigations of the Lower Mekong Basin and the many accomplishments,

ACKNOWLEDGING the great political, economic and social changes that have taken place in these countries of the region during this period of time,

RECOGNIZING that the *Mekong River Basin and the related natural resources and environment are natural assets of immense value to all the riparian countries for the economic and social well-being and living standards of their peoples,*

REAFFIRMING the determination *to continue to cooperate and promote in a constructive and mutually beneficial manner in the sustainable development, utilization, conservation and management* of the Mekong River Basin water and related resources for navigational and non-navigational purposes, *for social and economic development and the well-being of all riparian States, consistent with the needs to protect, preserve, enhance and manage the environmental and aquatic conditions and maintenance of the ecological balance* exceptional to this river basin,

AFFIRMING to promote or assist in *the promotion of interdependent sub-regional growth and cooperation among the community of Mekong nations*, taking into account the *regional benefits* that could be derived and/or *detriments that could be avoided or mitigated from activities* within the Mekong River Basin undertaken by this framework of cooperation,

REALIZING the necessity to provide an *adequate, efficient and functional joint organizational structure* to implement this Agreement and the projects, programs and activities taken there under in cooperation and coordination with each member and the international community, and to address and resolve issues and problems that may arise from the use and development of the Mekong River Basin water and related resources in an amicable, timely and good neighborly manner,

PROCLAIMING further the following specific objectives, principles, institutional framework and ancillary provisions in conformity with the objectives and principles of the Charter of the United Nations and international law: (emphasis added)

Commentary 2: A Duty to Promote Mutually Beneficial Cooperation

Lessons Learned: Article 1 and the Preamble refer to mutually beneficial cooperation and sustainable mutual benefits on several occasions. This is one of the most important provisions with respect to the Mekong Spirit that underpins PNPCCA. In the Xayaburi and Don Sahong cases, this principle was tested and the PC process did not lead to a clearly defined conclusion. However, lessons were learned and additional efforts were made for improvement in design, and additional information was provided by the notifying country, especially for the Xayaburi hydropower project. In the Pak Beng case, a greater emphasis was placed on what measures could be put in place to bring the proposed use in line with Chapter III, in particular Article 7 (MRCS, 2017).

Relevant Provisions of the 1995 MA and MRC

Procedures: The title and contents (Preamble and relevant articles) of the 1995 MA re-affirm on many occasions the commitment to "cooperation for the sustainable development of the Mekong River Basin". This means that cooperation should lead to joint knowledge and information outcomes or mutual benefits whereby all states involved in cooperative activities gain from the interaction.

The MCs affirm their strong commitment for the social and economic development and the wellbeing of all riparian states and their peoples, consistent with the need to protect, preserve, enhance and manage the environmental and aquatic conditions and maintain ecological balance. The 1995 MA also affirms the important role of MRB development as a catalyst for other regional development activities, as well as the necessity of an adequately structured, efficient and functional organization to pursue the objectives and principles agreed to by the parties consistent with the United Nations Charter and international law.

Relevant International Norms and Practice: This duty is in line with the **international practices**. Article 8 of the UNWC presents the duty to cooperate as a legal obligation. Such a duty takes on meaning in specific

contexts – e.g. working together with co-riparians to achieve equitable and sustainable uses and benefits thereof according to the agreed principles and procedures in *good faith*.

Specific Recommendation: The obligation to cooperate is one of the main drivers for MCs to enter into the 1995 MA, hence the legal obligation to cooperate for mutually beneficial cooperation needs to be understood and promoted in a coherent manner by the MCs, and MRC bodies and platforms.

2.3 PURPOSE AND ROLE OF THE PNPCA WITHIN THE 1995 MA FRAMEWORK

2003 PNPCA

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.

2005 PNPCA Guidelines

Preamble

Pursuant toMRC 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.*²

Commentary 3: Purpose of PNPCA and Inter-dependency

Lessons Learned: The PNPCA's purpose and its processes were not well understood. Mainly due to time constraints on reaching agreement, several provisions in the G-PNPCA ended up in the footnotes and need to be elevated and clarified. It is important to recall them and share with the current and future generation – to address a generational gap in knowledge and understanding of the 1995 MA and PNPCA.

Relevant Provisions of the 1995 MA and MRC Procedures:

The PNPCA (2003) Preamble confirms its main purpose to support the Member Countries in realizing their commitment to continue to cooperate and promote in a constructive and mutually beneficial manner for the sustainable development of the MRB's waters and related resources as proclaimed by the Member Countries in the 1995 MA.⁸

Even though the PNPCA is primarily based on Article 5 and pursuant to the Rules for Water Utilisation and Inter-Basin Diversion provided under Article 26, it is important to apply and interpret it in conjunction with other relevant provisions and procedures (G-PNPCA, Preamble, and Footnote 1).

Recently, the MRC has taken steps to commence early planning to prepare implementing the PC process more effectively and efficiently, wherever feasible, that address the lessons learnt and build on the time-bound and inter-linked roadmap to ensure timely information sharing and access to a more meaningful participation and assessment by all stakeholders.

Relevant International Norms and Practice: This obligation is based on the international law principle of *Pacta sunt servanda* – obligation arising from international agreements must be fulfilled in good faith. It is a fundamental rule of international law (UN Charter and UN Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation among States).

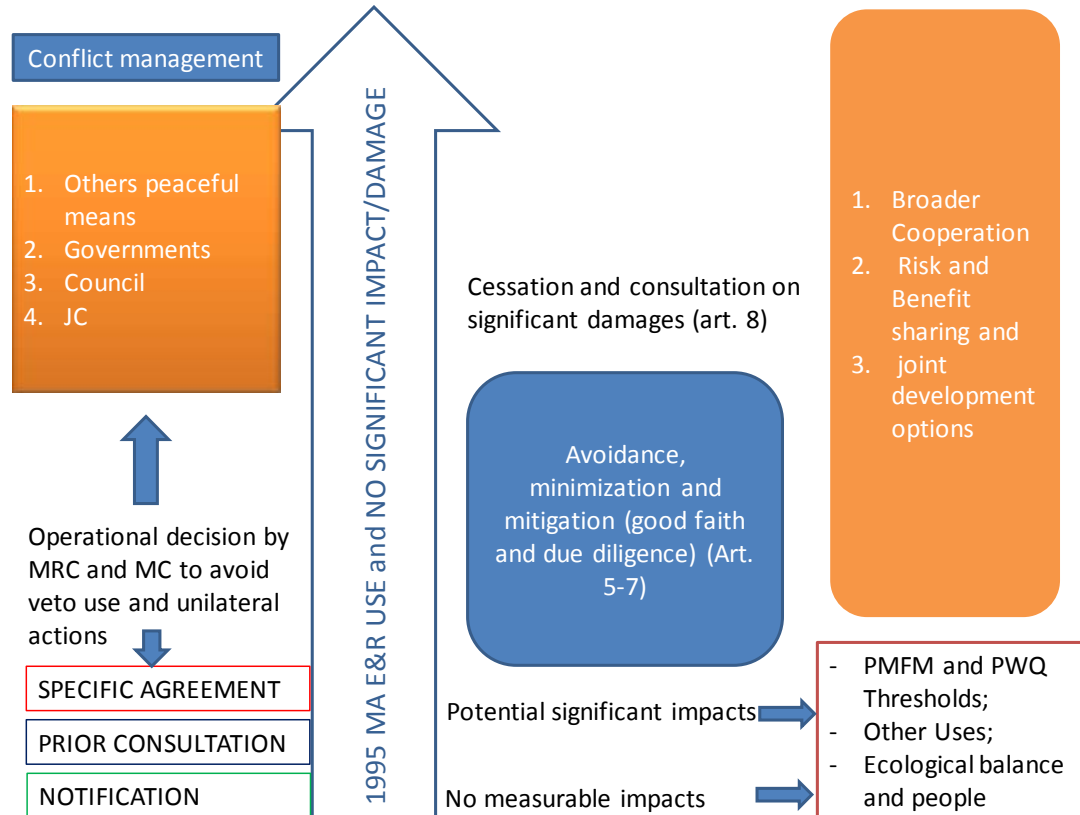
Specific Recommendation: The Member Countries need to improve the treatment of the PNPCA and 1995 MA's implementation as a continuous, collaborative and pro-active process for building further confidence, and strengthening the understanding of the PNPCA and capacity to effectively and efficiently implement their mutual obligations of both notifying and notified countries.

⁸ PNPCA Section 2 provides for its main objectives for providing steps (measures, or platform) for the MRC member States to support the establishment of the Rules for Water Utilization and Inter-Basin Diversions and promoting better understanding and cooperation among the MRC member countries. The G-PNPCA 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 (G-PNPCA Preamble, 2005).

The PNPCA is only as effective as its weakest link, hence it is important for MRC and Member Countries through the JC Working Group and MRC Joint Platform to identify and rectify PNPCA’s weaknesses to improve its effectiveness and relevance to achieve the agreed sustainable and mutually satisfying outcomes.

The relationship and linkages among the key MRC Procedures and Guidelines related to the maintenance of mainstream flow, water use monitoring, water quality, knowledge and information sharing etc., as well as the legal requirements for notification, prior consultation and specific agreement must be further promoted by a more unified platform such as the MRC Joint Platform.

Figure 2-1 PNPCA’s Purpose and Place in Broader Mutually Beneficial Cooperation and Good Faith Implementation of the 1995 MA



E&R Use = Equitable and Reasonable use

Figure 2.1 shows the central place of the PNPCA within the overall Mekong Cooperation and Legal Regime agreed upon by the Member Countries. It forms a major part of the mutually beneficial cooperation and mutual respect of the legal and legitimate rights of all Mekong Countries.

2.4 PNPCA AND RELEVANT SUBSTANTIVE PROVISIONS

1995 MA

Article 1. Areas of Cooperation

To cooperate in all fields of sustainable development, utilization, management and conservation 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, in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities.

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.

Article 4. Sovereign Equality and Territorial Integrity

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.

Commentary 4: Sovereign Equality and Territorial Integrity, Reasonable and Equitable Use and No Significant Harm

Lessons Learned: In practice, the Member Countries have adhered to the obligation to achieve a proper balance between “no right to veto the use and no unilateral right to use water by any riparian without taking into account other riparian’s rights. However, there have been a few instances of disagreement on Article 4 on sovereign equality and territorial integrity.

Relevant Provisions of the 1995 MA and MRC Procedures:

As stipulated in the 1995 MA Preamble, the MRC Member Countries re-affirm their commitment to cooperate based on a mutual respect of the fundamental principles of peaceful international relations, namely sovereign equality and territorial integrity in the utilization and protection of the water resources of the MRB.⁹ In recognizing reciprocal rights of other riparian states, the MRC Members Countries have entered into an international obligation to cooperate for mutual benefit from the international river basin and related resources.

The MRC Member Countries take upon themselves an obligation to cooperate and fulfil the agreement in good faith¹⁰ by making the best efforts to cooperate and coordinate with each other through a functional joint organizational structure to implement the 1995 MA and the projects, programs and activities; taking all available and affordable measures to avoid, minimize and mitigate significant harmful effects; and to address and resolve issues and problems in an amicable, timely and neighbourly manner.

Relevant International norms and practice: The Helsinki Rules (by International Law Association, Article IV, 1966) defined the equitable utilization of the waters of international drainage basin as an entitlement of all

⁹ The right to development and the principle of permanent sovereignty over natural resources are the economic aspects of the fundamental principle of international law – state sovereignty. Right to development has two aspects:

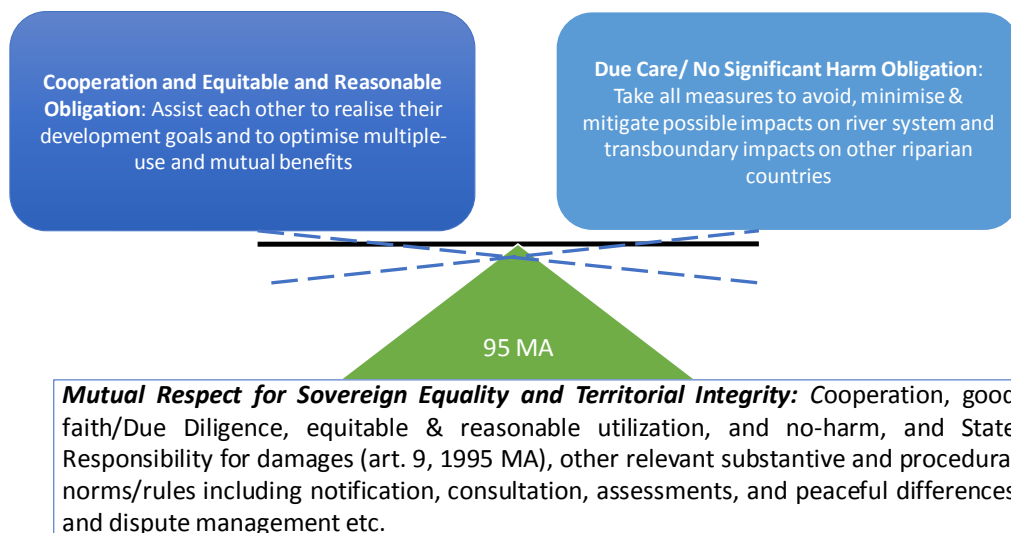
- 1) The duty of government to its own people – the state has to create appropriate conditions for their pursuit of happiness and economic development and social well-being, and
- 2) The duty of government towards other states and the international community as a whole by formulating and taking appropriate national measures and complying with the international principles and rules consistent with the UN charter and other treaties/agreements and promoting peace and security.

¹⁰ The International Court of Justices (ICJ) has affirmed the important role of good faith in several cases including North Sea Continental Shelf Judgment, 20 February 1969; Fisheries Jurisdiction Decision of July 25, 1974; Gabčíkovo-Nagymaros Project Judgment of 25 September 1997; and Case Concerning Pulp Mills on the River Uruguay Judgment of 20 April 2010. States are bound to identify in good faith the actual circumstances and interests of all concerned States within the scope of rules, to ensure that the application of rules are truly consistent with their letter and spirit, as well as relevant international law principles, norms and morality. The UN WATERCOURSES CONVENTION User’s Guide defines acting in good faith as an act with honest intent, fairness and sincerity, and with no intention of deceit.

basin states to use within their respective territories, to a reasonable and equitable share in the beneficial uses of the waters. It also rejected the unlimited sovereignty position.

Specific Recommendation: In the spirit of cooperation, all MRC Member Countries should actively assist one another to realise their development goals and to optimise the multiple-use and mutual benefits of this development, while considering measures to avoid, minimise and mitigate possible impacts on the system and transboundary impacts on other riparian countries. The Member Countries are required to take every practical and available means to ensure that activities within their jurisdiction or control do not cause significant impacts or damage to the legal rights and interests of others, and adhere to the obligation to cooperate, the **principle of good faith**, equitable and reasonable utilization, no-harm (substantive norms), and their procedural rules such as notification, consultation, agreement, impact assessment and negotiation/peaceful management of differences and disputes (Figure 2.2 below).

Figure 2-2 The Balancing Act between Mutual Respect for Sovereign Equality and Territorial Integrity



1995 MA

Article 5. Reasonable and Equitable Utilization

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:

A. On tributaries of the Mekong River, including the Tonle Sap, intra-basin uses and inter-basin diversions shall be subject to notification to the Joint Committee.

B. On the mainstream of the Mekong River:

1. During the wet season:

a) Intra-basin use shall be subject to notification to the Joint Committee.

b) Inter-basin diversion shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.

2. During the dry season:

a) Intra-basin use shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.

b) Any inter-basin diversion project shall be agreed upon by the Joint Committee through a specific agreement for each project prior to any proposed diversion. However, should there be a surplus quantity of water available in excess of the proposed uses of all parties in any dry season, verified and unanimously confirmed as such by the Joint Committee, an inter-basin diversion of the surplus could be made subject to prior consultation.

Commentary 5: Aiming at Achieving Equity and Reasonableness for All

Lessons Learned: All Member Countries find it necessary to generate and confirm the full understanding among the countries on key issues and recognize international principles such as equitable and reasonable use, no significant harm, and the duty to cease activities causing significant damage (and negotiate the responsibilities for damages) and norms.

Relevant Provisions of the 1995 MA and MRC Procedures: Paragraph one of Article 5 sets out first and foremost, the universally accepted principle that each riparian is entitled to a "reasonable and equitable utilization" of this International River Basin in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences and man-made activities", as required by: **Article 1** – Areas of Cooperation, and consistent with **Article 3** – Protection of the Environment and Ecological Balance.

Article 5 is closely related to and must be read in light of other key provisions in **Article 6** – Maintenance of Flows and **Article 26** – Rules for Water Utilization and Inter-Basin Diversions, etc.

Relevant International Norms and Practice:

International rules (e.g. Article IV of the 1966 Helsinki Rules) and treaties (e.g. UN Water Convention) have confirmed a key principle of international law that recognises that every basin State in an international drainage basin has the right to the reasonable use of the waters of the drainage basin. They also rejected

the unlimited sovereignty position, exemplified by the "Harmon Doctrine" (UNWC User's Guide).

Moreover, the Mekong Committee's 1975 Joint Declaration on Principles for the Utilization of the Waters of the Lower Mekong Basin, and the International Conventions (e.g. UN Water Convention, Article 6) listed relevant factors and circumstances for determining equitable and reasonable use. The factors listed in the UN Convention, Article V of the Helsinki Rules, and the additional factors noted in the Berlin Rules 13, can provide some basis for identifying measures that would make the use more reasonable and equitable within the Mekong context. Article 5 refers to all relevant factors and circumstances to be elaborated in the Rules for Water Utilization and Inter-Basin Diversions provided for under Article 26. However, as of date, discussion of such factors and circumstances has not yet arisen.

Specific Recommendation: It is important for the MRC to build on international practices (e.g. Helsinki Rules and the UN Convention) to agree on a better elaboration of Articles 5 and 26 under the 1995 MA, and apply the relevant factors and circumstances to their reasonable and equitable utilisation.

3.0 PNPCHA PROCEDURAL PROVISIONS AND TERMS

3.1 NOTIFICATION REQUIREMENTS

1995 MA - CHAPTER II. DEFINITIONS OF TERMS

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.

2003 PNPCHA

1. Definitions of Key Terms

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.

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;

Commentary 6: Proposed Use Subject to Notification Requirements

Lessons Learned: Per the PNPCHA, notification is required for the following proposed uses: i) intra-basin use and inter-basin diversion on the tributaries, including Tonle Sap; and, ii) intra-basin use during the wet season on the mainstream. As documented in the Definition of Terms section, there has been less consistent understanding and application of the Proposed Use subject to notification. On many occasions, Member Countries have submitted notification of a bridge across the Mekong out of consideration that it might affect other equitable and reasonable uses such as freedom of navigation, etc. Some MCs suggested that the proposed water uses should include other uses of related resources, such as bridges or transmission lines crossing the mainstream or important navigation routes and other uses that may significantly affect the flow and quality of the mainstream.

Relevant Provisions of the 1995 MA and MRC Procedures: The 1995 MA¹¹ defines the proposed water uses and water use as any uses of water that potentially have a significant impact on mainstream flows including large scale irrigation and hydropower projects (excluding domestic and other uses having no significant impact). The definition in PWUM expands it to include those uses having a significant impact on water quality in addition to the flows regime of the Mekong mainstream.

Relevant International Norms and Practice: A broader term of “planned measures with possible adverse effects”, or “planned measures” are used in the 1997 UNWC (article 12) and 2017 ZAMCOM’s Procedures for Notification of Planned Measures.¹² The planned measures include any programme, project or activity planned - not only proposed water use, but other use - by one or more Member States which may adversely affect the Watercourse or any other Member State(s).

Specific Recommendation: The definitions of the “proposed use” presently found in both the 1995 MA and PWUM need to be properly compiled and formalized since the PWUM must be consistent with the scope and definition of the mother agreement, namely the 1995 MA. It is a progressive step in expanding it to the proposed uses - excluding domestic and other insignificant uses - that causes or

¹¹ The 1995 MA defines “proposed use” as any proposal for a definite use of the waters of the Mekong River System by any riparian, except for the domestic and minor uses of water not having a significant impact on mainstream flows.

¹² Zambezi Watercourse Commission (ZAMCOM) Procedures for Notification of Planned Measures adopted by the ZAMCOM Council on 23 February, 2017 Tete, Mozambique.

are likely to cause a significant impact on both mainstream flows and water quality. It is well in line with the facts that PNPCA is about both maintaining flows (Article 6), keeping the ecological balance (Article 3), and avoiding, minimising and mitigating potential impacts (Articles 7 and 8), and maintaining freedom of navigation (Article 9).

3.2 NOTIFICATION PROCESS – TIMELINESS

PNPCA 2003

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.

4.5 Timing for Notification

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

Commentary 7: Timely Notification Requirements

Lessons Learned: According to the established practices of the Member Countries since the first “notification” submitted in November 1995 to August 2018, most submissions were made 2-6 months in advance of the start dates of proposed use projects.

Relevant Provisions of the 1995 MA and MRC Procedures: Chapter 2 of the 1995 MA defines notification as the timely provision of information according to the format, content, and procedures adopted by the MRC. Accordingly, PNPCA Article 4.3, states that “timely” notification requires that the notified countries are afforded sufficient time to

provide meaningful comments should they so desire, and for the notifying country to consider these comments and potentially to incorporate them into the design and/or operations of the proposed use project.

Relevant International Norms and Practice: The requirement to notify of planned measures is embodied in numerous international agreements, declarations and resolutions, decisions of courts and tribunals, and studies by intergovernmental and non-governmental organisations. For example, the UNWC’s Article 12 stipulates that notification must be submitted before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states. The 2017 ZAMCOM’s Procedures for Notification of Planned Measures (provision 4) requires that “such notification must be made as early as possible and a notifying Member State should not delay on the grounds that all relevant information is not yet available”.

Specific Recommendation: The implementation of the Notification under the MRC PNPCA and its Guidelines can be improved by providing more attention on the proposed use or projects which may have a significant adverse effect upon other Mekong Countries.

The notification should be submitted at least 4-6 months before the notified country implements or permits implementation. It is critical for all MCs to accept that the notifying country should not delay on the grounds that all relevant information is not yet available.

According to Article 5 (a), the notifying country(ies) may proceed with implementing its proposed water use after satisfactory completion of the notification process. But it is required to exercise due care or diligence in avoiding, minimizing, and mitigating significant impacts.

3.3 CLARIFYING THE NOTIFICATION PROCESS - COMPLETENESS

2003 PNPCHA

- 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.

2005-PNPCHA

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 PNPCHA.

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”.

Commentary 8: Completeness of Notification Documentation

Lessons Learned: It is important to rectify past practices where many notifications failed to include “a feasibility study report, implementation plan, schedule, and all available data” in addition to the notification form/format in Annex 1 of PNPCHA 2003.

Relevant Provisions of the 1995 MA and MRC Procedures: According to the PNPCHA and G-PNPCHA, the contents of the notification shall include a feasibility study report, implementation plan, schedule, and all available data.

As clarified in footnote 8 of the G-PNPCHA, the notification should include a full report or detailed summaries of relevant matters from the feasibility studies, including an EIA or initial environment evaluation (IEE), etc., since most feasibility study reports already include these assessments. The G-PNPCHA (Footnote 8) and its Section 3 on the roles / functions /

responsibilities of the NMCs requires that the concerned Member Countries should make an effort to provide sufficient “relevant” data to the notified parties – 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 and other requirements under PMFM and PWQ. The MRC practices show that the discussion on scope and request for additional data and information and for consultation on the notification become necessary in some important circumstances.

Relevant International Norms and Practice: UNWC’s Article 12 stipulates that such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessments, in order to enable the notified states to evaluate the possible effects of the planned measures. The 2017 Zambezi Watercourse Commission (ZAMCOM’s) Procedures for Notification of Planned Measures (Provision 6) empowers its Secretariat to review and determine without delay the adequacy and completeness of the information contained in a notification. The Executive Secretary shall make an immediate decision – with proper reasoning – on requests for the resubmission of notifications.

Specific Recommendation: To be in compliance with the PNPCHA and its Guidelines, the notification on proposed projects shall be accompanied with a feasibility study report (at least a detailed summary of relevant matters from the feasibility studies, and EIA or initial environment evaluation (IEE) etc.), implementation plan, schedule and all available data. It will allow the notified countries to evaluate the possible effects of the notified projects. At the JC’s request, the notifying country(ies) shall continue/improve their cooperation in providing additional assistance or available data and information, including organized site visits, to support them in their assessment of the positive and negative implications.

To make it more effective, the MRC should consider 2017 ZAMCOM’s modality whereby they entrust the MRC Secretariat to review and determine quickly the adequacy and completeness of the information. The CEO shall then make an immediate decision – with proper reasoning – on requests for the resubmission of

notifications to meet completeness requirements. The official date of the notification should be the day the MRC CEO or Chair of the JCWG confirms its adequacy and completeness.

3.4 INSTITUTIONAL MECHANISM FOR NOTIFICATION

2003 PNPCHA

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.

4.6. 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.

Commentary 9: Notification Institutional Mechanism

Lessons Learned: The 1995 MA, Rules of Procedures of the Council, JC and MRCS, PNPCHA, G-PNPCHA and other Procedures, have already specified roles and responsibilities. But the roles and responsibilities, and obligations of other key players in the PNPCHA process (e.g. JCWG, MRCS, notifying country and notified country, and external stakeholders etc.) need to be clarified and properly understood.

Relevant Provisions of the 1995 MA and MRC Procedures:

G-PNPCHA Footnote 9 notes the need for clarity on the NMCs and the MRC Secretariat's roles and responsibilities. Section 3 of the G-PNPCHA states that the clear understanding and serious undertaking of the roles, functions, and responsibilities of NMCs – notifying and notified countries – are critical for effectively meeting notification requirements. The NMCs' roles include informing relevant line agencies (LAs) of notification obligations and detailed 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 of the G-PNPCHA. Similarly, the notified countries' NMCs play a crucial role in coordinating the review and comments on the notification from the relevant LAs and transmitting any requests or comments in a timely manner to the notified country through the MRCS.

Relevant International Norms and Practice: The 2017 ZAMCOM's Procedures for Notification of Planned Measures (provisions 2 and 7) provide a clear step by step process for notification, adequacy and completeness checks and steps for re-submission and declaration of the official submission date. The most

interesting aspect is the way in which the Member Countries trust in the Secretariat of ZAMCOM to check and declare the completeness and declare the official date of the notification.

Specific Recommendation:

The roles, functions and responsibilities of MRCS and NMCs of the notifying and notified countries should be clarified/strengthened through further development of the current notes by the Joint Platform, as they play a very critical role in implementing the PNPCA.

It is also urgent to adopt/improve the MRCS internal detailed PNPCA procedures as required by G-PNPCA Footnote 18. The ZAMCOM Secretariat’s roles and functions in handling the notification process can be studied for possible adaptation.

It is important to raise awareness and training on the notification requirement, mechanism, and the roles and responsibilities of key players.

4.0 PRIOR CONSULTATION

1995 MA - CHAPTER II. DEFINITIONS OF TERMS

Prior consultation: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversions 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.

2003 PNPCA

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.

Commentary 10: Proposed use under prior consultation

Lessons Learned: The Prior Consultation (PC) has been the most critical of challenges. The previous PC projects, which were mostly in the Mekong mainstream, showed some key challenging issues. There was a circumstance where the MCs disagreed over the proposed use on the mainstream subject to the prior consultation. However, through a dynamic consultation process, the notifying country decided to upgrade Don Sahong’s proposed use from the notification to prior consultation process.

Relevant Provisions of the 1995 MA and MRC Procedures:

The definition of key terms, 1995 MA, and PNPCA define the proposed uses that require prior consultation as (PNPCA, Section 5.1) including: 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.

The 1995 MA¹³ defines the proposed water uses as any use of water that potentially has a significant impact on mainstream flows (excluding domestic and other uses having no significant impact). The definition in PWUM expands it to include those uses having a significant impact on water quality in addition to the flows regime of the Mekong mainstream.

Relevant International Norms and Practice: Not applicable.

¹³ The 1995 MA defines “proposed use” as any proposal for a definite use of the waters of the Mekong River system by any riparian, *except for the domestic and minor uses of water not having a significant impact on mainstream flows.*

Specific Recommendation: As proposed in commentary 6 above, the definitions of the “proposed use” presently found in both the 1995 MA and PWUM need to be properly compiled and formalized. It is well in line with the facts that the PNPCA is about maintaining flows (Article 6), keeping the ecological balance (Article 3), avoiding, minimising and mitigating potential impacts (Articles 7 and 8), and maintaining freedom of navigation (Article 9).

4.1 PRIOR CONSULTATION – CONTENT AND FORMAT

PNPCA 2003

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).

G-PNPCA

1. 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 evaluation and reply as described in Section 5.4.2 of the PNPCA.

Commentary 11: Available” and “Relevant” Data and Information for PC

Lessons Learned: In the past, notifying countries have provided available data and information as required in the PNPCA and PNPCA guidelines but the MRCS and notified countries have requested more data and information. These data may not be available in project feasibility studies and project EIAs. Additional data and information may imply more time and costs.

The assessment was delayed or difficult due to data and information issues – incomplete and “quality” of data. From time to time within the six-month timeframe, additional information was updated and provided making it difficult for the MRCS and the notified countries to have sufficient time to evaluate and re-evaluate the Notification for the Prior Consultation (PC). Some experts found that data were outdated and contested the quality, and new data emerged during

the evaluation. As a result, the assessment needed to be carried out again, which meant that 6 months was too short a timeframe. Information on transboundary impacts is the most challenging.

Relevant Provisions of the 1995 MA and MRC Procedures: The MRC PNPCA documentation for a prior consultation submission is more extensive than documentation required for notification (para 5.2.1, PNPCA). The G-PNPCA elaborates in Footnote 16 that it 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”. Demands for additional data and information are also covered by the PNPCA, which stipulates that: “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 effects on their rights and to facilitate the aim of reaching an agreement under the good faith principle” (G-PNPCA, Footnote 17).

Relevant International Norms and Practice: Based on recent developments in both international and national environmental law, conducting a credible EIA and TbEIA is one of several “appropriate” measures

to take when planning large infrastructure projects. For example, the UNECE Espoo Convention¹⁴ not only requires the notifying state to notify potentially affected states, but also prescribes the content of a transboundary EIA.

Specific Recommendation: Since prior consultation category projects are more likely to have a significant transboundary impact on the mainstream of the Mekong River, the MCs/MRC should quickly adopt and apply the MRC Transboundary EIA (Tb-EIA) Guidelines and relevant Design Guidelines (revised and updated version) to address the issue of “relevant and available data”.

The EIA and TbEIA processes could therefore play a stronger role not only in relation to issues around the timing of notification, but also in relation to the data and information that should be shared between states. This obligation should be considered alongside more general due diligence requirements contained within the 1995 MA which requires states to take all appropriate measures and make every effort to prevent significant harm to other watercourse states.

4.2 PRIOR CONSULTATION – THE PROCEDURAL REQUIREMENT OF TIMELINESS

G PNPCA 2005

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.

Commentary 12: Timely Notification Requirements under PC

Lessons Learned: The notifications for PC have been done at the feasibility stage and have not provided sufficient information for the review of potential significant transboundary impacts.

Relevant Provisions of the 1995 MA and MRC Procedures: The 1995 MA stipulates that PC must be provided timely together with additional data and information to the JC as provided in the Rules for Water Utilisation and Inter-Basin Diversion under Article 26. This will allow the other Member Countries 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 in the form of a Joint Decision by the MRC Governance Bodies.¹⁵

The G-PNPCA further clarifies “timeliness” as: “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 processes.” In actual practice, it is likely that projects for proposed water use falling within the “prior consultation” category would be submitted well in advance of the intended start date because they are long-term, large-scale projects requiring considerable technical, economic, social and impact analyses (G-PNPCA, Footnote 15).

Relevant International Norms and Practice: In the international practices, for large infrastructure projects such as hydropower projects, the notification and consultation of a project should occur when the intention

¹⁴ Through the entry into force of its first amendment on 26 August 2014, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context is now open to all United Nations Member States. This opening will fill an important gap in international law and will further advance environmental impact assessment as an important tool for sustainable development.

¹⁵ The JC’s statement on the Pak Beng Hydropower Project Prior Consultation and its Joint Action Plan was considered as a good faith effort for arriving at an agreement.

to commence environmental assessment occurs so that the notified parties can participate at the assessment stage (UN WATERCOURSES CONVENTION Art. 17, and the ICJ Decision in the Pulp Mills Case related to the project on the Uruguay River.) Similarly, the Espoo Convention on Environmental Impact Assessment in a Transboundary Context requires the planning country to notify other Member States of a proposed water use at the same time as stakeholders within the country where the project is planned - meaning at the stage when the feasibility study, EIA and SIA are being conducted.

Specific Recommendations: The early start of the PC process certainly allows MRCS to prepare for a timely commencement of the PC, and the MRC Member States would benefit from being more fully and reiteratively engaged in the planning for and engaging in identifying options for developing the project in a way that minimises the impacts while still meeting the needs of the proposing state.

The current practice by the MRC in Pak Beng’s PC to allow one month for Pre-PC is a good start and can be further expanded and properly formalized. This Pre-PC, PC and Post PC must be properly endorsed by the JC.

To make it more effective, the MRC should consider the 2017 ZAMCOM’s modality whereby they trust the MRC Secretariat to review and determine quickly the adequacy and completeness of the information, and the official date of the PC is the day the MRC JCWG confirms its adequacy and completeness at its first preparatory meeting.

4.3 PRIOR CONSULTATION – TIMEFRAME

PNPCA 2003

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.

G-PNPCA

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 evaluation and reply as described in Section 5.4.2 of the PNPCHA.

Commentary 13: When and How PC is Deemed Complete

Lessons Learned: There was a lack of a clear-cut decision by the MRC JC, Council or governments on Xayaburi and Don Sahong PCs. The Pak Beng PC process was perceived by stakeholders as more helpful and open as the JC issued a statement indicating the need for formulating a Joint Action Plan. A fewer number of critical comments is related to the improved engagement with external stakeholders, and the JC’s statement outlining an ongoing engagement process also known as a Post PC.

Relevant Provisions of the 1995 MA and MRC Procedures: Firstly, the PNPCHA stipulates that, “the timeframe for Prior Consultation shall be at least six months from the date of receiving documents on

Prior Consultation”; and secondly that “if necessary, an extended period shall be permitted by decision of the MRC Joint Committee” (PNPCA para. 5.5.1 and 2). Footnotes 14-15 of the G-PNPCA draw the attention to the duty of due care/diligence for both sides – notifying and notified countries – in determining a potential cause of harm to each other’s rights and interests; and take precautionary measures in considering/evaluating the proposed water uses falling within the “prior consultation” category because they are long-term, large-scale projects requiring considerable technical, economic, social and environmental impact analyses.

Relevant International Norms and Practice: According to International practice, e.g. UN Watercourse Convention, it is important to provide clear cut step-by-step procedures. It is suggested adding further

clarity by requiring States to “negotiate in good faith with a view to agreeing upon such period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects”.

Specific Recommendation: Even though It is not well established/formalized by MRC, Pak Beng’s practices set a good reference point for good will shown by the notifying and notified countries to improve the process by extending it into pre-PC, a 6 month-period of study and discussion, and post PC based on the roadmap agreed by the JC. The current phasing practice should be further formalized to create appropriate conditions and incentives for MRC and MCs for timelier submission and sharing of relevant information, and for reaching a fair and timely solution so that development needs can be met and harmful impacts prevented, minimized or mitigated for a peaceful, mutually beneficial cooperation, and sustainable development.

It is also recommended that the JC consider/agree requests on a case-by-case basis for extensions in cases of a highly incomplete PC and limited data availability due to the feasibility report’s poor quality.

It is further recommended that a specific period of moratorium on implementation of the planned measures/project and associated groundwork, including but not limited to building access roads, ground preparation for dam construction, work camp development and work mobilization should be specified. (See Commentary 14 for further discussion).

4.4 PRIOR CONSULTATION – OBLIGATIONS OF MEMBER STATES DURING THE PERIOD OF PRIOR CONSULTATION

1995 MA - CHAPTER II. DEFINITIONS OF TERMS

Prior consultation: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversions 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.

PNPCA 2003

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).

Commentary 14: Good Faith and Due Diligence Obligations during PC

Lessons learned: Activity related to the project or “preparatory activity” included the groundwork or preparatory work carried out before completion of the six-month timeframe or before a clear decision was made by the MRC JC or the Council. Some MCs have expressed that, the obligation not to start the notified project without allowing other MCs to assess its impacts properly first, needs to be clarified.

Relevant Provisions of the 1995 MA and MRC Procedures: Chapter III of the 1995 MA stipulates that prior consultation for the proposed use is to allow the other Member Countries to discuss and evaluate its impact on their uses of water and any other effects, aiming at arriving at an agreement. PNPCA section 5.4.3 (para 2) requires that the notifying

country shall not implement the proposed project without providing an opportunity for the other NMCs to discuss and evaluate the proposed project. This may also include the **preparation of the area around proposed project.**

Relevant International Norms and Practice: In international practice, e.g. in the *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010], the ICJ maintains that any activities in support of the particular proposed uses, including localized preparatory works should not be undertaken during the prior consultation phase as it may undermine efforts by the states to negotiate a mutually acceptable solution in good faith. The UN Watercourse Convention (Article 14) requires that the notifying country shall cooperate with the notified one(s) in providing the requested additional data and information, and shall not implement or permit implementation of the proposed project without the consent of the notified states. Its Article 15 further sets a timeframe for such a refrain up to six months unless otherwise agreed.

Specific Recommendation: It is important to have a common understanding that the term “proposed use” and the need for discussion, evaluation, consultation aiming at arriving at an agreement, confers an obligation on the concerned parties during the notification, prior consultation or specific agreement period with regards to information provision and consultation in good faith, and avoidance to undertake project related preparatory activities.

4.5 PRIOR CONSULTATION – ROLES AND RESPONSIBILITIES

PNPCA 2003

5.3 5. 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:

Commentary 15: PC Institutional Mechanism

Lessons Learned: The roles, responsibilities, rights, and duties of all parties to the PNPCHA process, especially those of MRC – JCWG, MRCS as well as other broader stakeholders, are not always understood or fulfilled. There is an urgent need to clarify or refine the roles and responsibilities of other key stakeholders, including developers, the media, and CSOs.

Relevant Provisions of the 1995 MA and MRC Procedures: The 1995 MA, Rules of Procedures of the Council, JC and MRCS, PNPCHA, G-PNPCHA and other Procedures, and Terms

of Reference of JC working groups and joint platforms etc., have already specified their respective roles and responsibilities. But these roles and responsibilities need to be well understood and proper conditions must be in place to make sure they are discharged and followed up effectively.

Relevant International Norms and Practice: The 2017 ZAMCOM's Procedures for Notification of Planned Measures (provisions 2 and 7) provide a clear steps for notification (advanced and technical phases), checking adequacy and completeness, and steps for re-submission and declaration on the official submission date. The most interesting aspect is the way in which the member countries trust the Secretariat of ZAMCOM to check and declare the completeness and declare the official date of notification.

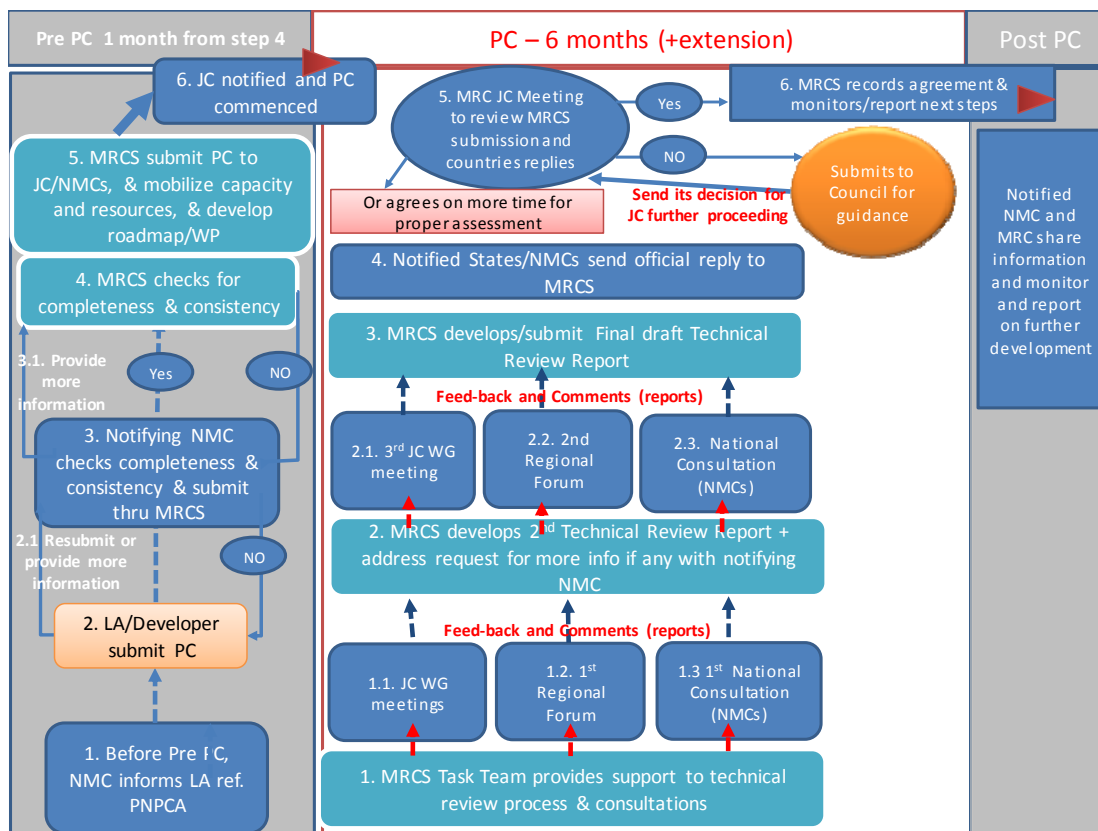
Specific Recommendation:

With a move toward a more proactive and continuous cooperation in good faith during the Pre-PC, PC and Post PC, the MRCS and NMCs should take a much stronger role in encouraging the notifying agency on sharing project information as well as MRCS to share knowledge generated by the MRC. This can occur at least several months before the PC process and facilitate the timely provision of additional data and information, host a site visit, and inform/engage other Member States in addressing their comments.

MRCS and NMCSs should **take a more pro-active role** in carrying out the instructions and directives of the MRC JC to assist and facilitate implementation of the PNPCHA and to assist the MRC JC and Member States in the overall implementation of the 1995 MA and PNPCHA, especially when there is a deadlock in reaching decisions by the JC or Council (as required by the G-PNPCHA Section II).

MRCS is further requested to take a more pro-active role to support the MRC JC, JC TWGs and the member countries in Pre-PC, PC and Post PC phases. Hence, the MRC Secretariat should speed up the finalization/improvement of the internal procedures for handling PNPCHA as required by G-PNPCHA (footnote 18) relating to receiving, processing, recording and transmitting notification and prior consultation submissions, and facilitating the MRC Joint Committee and its working groups.

Figure 4-1 Pak Beng Prior Consultation Phases and Decision Tree



The figure above shows good practices applied in the Pak Beng PC and lessons learned, where NMCs and MRCS played several inter-related roles in each stage, such as:

Before Pre-PC – NMCs inform and advise LAs and Project Developers on the PNPCA requirements and reviews of the PC notification for completeness and consistency before submission to MRC JC via MRCS.

During Pre-PC - MRCS takes the following actions, such as establishing an internal working group; using a checklist for completeness of the submitted documentation based on the Preliminary Design Guidance (PDG) and other reports and studies; making a stakeholder engagement/information disclosure plan; and, submitting the PC documents to the MRC JC and copying to other NMCs.

Prior Consultation, MRCS takes the following actions:

- 1) Reviews, analyzes and provides technical advice to the MRC JC and its Working Group, including developing technical review reports (TRR). The TRR process is managed by the MRCS Task Team with necessary input from international experts and submitted to PNPCA JCWG for final consideration and submission to MRC JC for decision.
- 2) Supplies available additional data and information and facilitates with NMCs, the JCWG, regional, and national meetings as requested by the concerned Member State(s).
- 3) Facilitates JC's deliberation aiming at reaching a JC Statement and required Joint Action Plan.
- 4) Undertakes public communication during pre, prior, and post-consultation, and makes arrangements for the provision of follow-up information with regard to concerns and issues raised by both the media and general stakeholders (and organises appropriate follow-up actions).¹
- 5) Enters the relevant data and information into the MRC Data and Information System facilitating the monitoring and implementation of other procedures (flow maintenance and water quality).

Post-Prior Consultation: MRCS actions during this phase will be guided by the JC based on the agreement from the prior consultation process, including for instance, reporting to JC on the follow ups to the comments and concerns gathered during PC, and conducting and reporting on the monitoring of impacts.

5.0 SPECIFIC AGREEMENT

1995 MA

CHAPTER II. DEFINITIONS OF TERMS

For the purposes of this Agreement, it shall be understood

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

PNPCA 2003

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.

Commentary 16 – Specific Agreement

Lessons Learned: To date, there have not been any cases of specific agreement.

Relevant Provisions of the 1995 MA and MRC Procedures: Section 6 of the PNPCHA outlines procedures to be followed when water is diverted out of the mainstream in the dry season, requiring consent of the JC before the notifying Country can proceed, except for a surplus quantity of water verified and unanimously confirmed as such by the JC.

PNPCA Section 6 further clarifies that “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”.

Section C of the G-PNPCHA “Specific Agreement” again clarifies that the necessary request and documentation using the format and content of the prior consultation process for such a project shall be submitted to the MRC JC through the

MRCS.

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.

Relevant International Norms and Practice: Not found since this is unique to the 1995 MA.

Specific Recommendation: MRC and MCs should apply similar procedural and substantive requirements of the prior consultation, including steps/phases and key requirements for its completeness, consistency, adequacy, and timeliness. However, the only major difference is that the JC is required to reach a specific agreement/decision. Lessons can be learned and specific procedures for “Specific Agreement” can be developed with special arrangement to discuss the Specific Agreement and clear agreement reached before submission to the JC for decision.

6.0 OTHER PROCEDURAL ISSUES

6.1 PROCEDURE IN CASES WHERE NOTIFICATION IS ABSENT

PNPCA 2003

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.

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.

Commentary 17 – Monitor and Address Absence of Notification

Lessons Learned: To date, there has been no formal complaint or action for failure to notify.

Relevant Provisions of the 1995 MA and MRC Procedures:

The PNPCA has a provision on the absence of notification (4.6), and prior consultation (5.6). When submission for the Notification or Prior Consultation has not been provided, the JC can request (call-in a project) the relevant NMC to fulfil its duties/responsibilities in accordance with the provision on the Notification and Prior Consultation as provided in Sections 4.3.1, and 5.2.1 of the PNPCA respectively. In the absence of

notification, the JC must firstly determine that the proposed use will have a significant impact and fall within the PNPCA requirements and that this can be determined through objective evidence. The MRC JC may direct the MRC Secretariat to undertake a study and prepare advice on whether the proposed use will have significant impact. Based on this evidence, the JC must request the relevant NMC to fulfil its duties in respect of submission. It further highlights the role of the MRCS to monitor and scan the situation more closely in order to bring to the JC's attention the likelihood of an absence of notification. Then the JC should be able discuss and request relevant actions, including conducting a further investigation or requesting the relevant NMC to fulfil its duties/responsibilities.

Relevant International Norms and Practice: The UN Watercourse Convention (Article 18) also provides procedures for cases where a watercourse state is aware of measures being planned in another state and believes they may have a significant adverse effect upon it, but has received no notification by the planning state. In such an instance, the former is allowed to initiate the procedure provided for under relevant Articles.

Specific Recommendation: The procedures and practices in this regard seem adequate, hence no recommendation is proposed.

6.2 ADDRESSING DIFFERENCES AND DISPUTES

1995 MA

Article 24. Functions of Joint Committee

The functions of the Joint Committee are:

- F. To address and make every effort to resolve issues and differences that may arise between regular sessions of the Council, referred to it by any Joint Committee member or member state on matters arising under this Agreement, and where necessary to refer the matter to the Council.

Article 18. Functions of Council

The functions of the Council are:

- C. To entertain, address and resolve issues, differences and disputes referred to it by any Council member, the Joint Committee or any member State on matters arising under this Agreement.

Article 34. Resolution by Mekong River Commission

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 through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F.

Article 35. Resolution by Governments

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 thereafter to proceed according to the principles of international law.

Commentary 18: Addressing Differences and Disputes

Lessons Learned: The previous PCs reaffirm the need to promote timely and effective decision-making and management of issues and differences under all relevant provisions/steps, especially when the decision or agreement on extension or agreed condition to avoid, minimize and mitigate impacts has not been reached or known to have not been reached. In the past, the JC working group and MRC joint platform were established to support the JC in addressing and discussing differences raised during the PC process.

Relevant Provisions of the 1995 MA and MRC Procedures: It is required (Articles 24 and 18) that every effort be made within the JC and Council before raising the issue to the government or to other mechanisms enshrined in Article 35 of the 1995 Mekong Agreement.

Articles 34 and 35 set out a four-step approach in efforts to resolve any differences or disputes that may arise from implementation of the Agreement including PNPCA.

Relevant International Norms and

Practice: The 1997 UN Watercourse Convention (Article 33) provides steps and a time-bound period of up to six months at each step for negotiation; to use the good offices, mediation, or conciliation by a third party; or to make use, as appropriate, of any joint watercourse institutions; or agree to submit the dispute to arbitration or to the International Court of Justice.

Specific Recommendation: It is important to explore and consistently put into practice how the UN Watercourses Convention can support successful and timely outcomes for both sides. More effort is needed to solve the differences and disputes in the relevant MRC mechanisms.

6.3 ROLES AND RESPONSIBILITIES OF OTHER KEY STAKEHOLDERS

PNPCA 2003

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.**

Commentary 19: Roles and responsibilities of other Key Stakeholders

Lessons Learned: There was a severe concern over a lack of adequate opportunities for more meaningful participation and timely disclosure of information during the Prior Consultation process according to the principle of transparency in the PNPCA. The stakeholders lacked confidence in the process due to a lack of understanding of the PC process itself, and the mandate of the MRC. Moreover, there was a concern over the absence of a *formal mechanism for post PC engagement.*

The Pak Beng PC process was perceived by relevant stakeholders as more inclusive. This is primarily related to improved engagement with external stakeholders, and the JC's Statement outlining an ongoing engagement process also known as a Post PC.

Relevant Provisions of the 1995 MA and MRC Procedures: Transparency is one of the guiding principles in the PNPCA. Furthermore, the MRC Strategic Plan focuses its main attention on building confidence with the CSO/NGO community and the public so that public consultation will be meaningful during prior and post-consultation, and that public consultation processes plan for the provision of follow-up information with regard to concerns and issues raised. The Pak Beng PC and the JC's Statement outlining an ongoing engagement process achieved an improved engagement with external stakeholders. This good practice needs to be further applied and improved to enhance the reputation of the process and acceptance by the public.

Relevant International Norms and Practice: The United Nations Economic Commission for Europe (UNECE) [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#) (Also known as the Aarhus Convention) requires State Parties to make the necessary provisions so that public authorities (at national, regional or local level) contribute to the effective exercise of these rights.¹⁶

The 1991 ESPOO Convention on Environmental Impact Assessment requires for stakeholder engagement from "the stage when the relevant national authority has had the project referred to it with the aim of obtaining initial environmental authorisation and before the granting of that authorisation". The Mekong Countries have developed national EIA legislation that requires a public participation process, and hence offers important opportunities to harmonise national commitments at the regional level.

Specific Recommendation:

Both Notifying and Notified MCs, and the MRCS should further improve their public participation and communication throughout various phases from PC to Post PC, especially involving the private sector and developers. Public participation at national level may follow the national regulations of the respective MRC Member Country.

¹⁶ The Convention provides for:

- The right of everyone to receive environmental information that is held by public authorities.
- The right to participate in environmental decision-making e.g. to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it.
- The right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general.

The MRC shall make further efforts with other partners ***to build the capacity of all external stakeholders to effectively appreciate and engage in the process*** through improved understanding.