




A window of opportunity for the Mekong Basin: The UN Watercourses Convention as a basis for cooperation

A legal analysis of how the UN Watercourses Convention complements the Mekong Agreement



BRIDGE: Building River Dialogue and Governance

 Schweizerische Eidgenossenschaft
Confédération suisse
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The BRIDGE project is funded by the Swiss Agency for Development and Cooperation.

Published by:
IUCN Asia Regional Office

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Citation:
IUCN. (2016). A window of opportunity for the Mekong Basin: The UN Watercourses Convention as a basis for cooperation (A legal analysis of how the UN Watercourses Convention complements the Mekong Agreement): IUCN. 27pp.

Cover illustration:
Map of Mekong River Basin. IUCN Asia (2016). Data: CIAT-CSI SRTM (2014), Mekong River Commission (2013).

Produced by:
IUCN Asia Regional Office

Available from:
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ABBREVIATIONS

ICJ	International Court of Justice
IWRM	Integrated Water Resource Management
LMB	Lower Mekong Basin
MA	Mekong Agreement, 1995
MRC	Mekong River Commission
PNCPA	Procedures for Notification, Prior Consultation and Agreement
UNWC	United Nations Watercourses Convention, 1997
ILC	International Law Commission

GLOSSARY

Convention: The creation of a written agreement whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. The term is used interchangeably with Treaty. Treaties are also known by a variety of differing names, ranging from International Agreements, Pacts, General Acts and Charters, through to Statutes, Declarations and Covenants.

Customary International Law: Rules derived from the general practice among states and accompanied by a belief that such practice is legal binding (see *opinio juris*).

Due Diligence: The steps taken (including financial, legal, technical and administrative) by a state to reach a legal standard of care recognized in order to reasonably avoid committing harm to another state.

Equitable and reasonable utilization: Equitable and reasonable refers generally to the equal right among states sharing an international watercourse to use its water for their own beneficial and sustainable purposes in relation to one another.

Good faith: Conduct with honest intent, fairness and sincerity, and with no intention of deceit.

Entry into force: A treaty comes or enters into force at a time when it becomes legally binding on the parties to the treaty. A treaty does not enter into force when it is adopted (open for signature). The date of entry into force may be a date specified in the treaty or a date on which a specified number of ratifications, approvals, acceptances or accessions have been deposited with the depositary.

Jurisdiction: The right in international law for a state to exercise authority over its national and persons and things in its territory.

Opinio juris: General belief by a state that a particular state practice is legally binding upon it.

Optimal utilization: The best possible or desirable use under certain restrictions, for example satisfying the interests of two or more states.

Party: A state or regional economic integration organisation that has consented to be bound by the Convention once in force.

Ratification: Following signature, the expression of a state's consent to be bound by a treaty. Often the term ratification is used interchangeably with 'accession', 'approval' and 'acceptance'.

Significant harm: Something that is more than merely detectable, but not necessarily to a level of severe or substantial. To be significant the harm must lead to a 'real detriment' to, for example, human health, industry, property, environment or agriculture.

Sustainable utilization: Comprises two key elements in the context of natural resources: rational use and the protection of the ecosystem. In the context of renewable resources this means protecting the long-term viability of the resources for present and future generations.

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PREAMBLE

The BRIDGE (Building River Dialogue and Governance) project is facilitated by IUCN, International Union for Conservation of Nature, and supported by the Water Diplomacy Programme of the Swiss Agency for Development and Cooperation (SDC). The project aims to build water governance capacities through learning, demonstration, leadership, and consensus-building in trans-boundary hotspot river basins. It is a multi-regional project, implemented in more than a dozen river basins located in South and Meso-America, Africa and Asia.

In Asia, the BRIDGE project has been working in the Mekong Region since 2011, and has provided opportunities for dialogue and training on hydrodiplomacy for key stakeholders, facilitated the sharing of information on Integrated Water Resources Management (IWRM), and produced data and studies to support technical discussions across basins.

BRIDGE also generates political momentum in support of national governments recognizing and committing to the legal principles provided by the 1997 UN Watercourses Convention and 1992 UNECE Water Convention.

As part of this effort, BRIDGE provides training workshops on a number of topics related to trans-boundary water cooperation including international water law in general and the UNWC in particular. The aim of these trainings is to provide relevant key agency officials and representatives from civil society and the private sector with a better understanding of international water law and the key provisions, substantive and procedural rules, and institutional aspects of the UNWC.

This document, based on a legal analysis prepared by Rémy Kinna from TWL Global Consulting, is part of a training package supporting the BRIDGE training on hydrodiplomacy. It was produced at the request of BRIDGE practitioners and partners in the Lower Mekong Basin region and will be used during BRIDGE trainings. It will also be widely disseminated in the Lower Mekong Basin countries.

BRIDGE envisages that this document will further strengthen the principles of the UNWC and its compatibility with the Mekong Agreement, as well as contribute to the regional dialogue on trans-boundary water cooperation.

EXECUTIVE SUMMARY

The UN Watercourses Convention (UNWC) entered into force on August 2014 when Viet Nam became the required 35th country to ratify the UNWC. This represented a milestone for the global management of trans-boundary waters and a significant opportunity for countries and regions lacking cooperative management frameworks for shared waters.

Adopted in 1997 as a codification of customary international law, the UNWC provides clarity regarding the implementation of international water law. As a global framework convention, its central objective is to provide a flexible legal framework within which more specific basin and/or watercourse treaties can be developed, providing more nuanced governance mechanisms via context-specific provisions and related non-binding policy frameworks.

In the Mekong region, one such basin-specific treaty is the Mekong Agreement. Entering into force in 1995, the Mekong Agreement was adopted by the Lower Mekong Basin (LMB) states of Cambodia, Lao PDR, Thailand and Viet Nam, and was accompanied by the establishment of a robust inter-governmental basin institution, the Mekong River Commission (MRC). The treaty was originally held up as the “most progressive of institutional frameworks for the governance of an international watercourse”¹ of its time and along with MRC was “lauded as a ‘model for the world’”². Yet, 20 years later, the ability of the Mekong Agreement and MRC to effectively govern trans-boundary watercourse management in the region have been called into question, in particular regarding disputes related to the rapid development of hydropower dams along the river and its tributaries.

The entry into force of the UNWC presents an opportunity to seek a common approach for strengthening trans-boundary water governance both in the Mekong Basin and globally. All states in the basin are already bound by the principles of international customary law which is codified under the UNWC. As a result, states which ratify and implement the UNWC will see no change in their fundamental obligations. However, they will benefit from an enforceable framework currently lacking from the Mekong Agreement. This will provide basin-wide consistency in the effective governance and regulation of riparian state practices. It will also support Lower Mekong Basin states as they seek more balanced dialogue with upstream countries which are not yet part of the Mekong Agreement and the MRC.

This paper provides a comparative analysis of the key substantive and procedural principles and obligations provided for in the two treaties.

The result is a finding of overall general legal compatibility between the UNWC and the Mekong Agreement. Moreover, where gaps and inconsistencies between these instruments exist, the UNWC addresses them. In particular, the Procedures for Notification, Prior Consultation and Agreement (PNCPA) of the Mekong Agreement, which are so critical to dispute resolution, are external to the Agreement, and as a result are non-binding. This gap in enforceability is addressed, however, by the clear legal provisions of the UNWC in this regard.

The results of the analysis point clearly to the benefits of ratification of the UNWC by all the Lower Mekong Basin states and members of the MRC. It further recommends that the UNWC would reinforce rather than replace the Mekong Agreement and the MRC, as well as strengthening its broader normative impact as the most important legal instrument for the governance of trans-boundary watercourses globally.

¹ Bearden, 2010, p. 798

² *Ibid.*, p. 803

1 BACKGROUND

The *United Nations (UN) Convention on the Law of the Non-navigational Uses of International Watercourses* (UNWC) is the key source of international law at the global level for governing the use of trans-boundary freshwater rivers. A suite of existing treaties (regional, basin, bilateral) and customary international law also overlap with the UNWC in order to form the complete legal regime of international watercourse law.

The global relevance of international water law has been increasing gradually since the mid 20th century, culminating in the entry into force of the UNWC in August 2014. This entry into force represented a major milestone in the development of legal frameworks, and in global management of trans-boundary water. The entry into force of the UNWC has added significance for the Mekong region, given that Viet Nam, a Mekong country and also a member state of the Mekong Agreement, became the required 35th country to ratify the UNWC, thereby bringing it into force.

The Mekong River and its many tributaries, some of which are also trans-boundary in nature, flow through six countries (China, Myanmar, Cambodia, Lao PDR, Thailand and Vietnam) and its resources affect the lives of over 70 million people. The Mekong Agreement, a regional water treaty adopted in 1995 to govern the sustainable development of the river between riparian states currently includes the Lower Mekong Basin states of Cambodia, Lao PDR, Thailand and Vietnam; the upstream riparian countries of China and Myanmar have been invited but are not yet members. The Mekong River Commission (MRC) was also established by the Mekong Agreement as an inter-governmental institution with the aim of fostering cooperation between basin states to effectively manage uses of the river.

With the UNWC now enforceable, it is widely “anticipated to have a significant impact on water governance in trans-boundary water basins around the globe by bolstering the strength of regional treaties already in force, enhancing cooperation between states, and inciting new states to accede to the Convention”³. The UNWC’s role in supporting existing treaties is especially important because even where basin agreements exist, they often lack certain accepted principles or procedures of international water law, or do not count all basin states as parties. This is the case in the Mekong where China and Myanmar are not parties to the Mekong Agreement.

1.1 The UNWC: Background and overview

The UNWC is a pivotal document for a number of reasons: it creates a strong framework for water governance arrangements and a basic common ground that enhances predictability and encourages reciprocity; it codifies and clarifies existing norms and develops emerging principles of customary international water law (IWL); it constitutes a model that can guide the interpretation of other treaties and the negotiation and drafting of future ones; and it has informed the judgments of international and regional courts.

Approximately 40% of the world’s 263 international watercourses are currently the source of an international treaty or agreement. Trans-boundary water agreements are generally regional or bilateral in nature and are largely developed, signed and ratified by those countries whose borders are adjacent to, or encompass, the international watercourse in question. Many recent agreements are largely based on the provisions of the UNWC.

Such agreements are all part of a broader legal architecture through which international watercourses are broadly governed by: states (as parties to legal instruments and those who primarily implement them); basin institutions (as organs overseeing treaty promotion and basin governance); and dispute settlement bodies such as the International Court of Justice (ICJ) - the primary judicial avenue for settling international watercourse disputes. Their respective roles and contributions within the overarching legal architecture for managing international watercourses are factored into the key sections of the UNWC as a global framework to allow them to deliver contextual basin governance.

³ Litke & Rieu-Clarke, 4 Feb 2015

1.1.1 Evolution

The United Nations began addressing the importance of trans-boundary rivers in international law in 1959 when the UN General Assembly (UNGA) adopted a resolution calling for preliminary studies on the legal issues relating to utilisation of international rivers. An extended series of studies, negotiation, drafting, statements and resolutions culminated with the International Law Association (ILA) producing the seminal Helsinki Rules in 1966. Despite the advancements made by the ILA in negotiating and drafting the Helsinki Rules, it took until 1970, 11 years after first referring the matter for further legal study, for the UNGA to designate the International Law Commission (ILC) with the subsequent task of preparing a watercourses convention for possible adoption. The highly complex and painstaking process of negotiating and agreeing upon the key principles and provisions of the draft document which followed was not complete until 1994. It took a further three years of debate over the draft articles before the UNGA passed Resolution 51/229 adopting the UNWC on 21 May 1997.

1.1.2 Overview

The main purpose of the UNWC is to codify international norms relating to non-navigational uses of international watercourses. This is encapsulated in the Preamble with its stated aim to “ensure the utilisation, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations” and taking into account “the special situation and needs of developing countries.” International watercourses are defined in Article 2 of the UNWC as encompassing both surface water and groundwater which recognises subterranean watercourses as an essential part of terrestrial watercourses in riparian ecosystems.

1.1.3 Principles

The core of the UNWC, Part II, sets out general principles and is introduced by what is regarded as the most significant provision in the whole text: Equitable and Reasonable Utilisation and Participation (Articles 5-6). The most disputed of all the principles in the UNWC was the obligation for states “to take all appropriate measures” (Article 7) to utilise an international watercourse so as not to cause significant harm to another riparian state. This relationship between the principles of no significant harm and equitable and reasonable utilization has long been at the centre of debate between upstream and downstream riparian states; not only within the text of the UNWC but also with regard to most basin treaties, such as the Mekong Agreement.

1.1.4 Procedures

Part III of the UNWC provides procedural guidelines, including an obligation of prior notification that must be followed when initiating any new planned measures in one state that may have significant detrimental impacts on other riparian states sharing the watercourse. It then outlines the environmental provisions by laying out the unqualified obligation for states to “protect and preserve the ecosystems of international watercourses” (Article 20). The UNWC also outlines duties whereby states must immediately notify other states of harmful conditions and emergency situations that could potentially impact them (Articles 27, 28). Finally, it deals with private remedies and dispute resolution procedures, allowing a state to pursue judicial and/or administrative procedures against another, and makes automatic dispute resolution procedures compulsory if negotiations are not settled within six months (Articles 32, 33). Annexes to the UNWC outline specific processes such as Arbitration (Annex II).

1.1.5 Adoption and entry into force

A total of 103 nations voted to adopt the UNWC in 1997 and three opposed it (China, Burundi and Turkey). There were also 27 abstentions and a further 52 states did not participate in voting. Taken as a whole, this voting record is significant in that it displays the almost unanimous global support of those states that voted.

In terms of Mekong Basin states, two points are noteworthy: China voted against adoption of the UNWC, and while all Lower Mekong Basin states voted in favour of its adoption, only Vietnam has yet ratified it.

1.2 The Mekong Agreement: Background and overview

1.2.1 Evolution

Trans-boundary water cooperation in the Mekong River Basin dates back to the early 1950s with the establishment of the Mekong Committee, which included Cambodia, Lao PDR, Thailand and South Viet Nam. Historically, prior to the initial commencement of substantial cooperative efforts between basin states which eventually led to the modern Mekong Agreement, the nature of interaction between populations living along its mainstream and tributaries was characterised by war and conflict. The final adoption of the Mekong Agreement and resulting establishment of the MRC was thus heralded as the dawn of a new era in regional cooperation and the formation of the current “international legal regime for water sharing and cooperative decision making in the Mekong Basin”.⁴

1.2.2 Overview

Divided into six chapters comprising a total of 42 articles which variously seek to define the roles and responsibilities of riparian states within the Basin, the Mekong Agreement takes the general character of a non-binding treaty for sustainable development, management and use of the river’s water resources. More specifically, it addresses altered hydrological flows that would arise as a consequence of inter- and intra-basin diversions and of large storage dams.

1.2.3 Principles

Explicitly grounded in the legal principle of “sustainable development”, the Mekong Agreement stipulates that all members agree to cooperate on the management, utilisation and conservation of water and associated resources in the Mekong Basin. Along with the attendant “Mekong Spirit” which not only underpinned its creation but also ushered in its adoption, the principle of cooperation over shared water resources is clearly evident both in the text of the Mekong Agreement as well as embodied institutionally via the MRC.

1.2.4 Procedures

Certain recognized procedures of international water law, such as elements of prior notification and consultation for inter-basin diversions during wet season and intra-basin diversions during dry season (Article 5) are dealt with in the text of the Agreement. However, the main provisions relate directly to the institutional arrangements and functions of the MRC, including dispute resolution (Articles 34-35). Most procedures leave further scope for the development of detailed but non-binding protocols and guidelines by the MRC and its technical bodies.

1.2.5 Adoption and entry into force

Entering into force in 1995, the Mekong Agreement was adopted by the Lower Mekong Basin states of Cambodia, Lao PDR, Thailand and Viet Nam, and was accompanied by the establishment of a robust inter-governmental basin institution, the Mekong River Commission (MRC). The treaty was originally held up as the “most progressive of institutional frameworks for the governance of an international watercourse”⁵ of its time, and along with MRC was lauded as a “model for the world”⁶. The fact that the Mekong Agreement and the MRC, along with their attendant “Mekong Spirit” have endured for 20 years is commendable, and a testament to the importance of cooperative trans-boundary water management in the region. However, the continued refusal of China to become a signatory remains one of the Mekong Agreement’s critical missing links.

⁴ Hirsch, 1999, p. 406-407.

⁵ Bearden, 2010, p. 798

⁶ Ibid., p. 803

1.3 Mekong River Commission (MRC)

1.3.1 Overview

The MRC is the principal institution for coordinating cooperation and implementation of the Mekong Agreement between its member states. The four states which are party to the Mekong Agreement - namely Cambodia, Lao PDR, Thailand and Viet Nam - also comprise the founding states represented by the MRC. China and Myanmar also hold observer status.

1.3.2 Structure and mandate

Structurally, the MRC comprises three permanent bodies: Council, Joint Committee and Secretariat.

1.3.3 Functions

The MRC performs certain specific functions under its general facilitative mandate and key structural components. In particular, the technical and scientific aspects of the MRC's work have received much attention and funding from external donors. The MRC has compiled invaluable and extensive databases of information pertaining to key aspects such as hydrology, geography and fisheries for both the basin as a whole and for specific states and regions. Since 1995, donors have invested substantially in fisheries research by the MRC Secretariat, the results of which confirm the immense value and productivity of the Mekong's capture fisheries, which are contingent on maintaining the ecological integrity of the Mekong river system.

Since its inception, the controversial issue of hydropower dams, especially those on the mainstream of the Mekong River, has been at the centre of much of the MRC's work. In this regard, the MRC has performed a variety of facilitative and policy-making functions within the limits of its mandate in order to inform and improve the impact analysis, negotiation and decision-making processes, tools and knowledge base of its member states on large-scale hydropower projects.

Dispute resolution

Under Articles 34 and 35 of the Mekong Agreement, matters that cannot be resolved by cooperative negotiation and that may result in impasses or conflicts between its members are referred to the MRC for attempted resolution. Procedurally, such conflicts are managed by the Council, or between regular Council sessions by the Joint Committee (Article 24(F)). However, a lack of detailed procedures to guide this process of dispute resolution between member states and the absence of any plenary jurisdiction over basin governance means that the role of the MRC is "primarily one of a mediator and a facilitator of discussions between representatives of the national governments"⁷.

Development of procedures and guidelines

Between 2000 and 2008, the MRC codified a suite of procedures to complement the general provisions in the Mekong Agreement: Procedures for Data and Information Exchange and Sharing, approved in 2001; Procedures for Water Use Monitoring, approved in 2003; Procedures for Notification, Prior Consultation and Agreement, approved in 2003; Procedures for Maintenance of Flows on the Mainstream, approved in 2006; and Procedures for Water Quality approved in 2011. All sets of procedures have subsequently been accompanied by MRC Guidelines for Implementation. While these specific procedures were required to be developed under Articles 5, 6, and 26 of the Agreement, they are external to the treaty instrument and are thus non-binding. The Procedures for Notification, Prior Consultation and Agreement (PNCPA) framework will be compared with the UNWC in section 7 below.

⁷ Rieu-Clarke & Gooch, *op.cit.* p. 217

1.3.4 Status

Its critics argue that the MRC's role, structure and powers obscure critical gaps in governance of the mainstream and tributaries of the Mekong River. The most fundamental limitation of the MRC is shared with the Mekong Agreement: the fact that China and Myanmar have declined to join. This prevents the MRC from governing the entire Mekong River Basin.

2 THE UNWC AND THE MEKONG AGREEMENT: A COMPARATIVE LEGAL ANALYSIS

2.1 Scope and definitions

<i>UNWC</i>	<i>Mekong Agreement</i>
<p>The UNWC applies to uses of international watercourses other than navigation and to measures for the purposes of “protection, preservation and management related to the uses of those watercourses and their waters” (Article 1(1)). Watercourse uses which affect navigation or which are affected thereby, also fall within the scope of the Convention.</p> <p>Under the UNWC “watercourse” is defined as a river system including both surface water, which incorporates a river’s tributaries, as well as groundwater, flowing into a common terminus (Article 2(a)); “international watercourse” is one which falls within or touches the boundary of two or more states (Article 2(b)); “watercourse state” is a “State Party to the present Convention in whose territory part of an international watercourse is situated or a Party that is a regional economic integration organization, in the territory of one or more of whose member states part of an international watercourse is situated” (Article 2(c)); and a “regional economic integration organization” is any regional inter-governmental institution which operates for the purposes of economic integration and development (Article 2(d)).</p>	<p>Rather than “watercourse”, the Mekong Agreement refers to the notion of a “basin” throughout its text but does not actually define this term. The treaty uses the term in various contexts, most frequently as the Mekong ‘Basin’, as well as the terms ‘river basin’, ‘basin level’, ‘basin-wide’, and ‘river system’ throughout, but the agreement fails to define these terms.</p> <p>Additionally, the Mekong Agreement refers to the term “tributary” yet this is defined only in the external procedures, which are not legally binding. This distinction between the river “mainstream” and “tributaries” within the text without defining the difference between these terms has significant legal ramifications for the prior notification and consultation procedures for hydropower projects which are examined in relation to certain non-binding processes within the PNPFA framework.</p>
<p><i>Compatibility and gaps</i></p> <p>The UNWC goes much further than the Mekong Agreement in both geographical and functional scope. Firstly, it deals with both surface water and groundwater (albeit only those directly linked to the hydrological cycle of surface water), taking these as a unitary whole. The UNWC adopts a “holistic and conjunctive approach to freshwater management” incorporating subterranean water resources which are linked to, and impact, surface flows as well as other terrestrial environments.</p> <p>Moreover, the UNWC does not distinguish between mainstream and tributaries, treating them legally as the same. By contrast, the Mekong Agreement does not refer to groundwater at all in its text. The Mekong Agreement also incorporates certain definitions and proposed uses which only relate to inter-basin diversions during the wet season from the mainstream; excluding domestic and minor uses of water not having a significant impact on mainstream flows, which effectively excludes tributaries. This is of particular significance for the governance of the river and the basin as a whole because although the text of the agreement distinguishes between the mainstream and its tributaries for management purposes, it lacks specific legal principles and mechanisms for regulating development of tributary watercourses.</p>	

2.2 Substantive principles: Sustainable development

<i>UNWC</i>	<i>Mekong Agreement</i>
<p>The UNWC refers explicitly to the principle of sustainable development in its text. Article 24, which concerns the management of international watercourses, stipulates that “Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism” (Articles 24(1) and 24(2)) then states that “For the purposes of this article, “management” refers, in particular, to: (a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and (b) Otherwise promoting the rational and optimal utilization, protection and control of the watercourse”. In this regard, the UNWC provides a legal reference point for the practical application and utilization of the principle of sustainable development as it pertains to the planning and adoption of plans in the overall management of an international watercourse.</p>	<p>In the Mekong Agreement, sustainable development is interpreted as “a balance reached between the maintenance of the adequate quantity and the preservation of good quality of water”. As a consequence, the Mekong Agreement incorporates several key provisions which function as the legal mechanisms for realizing this balance of sustainable development: environmental protection (Article 3); equitable and reasonable utilisation (Article 5); flow maintenance (Article 6); and the obligation for states causing substantial harm to other states to immediately abate the alleged use of the river causing harm until the cause of harm can be determined (Article 7). Taken together, these basic provisions of the Mekong Agreement must operate in concert to achieve sustainable water development or the balance reached between the adequate amount and good quality of waters.</p>
<p style="text-align: center;"><i>Compatibility and gaps</i></p> <p>While the UNWC and Mekong Agreement differ in the strength and clarity of their legal provisions to support the goal of sustainable water development, they are compatible in many regards. However, while the basic language of the Mekong Agreement is couched in terms of the principle of sustainability, the guidelines and objectives within the text are quite vague. As a result, it is difficult to ensure the equal and consistent practical legal application of the Mekong Agreement’s core provisions for achieving sustainable water development. The UNWC, on the other hand, provides a specific legal reference point for applying the principle of sustainable development in managing an international watercourse.</p>	

2.3 Substantive principles: Equitable and reasonable utilization

<i>UNWC</i>	<i>Mekong Agreement</i>
<p>In the context of international watercourses, legal experts have determined that the term “equitable” within the UNWC and customary international law can be understood to mean “the equal right to use the water for beneficial purposes, rather than division into equal portions”. The UNWC does not define what “equitable and reasonable” means in specific legal terms; instead it provides guidance on how equitable and reasonable utilization is to be determined in a practical sense by listing the major indicative factors to be considered when evaluating whether or not a new or increased use is consistent with the principle in Articles 5 and 6.</p>	<p>The Mekong Agreement can be interpreted as granting legal predominance to the principle of equitable and reasonable utilization in relation to the other international water law principles contained within its text and in keeping with its status under customary international law. However, the agreement also distinguishes between wet and dry season uses which is not a commonly recognized approach to equitable and reasonable utilization. Moreover, the distinction between mainstream and tributaries in Articles 5(A) and 6, and throughout the text, lends an interpretation that inter alia the principle applies to the river mainstream but not its tributaries. As a result, the practical legal application of equitable and reasonable utilization under the Mekong Agreement does not have a basin-wide scope.</p>
<p style="text-align: center;"><i>Compatibility</i></p> <p>The UNWC includes relevant factors for determining equitable and reasonable utilization (Articles 5, 6). The Mekong Agreement supports equitable and reasonable use in principle, but the distinctions made between the river’s mainstream and tributaries, as well as wet and dry season flows, means that the legal scope and inter alia practical application of equitable and reasonable utilization is severely limited in comparison to the UNWC, and by implication customary international law.</p> <p>However, it is arguable that under customary international law, and inter alia the UNWC as its commonly accepted codification, the principles of equitable and reasonable utilization would apply to the river’s mainstream and tributaries in equal measure, during both wet and dry seasons. Under this interpretation, it follows that all Mekong Basin states, not just those which are party to the Agreement, would be obliged to apply this principle to both mainstream and tributaries equally. Given their general compatibility, the Mekong Agreement and its related procedures and guidelines would clearly benefit from being able to draw on the UNWC Article 6 factors involved in determining its legal application.</p>	

2.4 Substantive principles: Obligation not to cause significant harm (and related duty to protect ecosystems)

<i>UNWC</i>	<i>Mekong Agreement</i>
<p>Article 7 of the UNWC deals in detail with the general obligation not to cause significant harm. It begins by stating that “Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States” (Article 7(1)). Directly related to this general obligation, Article 7(2) goes on to specify that “Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.” It is this explicit reference to “having due regard” that many legal experts consider as giving ultimate legal primacy to the principle of equitable and reasonable utilization over the obligation not to cause significant harm. Indeed, this direct reference “in effect recognizes that, where it can be shown that significant harm occurs, but it can also be proven that such harm is equitable and reasonable, a State will be in compliance with international law” and inter alia customary international law as codified within the UNWC.</p>	<p>Article 7 of the Mekong Agreement obliges member states: “To make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (eco-system) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharge of wastes and return flows.” This provision further dictates that “Where one or more States is notified with proper and valid evidence that it is causing substantial damage to one or more riparians from the use of and/or discharge to water of the Mekong River, that State or States shall cease immediately the alleged cause of harm until such cause of harm is determined in accordance with Article 8.” (Article 7, Mekong Agreement). Where Article 7 obliges MRC States “to make every effort” to avoid, mitigate and minimize harmful effects, this follows the due diligence component of international customary law. Considered here in isolation, the obligation on MRC States to “avoid, minimize and mitigate harmful effects” as codified under Article 7 represents an elaboration of the basic duty not to cause significant harm under customary international law and inter alia as contained within the UNWC.</p>
<p><i>Compatibility</i></p> <p>The UNWC incorporates a well-defined obligation to take all appropriate measures not to cause significant harm in Article 7. The Mekong Agreement in its own Article 7 does not go as far in defining key terms and phrases within this duty, referring instead to ‘harmful effect’ which requires the injured state to provide evidence of ‘substantial damage’, both undefined terms in the current legal regime. However, it can be argued that the UNWC and Mekong Agreement each separately contain the basic legal elements as per customary international law within their respective Article 7 provisions obliging states explicitly not to cause harm to another watercourse state; and inter alia, that there is a duty of care and thus a due diligence component.</p>	

2.5 Procedural obligations: Principle of cooperation and information exchange

<p style="text-align: center;"><i>UNWC</i></p>	<p style="text-align: center;"><i>Mekong Agreement</i></p>
<p>The over-arching duty to cooperate is encapsulated in Article 8 of the UNWC where it obliges watercourse states to “<i>cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith</i> in order to attain optimal utilization and adequate protection of an international watercourse” (Article 8(1)).</p>	<p>The Mekong Agreement contains within its title the inherent principle of “cooperation”, and cooperation is referred to throughout the text of the agreement. This is not expressed in terms of a specific obligation, however, but rather as an implied principle. It is significant that the Mekong Agreement makes no specific reference to, or obligation for, the exchange of information relevant to the overall management of the Mekong River and its tributaries.</p>
<p style="text-align: center;"><i>Compatibility</i></p> <p>Even though both legal instruments clearly and explicitly emphasise the principle of cooperation between watercourse states and inter alia its fundamental role and relevance in the effective governance of international watercourses, only the UNWC obliges state parties to cooperate. The Mekong Agreement, despite various references to the term “cooperation” within its text and its title, does not impose on watercourse states a general obligation to cooperate on the basis of mutual benefit and good faith.</p> <p>On the other hand, the MRC clearly has an important role in supporting cooperative processes and the Mekong Agreement contains very detailed provisions to support this, while the UNWC, due to its global nature, contains only provisions encouraging the watercourse countries to establish specific institutional arrangements.</p> <p>Nevertheless, the UNWC goes much further than the Mekong Agreement in specifying the procedural obligations and established mechanisms related to the duty to cooperate, including regular information and data exchange between watercourse states. These provisions are also reinforced by other UNWC provisions which emphasize the principle of “cooperation” in “good faith”. The end result is that the UNWC is entirely concerned with achieving the obligation of cooperation between watercourse states and provides a total package of obligations and procedures to assist states in achieving this over-riding goal.</p>	

2.6 Procedural obligations: Principle of prior notification, consultation and negotiation (over planned measures)

<i>UNWC</i>	<i>Mekong Agreement</i>
<p>Article 11 of the UNWC obliges states to: exchange information, consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse. Article 13(a) dictates that the state providing notification must allow six months for the notified state(s) to evaluate this information, carry out their own studies, and ultimately reply. With regard to consultations and negotiations, Article 17(1) dictates that where the notifying state has communicated via reply that they determine the planned measure is inconsistent with Articles 5 and/or 7, both the notifying and notified states are bound to “enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation”. In this regard, all states must engage in any consultations and negotiations “in good faith [and] pay reasonable regard to the rights and legitimate interests of the other State” (Article 17(2)).</p>	<p>The Mekong Agreement provides general guidance and binding procedural rules for prior notification and consultation. This differs from the UNWC provisions, however, by distinguishing between the river mainstream and its tributaries.</p> <p>With regard to the river mainstream, parties are obliged under Article 5(B), to notify the Joint Committee on any proposed intra-basin uses during both the wet and dry seasons; and any inter-basin diversions during both the wet and dry seasons, subject to prior consultation. Article 5(A) further stipulates that “intra-basin uses and inter-basin diversions on the river’s tributaries, including the Tonlé Sap, shall also be subject to notification to the Joint Committee.”</p> <p>However, in the definitions in relation to “domestic and minor uses not having a significant impact on mainstream flows” there is crucial caveat whereby “Notification of proposed uses that only have an impact on the tributaries of the Mekong are therefore excluded from the Agreement”.</p>
<p><i>Compatibility</i></p> <p>In terms of the overall obligation for prior notification and consultation, the major distinction between both instruments is that the UNWC does not distinguish between the mainstream and tributaries of international watercourses in this regard, whereas the Mekong Agreement clearly does, and that “domestic and minor uses of water not having a significant impact on mainstream flows” are excluded.</p> <p>Despite these distinct differences, both instruments demonstrate an underlying legal compatibility in so far as they codify provisions which, at the very least, incorporate the rhetoric and plain language of an obligation for prior notification and consultation over planned measures. The UNWC provides the legal rigour, clarity and binding status currently lacking under the Mekong Agreement.</p> <p>Finally, the need for more detailed procedures can be satisfied by the UNWC because the “procedural rules provide a transparent framework for the development and management of the changing uses of the shared watercourse”.</p>	

2.7 Procedural obligations: Dispute resolution procedures

UNWC	Mekong Agreement
<p>Article 33 of the UNWC, supported by the only Annex to the Convention’s text, provides the UNWC legal framework for the settlement of disputes. Article 33(1) stipulates that in the absence of an applicable agreement, in the event of a dispute between two or more parties concerning the interpretation or application of the UNWC, states are <i>obligated</i> to “seek a settlement of the dispute by peaceful means”.</p> <p>State parties to the UNWC are bound by the subsequent provisions under Article 33. Article 33(2) dictates that if such parties to a dispute fail to reach an agreement via negotiation requested by one (or more of them in the case of multiple parties) they can then “jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice”.</p> <p>Article 33(3) provides detailed timelines and procedures whereby, if after six months from the time of a state party requesting negotiations the parties to the dispute have failed to settle through negotiation or other means, the dispute must “be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraphs 4 to 9, unless the parties otherwise agree”. The legal role and relevance of impartial fact-finding in the overall scheme of the UNWC dispute resolution procedures cannot be underestimated because it is largely unique to this framework agreement within the field of international water law and trans-boundary basin/river agreements. Furthermore, given the range of dispute settlement mechanisms provided via Article 33(2), it remains the only truly non-negotiable, binding procedure and forum within the UNWC.</p>	<p>The Mekong Agreement text includes certain dispute resolution provisions. Article 8 pertaining to “State Responsibility for Damages” provides that: “where harmful effects cause substantial damage to one or more riparians from the use of and/or discharge to waters of the Mekong River by any riparian state, the party(ies) concerned shall determine all relative factors, the cause, extent of damage and responsibility for damages caused by that State in conformity with the principles of international law relating to state responsibility, and address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means as provided in Articles 34 and 35 of this Agreement, and in conformity with the Charter of the United Nations [emphasis added].”</p>
<p>Compatibility</p> <p>While both instruments contain dispute resolution provisions, there are significant differences between the obligations and procedures contained within the UNWC and the Mekong Agreement. Under Article 33, the UNWC provides a detailed and logically sequential set of steps with a range of binding and non-binding forums for the settlement of disputes which emphasize fact-finding, strategic counseling, crisis management and creative dispute resolution. This legal framework is further strengthened by the comprehensive Annex relating to arbitration, as well as Article 32 which provides individuals within watercourse states who have suffered or are under the imminent threat of harm with the right to seek liability in the jurisdiction where the harm is alleged to have occurred. By contrast, the Mekong Agreement provides member states and the MRC with a few general procedures leaving their interpretation open and maintaining a focus on non-binding processes.</p>	

3 UNWC SUPPORTING GOVERNANCE IN THE MEKONG AND BEYOND

Based on the comparative legal analysis above and the added weight of the main principles and procedures of customary international law as they relate to international water law within both instruments, there is a general finding of overall legal compatibility between the UNWC and the Mekong Agreement.

Nevertheless, it is clear that the Mekong Agreement differs from the UNWC substantively and procedurally in several important respects. Moreover, there are crucial legal elements which are missing or inadequate within the general substantive principles and procedures as codified under the Mekong Agreement in comparison to the UNWC and *inter alia* customary international law. Although the agreement purports to have the principle of sustainable development at its heart, the principles of equitable utilisation, equal participation and no significant harm are not adequately pronounced in any of its provisions or are qualified with references to territorial sovereignty. Compounding this is the absence of procedures relating to prior notification for states considering projects with potentially harmful effects on other riparian states, as well as no clear and ultimately binding dispute resolution mechanisms and procedures. Collectively, these comparative substantive and normative differences to the UNWC undermine the Mekong Agreement's ability to regulate effective utilisation of the Mekong River and its tributaries.

As a framework agreement, however, the UNWC can provide crucial guidance, processes and standards across all of these crucial legal elements within the Mekong Basin. In turn, the normative impact of Mekong Basin states ratifying the UNWC would be beneficial to the governance of international watercourses globally. The section below sets out the ways in which the MRC states ratifying the UNWC can achieve this.

3.1 Addressing gaps in the Mekong Agreement and the MRC

Previous comparative legal analyses of the Mekong Agreement and its accompanying procedures against the key pillars of international water law, specifically the UNWC, have overwhelmingly recommended that the agreement be brought into line with existing treaties and customary international law.

The majority of these studies were conducted before the UNWC came into force at a time when no Mekong states, apart from Vietnam, had taken concrete steps to ratify the UNWC, and when China had originally voted in opposition. As a result, it made sense then to focus arguments on raising the legal standards, clarifying processes and strengthening obligations of the Mekong Agreement to those of the UNWC and customary international law by *amending the existing provisions of the Agreement*.

Now that the UNWC has entered into force, however, there is the potential to look instead at how the two instruments can reinforce each other in the Mekong Basin. Based on the general legal compatibility between the two instruments across all their main substantive and procedural provisions as examined above, there is a compelling case for the Lower Mekong Basin states to ratify the UNWC so that it can operate alongside the Mekong Agreement, and clarify and strengthen its provisions, rather than replacing them.

In turn, the Mekong Agreement could be valued and utilised for what it is: a broad statement of purpose for sustainable development within the Mekong region. Moreover, the MRC can then be effectively utilized as the crucial *vehicle for cooperation* which brings the Mekong states to the negotiating table, rather than the only dispute settlement body. In addition, ratification of the UNWC would not represent any additional burden on the MRC Member Countries, given the advanced stage of water-related cooperation they have already achieved through the Mekong Agreement.

3.2 UNWC would *reinforce* not replace the Mekong Agreement

Ratifying the UNWC would provide a mutually reinforcing and supportive framework for the Mekong Agreement and its non-binding guidelines in terms of regulating hydropower development projects on the Mekong River mainstream *and its tributaries*. It would reinforce rather than replace the Mekong

Agreement and its accompanying procedures and guidelines, and create a hybrid legal architecture combining both “hard” and “soft” law for effective governance of the Mekong River Basin.

3.3 UNWC would *align* the Mekong Agreement with customary law

By ratifying the UNWC, parties to the MRC would also align the Mekong Agreement and its related procedures and guidelines with customary international law. The UNWC is generally a restatement and codification of customary international law as it relates to international watercourses. As a result, it has helped to clarify the legal meaning and specific content of rules and principles that are widely accepted as customary international law.

By ratifying the UNWC, MRC member states would not only affirm their willingness to adhere to the already binding rules and principles of customary international law, but also strengthen the Mekong Agreement as the existing legal platform for effective and equitable governance of the Mekong Basin.

Finally, as an adjunct objective to ratification of the UNWC within the Mekong Basin and globally, there should also be a parallel focus on strengthening applicable domestic laws to align with the provisions of the UNWC, and analyzing how ratification of the UNWC will interact with national laws and other bilateral/multilateral laws which might be relevant.

Irrespective of how long national ratification processes may take, the lower Mekong Basin states should begin actions to strengthen their domestic legislation with the aim of aligning with the principles and provisions of the UNWC (which are already binding on them as customary international law). At the same time, member countries which have not yet done so can also take this opportunity to enact specific legislation to adopt the Mekong Agreement, and to spell out the ways in which the agreement would be consistently adopted in the particular jurisdiction.

3.4 UNWC would *strengthen* not weaken the MRC mandate to govern

State parties to the Mekong Agreement which ratify the UNWC would strengthen *not* weaken the overall legal mandate of the MRC to govern the equitable and reasonable utilization and sustainable development of the Mekong River mainstream and its tributaries. Ratifying the UNWC would provide a common legal platform with binding provisions and clear procedures, especially regarding the prior notification and consultation standards and processes, as well as third party dispute resolution mechanisms that would empower the MRC to better perform its functions as a basin institution.

In particular, ratifying the UNWC would have the dual benefit of: *protecting* the existing rights and duties of MRC member states under the Mekong Agreement, as well as those of China and Myanmar as Basin states; and concurrently, *strengthening* the legal mandate of the MRC and its member states by providing them with a globally negotiated and agreed set of principles and obligations which are internationally recognized as binding on all states beyond the limited scope of the Mekong Agreement. In addition, the UNWC would help to address one of the major gaps in the existing legal mandate of the MRC which remains especially challenging to effective basin-wide governance: the absence of the upstream Basin states, China and Myanmar, from the agreement.

Ratification of the UNWC would create a common legal platform that is globally recognized and contains binding customary international legal principles and procedures, especially with regard to dispute settlement. This would be useful to the Lower Mekong Basin states in their negotiations with the Upper Mekong Basin states via the MRC.

The UNWC *protects* the existing mandate of the MRC and its member states via two critical sets of provisions. Firstly, the UNWC is explicit about the legal status of rights and duties stemming from existing watercourse agreements. Second, the UNWC is explicit about the legal status of rights and duties pertaining to watercourse states generally. Third, the UNWC would *expand* the mandate of the MRC in so far as it encompasses both the mainstream and tributaries of international rivers by making no legal distinction between them.

In terms of *strengthening* the legal mandate of the MRC and its member states to effectively govern the Mekong River mainstream and its tributaries, parties to the Mekong Agreement can draw reference from the ratification of the UNWC and implementation of its provisions by other trans-

boundary basins around the world. Since its adoption and subsequent ratification by the UNGA , the UNWC as a *framework* Convention has proved influential on regional, basin specific and bilateral agreements. The 2000 *Southern African Development Community (SADC) Revised Protocol on Shared Watercourses*, which replaced the previous 1995 Protocol of same name in order to repeat the UNWC text largely verbatim, is one such example of the Convention's global reach and recognition.

3.5 UNWC would *underpin* not undermine cooperation within and via the MRC

Ratifying the UNWC would underpin *not* undermine cooperative obligations, procedures and policy measures conducted by the MRC and its member states. In turn, this would strengthen overall governance in the Mekong region because ratifying the UNWC would provide a consistent suite of legal baseline standards, timeframes and procedures for cooperation between member states.

The overriding aim of Part III of the UNWC is to allow for consistent and transparent dealings between states with regard to projects which can otherwise be controversial. Therefore, the UNWC could help to alleviate the overall general ambiguities by providing an explicit "code of conduct" under which the notifying and notified states can cooperate and engage. Given the likely non-binding legal status of the Mekong Agreement's PNCPA and its related guidelines it is crucial that the Agreement enhance its procedural obligations in this regard.

Additionally, there are potential economic benefits provided to states by having clear pathways and binding procedures, standards and expectations for cooperation for hydropower development in the Mekong Basin, specifically in relation to the procedures for prior notification and consultation regarding planned measures for projects with possible trans-boundary impacts.. Cooperation would be further supported by raising awareness and providing technical capacity-building on the UNWC among MRC Member states.

4 CONCLUSION AND RECOMMENDATIONS

20 years after the Mekong Agreement was adopted by the Lower Mekong Basin states of Cambodia, Lao PDR, Thailand and Viet Nam, UNWC ratification by Viet Nam presents an opportunity to take a different approach to strengthening trans-boundary water governance in the Mekong Basin and globally.

It is important to note that all states in the basin are already bound by the principles of international customary law which is codified under the UNWC. As a result, states which ratify and implement the UNWC will see no change in their fundamental obligations. However, they will benefit from an enforceable framework currently lacking from the Mekong Agreement. This will provide basin-wide consistency in the effective governance and regulation of riparian state practices.

The enforceability of the UNWC will be further enhanced by existing and future treaties, international custom and ICJ decisions. By its very nature, this framework convention provides a central body of international law on which to build basin-wide uniformity for the MRC and its member States. While general in nature, the UNWC provides clarity regarding the implementation of international water law upon which contextual basin and/or watercourse treaties can provide more nuanced governance mechanisms.

In addition, ratification of the UNWC will support Lower Mekong Basin states as they seek more balanced dialogue with upstream countries which are not yet part of the Mekong Agreement and the MRC.

The benefits of ratification would likely also extend beyond the Mekong region. The UNWC still needs to be widely ratified to make sweeping long-term impacts on the practices of riparian states worldwide. However, ratification by the Mekong Basin states will provide a consistency of approach to negotiating binding measures for the management and utilisation of international watercourses. As this approach becomes more widespread, it could act as further compelling evidence of the importance of adopting international customary law. This gradual progression of developing protocols/treaties, adopting binding measures, and over time raising the standards of international custom related to the use, management and governance of trans-boundary watercourses will inevitably help improve riparian state practices within the Mekong and around the world.

4.1 Key recommendations

After a detailed comparative analysis of the respective key substantive and procedural principles and obligations of the UNWC and the Mekong Agreement, the finding is of overall general legal compatibility between the two instruments. Moreover, where gaps and inconsistencies exist, the UNWC, as the internationally recognised global framework convention on governance of trans-boundary watercourse governance, can help to fill those gaps. This is particularly important in the area of procedures for notification and prior consultation which are so critical to dispute resolution.

The Procedures for Notification, Prior Consultation and Agreement (PNCPA) of the Mekong Agreement are external to the Agreement, and as a result are non-binding. This gap in enforceability is addressed, however, by the clear legal provisions of the UNWC in this regard.

In turn, the UNWC would reinforce rather than replace the Mekong Agreement and the MRC, as well as strengthening its broader normative impact as the most important legal instrument for the governance of trans-boundary watercourses globally.

For the UNWC to be fully effective in reinforcing the Mekong Agreement, however, universal ratification of the UNWC by *all* of the lower Mekong Basin states and inter alia members of the MRC is needed, ideally extending to the upstream basin states, China and Myanmar.

Ratifying the UNWC is recommended on the grounds that it would:

- **Reinforce not replace the Mekong Agreement**

- Ratification of the UNWC would provide a mutually reinforcing and supportive framework for the Mekong Agreement and its non-binding guidelines which is crucial in terms of regulating hydropower development projects on the Mekong River mainstream *and its tributaries*.
- The result of ratification by states would be to create a hybrid legal architecture combining both 'hard' and 'soft' law for effective governance of the Mekong River Basin.

- **Align the Mekong Agreement with customary international law**

Ratification by MRC member states would affirm their willingness to adhere to the already binding rules and principles of customary international law, while also strengthening the Mekong Agreement as the existing legal platform for effective and equitable governance of the Mekong Basin.

- **Strengthen the ability of the MRC to govern**

- Ratification of the UNWC by all the Lower Mekong Basin states would have the dual benefit of: *protecting* the existing rights and duties of MRC member states under the Mekong Agreement, as well as those of China and Myanmar as basin States; and concurrently, *strengthening* the legal mandate of the MRC and its member States by providing them with a globally negotiated and agreed set of principles and obligations which are internationally recognized as binding on all states beyond the limited scope of the Mekong Agreement.
- Ratification would also prove the commitment of Lower Mekong Basin states to improving processes and transparency in line with customary international law.
- Despite the ongoing absence of China and Myanmar within the MRC, there are still clear benefits in the Lower Mekong Basin states ratifying the UNWC, especially if *all* MRC member States ratify. This would create a common legal platform that is globally recognized and contains binding customary international legal principles and procedures, especially with regard to dispute settlement, which the Lower Mekong Basin states via the MRC could utilize in negotiating with the Upper Mekong Basin states.

- **Underpin not undermine cooperation within and via the MRC**

- The UNWC contains clearly defined and transparent dispute resolution procedures which would provide a consistent set of provisions and legal framework to underpin the dispute settlement mechanisms in the Mekong Agreement, while maintaining the mandate of the MRC as a vehicle for basin cooperation and negotiation.
- The UNWC's binding prior notification and consultation procedures for planned measures can address critical gaps and ambiguities in the existing PNCPA framework under the Mekong Agreement and its related procedures and guidelines where the latter's non-binding nature and lack of clear timeframes/standards in this regard has caused notable disagreements between MRC member States in relation to hydropower dam projects.
- There are potential economic benefits associated with having a clearly defined, transparent and legally-binding prior notification and consultation process, especially in relation to large-scale infrastructure projects including hydropower dams.

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