

THE EMERGING PRINCIPLES AND RULES OF INTERNATIONAL WATER RESOURCES LAW

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The opinions expressed in this Article are those of the author and do not necessarily reflect the views of the States and institutions quoted herein nor that of their authorized commentators.

Abstract

The purpose of this paper is to identify those emerging principles and rules of international water resources law which, since the formulation of the 1966 Helsinki Rules of the International Law Association, have been incorporated in the recent codification work of the United Nations, notably the 1992 Convention drafted by the Commission for Europe and the 1997 Convention produced by the International Law Commission, as well as in the recent State practice with particular reference to the 1995 Mekong River Basin Agreement of which it constitutes an adequate illustration.

CONTENTS

I. INTRODUCTION	1
II. THE CODIFICATION WORK OF THE UNITED NATIONS	1
III. RECENT STATE PRACTICE	5
IV. THE MEKONG EXPERIENCE	7

Notes	17
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**Annex : 1995 Agreement on the Cooperation for the Sustainable Development of the
Mekong River Basin**

I. INTRODUCTION

It is today a generally accepted view that the 1966 Helsinki Rules of the International Law Association, if not those rules developed after 1966 and up to 1996 which, together, form the so-called Campione Consolidation (1966-1999), constitute a proper statement of the prevailing doctrine in the field of international water resources law.¹

If those Rules have not yet been widely incorporated in the recent practice of States or have even been rejected, as a package, by a number of States not yet ready to abandon their historical positions as upstream or downstream States, it may be considered that the definition of the Drainage Basin and the principle of Equitable Utilization with their far reaching implications are now finding their way into recent international treaties and conventions governing shared water resources.

Recent efforts made by the United Nations in promoting two new general conventions, one purporting to regulate the protection of the quality of water resources and the environment, the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes², and the other, the 1997 UN/ILC Convention on the Law of the Non-Navigational Uses of International Watercourses³, purporting to regulate the equitable utilization of shared water resources, attest of the recognition by the international community of the need for new norms in this field.

No matter how impatient scholars of international law or the community of nations may be to see those much needed new principles and rules acquiring the status of rules of international customary water law, the time required for these to pass the test of a matured custom, i.e., of becoming an international custom as evidenced by a general practice accepted as law (*opino juris vel necessitatis*), is bound to still take quite a few decades.

Nevertheless, by having effectively incorporated such new principles and rules, even if partially, a few recent treaties and conventions attest to the fact that the conceptual revolution brought about by the Helsinki Rules is on its way and that those hitherto soft-law norms are gradually acquiring the status of recognized rules of international law.

After a review of the above two UN Conventions, more specific attention will be given here to the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin⁴ which, while embodying essentially framework concepts and principles, constitutes a commendable synthesis of the basic norms which should nowadays govern the relationships among States sharing the water resources of the same international drainage basin.

II. THE CODIFICATION WORK OF THE UNITED NATIONS

1. Introduction

Early attempts at proposing general conventions in the field of international water law were made by the League of Nations in 1921 with the Barcelona Convention and Statute

on the Regime of Navigable Waterways of International Concern⁵ and in 1923 with the Geneva Convention relating to the Development of Hydropower of Interest to Several States.⁶

With the exception of the principle of freedom of navigation for all Nations, soon to be restricted to the riparian States only, and of the confirmation of the priority of navigation over all other uses, though with the exception of minor diversions and in-stream uses for limited domestic purposes, both Conventions have largely remained an academic exercise.

Another attempt, at this time not by the United Nations but by the European community of States, to adopt framework principles for the protection and use of water resources and the environment is exemplified by the European Water Charter adopted by the Council of Europe in 1967.⁷ If only of regional origin, this instrument is nonetheless of major importance in that States with the longest experience in shared international water resources have adopted such fundamental principles as recognize that ‘water is life’ (Principle I), ‘water resources are not infinite’ (Principle II), ‘water quality must be preserved’ (Principle IV), ‘existing water uses should not compromise the quality of water for future uses’ (Principle V), ‘adequate water resources management requires a plan adopted by the competent authorities’ (Principle VIII), ‘water constitutes a *common patrimonium* which everyone is under an obligation to conserve and use carefully’ (Principle X), ‘water resources should be apprehended within the framework of their natural basin rather than within that of administrative or political boundaries’ (Principle XI) and that, ‘as water resources know of no boundaries, they require international cooperation’ (Principle XII).

A major subsequent event at the global level was the holding of the United Nations Conference on the Human Environment in Stockholm in 1972, which event gave birth to the recent holistic approach aiming at managing the global environment. If, until then, it had been considered that the management of each natural resource was to duly take into account corresponding water quality and environmental protection, since Stockholm 1972 the environmentalists have been claiming that the management of each natural resource was to be a resultant of global environmental management.⁸

As to the codification work of the United Nations, exemplified by the aforementioned 1992 Helsinki Convention and the 1997 New York Convention, one eminent scholar of international law and advocate of the 1997 Convention has asserted that these have to be considered together since one addresses more particularly the qualitative and the other the quantitative aspects of shared water resources uses and since these Conventions do in effect complement and supplement each other.⁹

If the motivation for such an interpretation no doubt emanates from a praiseworthy desire to resolve discrepancies and contradictions present in these two texts in an attempt to make these coincide, the outcome remains questionable. If the exercise needs recourse to interpretation, it evidences by itself the difficulties encountered in the simple reading of the 1997 Convention. A fundamental rule of interpretation of legal texts is to evidence the original will of the drafters. Considering that these two instruments were produced by different drafters at different times, that their object is patently different and that the

ensuing plenary debates were conducted by different representatives, it is difficult to accept the argument that these two Conventions complement or supplement each other, if not that the more recent one corrects errors and discrepancies in the older one.¹⁰

As has been rightly underlined by another writer, the background to the 1992 Convention has to be apprehended within the framework of the work of the ECE which, in response to environmental challenges, is to promote 'transboundary co-operation by developing institutional and legal frameworks which are applicable at the regional level but can serve also as model for solving transboundary environmental issues in other regions'.¹¹

2. The 1992 UN/ECE Convention

Within such a framework, the 1992 Convention can be said to constitute an adequate legal instrument governing the protection and use of transboundary watercourses and international lakes with a clear emphasis on environmental protection.

Indeed, Article 2 of the Convention defines its aims as (i) the protection of transboundary waters, both surface and underground, by preventing, controlling and reducing pollution, (ii) an ecologically sound and rational management of transboundary waters; (iii) the reasonable and equitable use of transboundary waters; and (iv) the conservation and restoration of ecosystems.

Article 9 entices States bordering the same transboundary waters to enter on the basis of equality and reciprocity into bilateral or multilateral agreements or other arrangements in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact. This Article further recommends that such agreements should provide for the establishment of joint bodies, covering well-defined catchment areas, to monitor and control water quality and environmental impact, including co-operation with coastal States and the joint bodies which they have established for the protection of the marine environment.

To these ends, the Convention recognizes the following principles : (i) the so-called 'precautionary principle' which implies action to avoid the potential transboundary impact of the release of hazardous substances into watercourses and lakes; (ii) 'the polluter-pay-principle'; and (iii) the obligation to manage water resources in such a way as to meet the needs of the present generation without compromising the ability of future generations to meet their own needs,¹² or the 'sustained development' principle.

The water resources object of the Convention are defined as 'transboundary waters' which, according to Article 1, paragraph 1, are themselves defined as 'any surface or underground waters which mark, cross or are located on boundaries between two or more States'. As to the definition of a 'transboundary impact', paragraph 2 of that same Article reads 'Transboundary impact means any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the principal origin of which is situated wholly or in part within an area under the jurisdiction of a party, within an area under the jurisdiction of another party'. While falling short of the Drainage Basin definition of the Helsinki Rules, this definition can however be said to encompass the whole of surface and underground waters, including confined aquifers, the

use of which one way or another has a transboundary impact. This definition is further interestingly complemented by the specification of Article 9 to the effect that reference therein is made to ‘well-defined catchment areas’ and to the ‘protection of the marine environment’ which, together, do cover the definition of the Drainage Basin of the Helsinki Rules.

On the uses of transboundary water resources, as mentioned above the Convention establishes in Article 2., paragraph 2, the principle that the parties shall in particular take all appropriate measures ‘to ensure that transboundary waters are used in a reasonable and equitable way’, a principle followed by the recommendations that, in doing so, the parties should take in particular into account ‘their [of such waters] transboundary character, in the case of activities which cause or are likely to cause transboundary impact’, i.e., the ‘no-harm’ rule.

This formulation is of particular significance in that it clearly demonstrates that the drafters of the 1992 Convention have not considered the ‘no-harm’ rule to constitute a principle of international law but one of the essential factors which States are to consider when intending to make use of their transboundary waters. States are thus encouraged to incorporate this recommendation as a rule in their transboundary water treaties and conventions, thereby giving it the legal status of a treaty provision.

The UN/ECE 1992 Convention was signed by 25 countries and ratified by 29 countries, including the European Union.¹³

3. The UN/ILC Convention

The same can unfortunately not be said of the 1997 UN/ILC Convention, work on which was initiated more than twenty years before its adoption. Keeping with the inherited terminology of ‘waterways of international concern’ of the Barcelona Convention the object of which was in substance ‘the regulation of the navigational uses of international watercourses’, the 1997 Convention purports to have as an object ‘the regulation of the non-navigational uses of international watercourses’.

Even if, at closer analysis, it may be argued that the term ‘watercourses’ within the text of the Convention does in fact cover the Drainage Basin,¹⁴ the question remains as to why the Convention has not simply made use of this now well known definition. As has been reported elsewhere, ‘when the ILC had started studying the subject, . . ., the main focus was on the equitable apportionment of freshwater, while problems of pollution entered the picture only at a later stage, . . .’.¹⁵ If pollution control and transboundary impact of water resources activities do constitute due regulatory requirements under the 1992 Convention, such hermetic concepts as the ‘ecosystems of international watercourses’, ‘ecosystem of the water’ and ‘ecosystem of the environment’ have found their way into the 1997 Convention together with the so-called concept of the ‘ecosystems approach’ boosted by the environmentalists together with their sterile argumentation on the pros and cons of the use of such terms as ‘environment’ and ‘ecosystem’.¹⁶

It may be that the initiative of the ILC was just to try and attract support to the recognition of the 1966 Helsinki Rules as, in fact, the contents of the 1997 Convention adds little or

nothing thereto. Unfortunately, by having gone through the international political debate, the outcome is most disappointing in that the terminology carefully carved out, and the logical sequence engineered, by the ILA in drafting of the Helsinki Rules have been totally lost to the effect that, notwithstanding the large representation of States in the various ILC sessions, very few ratifications, if any, should be expected.

III. RECENT STATE PRACTICE

1. Introduction

A comprehensive inventory of international water resources treaties, declarations, acts and cases by basin was undertaken in the form of a Systematic Index by the Food and Agriculture Organization of the United Nations (FAO) in 1978 and supplemented in 1984. This Index covers the chronological compilation of some 3700 legal instruments governing international water resources from the early IXth century until 1983, with Tables classifying water resources by country and countries by basin. An up-date of this Index is available through the Web.¹⁷

a) Regional Conventions

A number of recent regional conventions have formally or informally recognized the 'drainage basin' concept, or that of different hydrological management units, as well as the principle of the 'conjunctive use of surface and underground water resources'.

Among these, the following may be mentioned¹⁸ : the 1968 African Convention on the Conservation of Nature and Natural Resources, the 1970 Convention Establishing the Arab Center for Studies of Dry Areas and Arid Lands which promotes the investigation of both surface and underground water resources and the irrigation of arid lands, the 1976 Convention and its 1980 Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, the 1978 Regional Convention between Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates for Co-operation in the Protection of the Marine Environment from Pollution which regulates the prevention and abatement of marine pollution in the Persian Gulf from land-based sources and states the principle of civil liability and of compensation for damages, the 1982 Regional Convention between Jordan, Saudi Arabia, Somalia, Sudan, the Arab Republic of Yemen and the People's Republic of Yemen for the Conservation of the Red Sea and of the Gulf of Aden Environment which enjoins contracting states to take all reasonable measures to prevent pollution originating from land-based sources in accordance with international environmental law, and the 1995 Protocol on Shared Watercourses Systems in the Southern African Development Community Region.¹⁹

b) Bilateral and Multilateral Agreements

As regards recent bilateral and multilateral conventions, treaties and agreements governing shared water resources, the following may be mentioned : the 1975 Agreement between Iran and Iraq Concerning the Use of Frontier Watercourses (optimum use and division of the waters, Art. 2; Joint Technical Commission; procedures for the settlement of disputes,

Art. 6);²⁰ the 1982 Agreement between Iraq and Turkey Establishing the Joint Technical Committee for Regional Waters (Euphrates water releases after Syria impounded the Al-Tawah Dam in 1975; participation of Syria since September 1983);²¹ the 1987 Agreement between Botswana, Mozambique, Tanzania, Zambia and Zimbabwe on the Action Plan for Environmentally Sound Management of the Common Zambezi River System (application of the 'Drainage Basin' concept);²² the 1993 Agreement Establishing the Framework for General Co-operation between Egypt and Ethiopia (conservation and protection of Nile waters in accordance with international law; development of a framework for effective co-operation among Nile Basin States based on the community interest);²³ the 1993 Declaration of Principles on Interim Self-Government Arrangements between Israel and the Palestinian Liberation Organization (recognition of the parties' water rights; equitable utilization; establishment of a Joint Committee for Economic Cooperation), the 1994 Agreement between Israel and the Palestinian Liberation Organization on the Gaza Strip and the Jericho Area (conservation, development and use of water resources, including drilling; water supply and sewerage systems operations; reservation of Israeli water rights and PLO payment for water supplied), the 1994 Peace Treaty between Israel and Jordan (integrated water resources management, the regulation of sewerage and groundwater exploitation, cost sharing and surface and groundwater apportionment) followed by the 1996 Framework Agreement between Israel, Jordan and Palestine (the first multi-lateral agreement for sharing water resources ever adopted in the Region);²⁴ the 1994 Agreement between Lebanon and Syria (apportionment of the waters of the Orontes River); the 1994 Agreement between Belgium, France and the Netherlands on the Rivers Meuse and Scheldt;²⁵ and the 1995 Agreement between Cambodia, Laos, Thailand and Viet-Man on the Cooperation for the Sustainable Development of the Mekong River Basin.²⁶

c) Conclusion

All these conventions, treaties and agreements, which do effectively evidence recent State practice, show a drastic departure from prior arrangements which aimed at regulating individual water uses or the protection of water quality with respect to individual rivers and lakes of international concern. They recognize the reality of the concept of the hydrologic cycle and the principle of the conjunctive use of surface and groundwater resources as well as the need for multi-lateral cooperation and for the institutionalization of the planning and development of shared water resources, the requirement of corresponding environmental impact studies and the institutionalization of some form of arrangements for the prevention and settlement of water disputes.

However, if the concept of 'joint' or 'common' water resources has somehow found its way in bi-lateral arrangements, the same does not hold true in respect of multi-lateral treaties, conventions and agreements in which the contracting parties still uphold such concepts as absolute territorial sovereignty and integrity. If a number of these arrangements do provide for the equitable utilization of water resources, in practice the concept is still largely understood in terms of apportionment. And if, with one exception though, they all provide for some form or another of joint planning, this essential function and fundamental means of contractual enforcement is left to a mere obligation to exchange data and information on individually planned water resources conservation or development projects.

The exception is offered by the Mekong Basin experience which is more specifically described in Chapter IV herebelow in which the provisions of the 1995 Mekong Agreement are tested against those of the 1966 Helsinki Rules.

IV. THE MEKONG EXPERIENCE

1. Introduction

The Mekong is the world's tenth longest river and is the heart and soul of mainland South-East Asia. From its headwaters on the Tibetan Plateau, this river runs 4'000 kilometers south through the Yunan Province of China, Myanmar (formerly Burma), Laos, Thailand, Cambodia and Viet-Nam where it discharges into the South China Sea.

A unique feature of the Mekong River system is the Great Lake in Cambodia which is connected to the mainstream through the Tonle Sap. The Great Lake is the largest freshwater lake in South-East Asia. Its existence revolves around the prevailing two seasonal cycles : in the dry season, it is a shallow lake with a surface of some 2'500 square kilometers while, when the monsoon begins in June/July, the swollen waters of the Mekong River force its Tonle Sap tributary to reverse its flow northwards back into the Great Lake, spreading over the surrounding flood plain to cover about 12'000 square kilometers with a depth ranging from 8 to 10 meters.

More than 50 million people depend on the Mekong River system for food, water, transport, irrigation and power. The river's annual flood/drought cycles are essential for the sustainable production of food crops on the floodplains and along the banks of the river during the dry season. Although a number of mainstream dams were planned over the years, none has fortunately been built so far. Several flood control, irrigation and hydro-power dams have however been built and are operational on number of its tributaries.

The institutional history of the Lower Mekong Basin was initiated in 1957 when, during the 13th Session of the United Nations Economic Commission for Asia and the Far East (ECAFE), now known as the Economic Commission for Asian and the Pacific (ESCAP), Cambodia, Laos, Thailand and Viet-Nam established the original Mekong Committee to address the comprehensive development of water and related resources in the Lower Mekong Basin.²⁷

Given the prevailing political situation in the region, Cambodia was prevented as from 1975 from effectively participating in the work of the Mekong Committee which, in 1978, adopted a Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin²⁸ according to which Laos, Thailand and Viet-Nam undertook to pursue the joint development of the Basin under a three-member committee until Cambodia would be in condition to resume its participation.

It is not until 1995, however, that Cambodia resumed its participation and that the current Mekong River Commission was established with the signing of the Agreement on Cooperation for the Sustainable Development of the Mekong River Basin (Text given in the Annex²⁹).

Worth noting is the fact that notwithstanding those twenty intermediate years of political unrest in the region, from the Viet-Nam war until after the Kampuchea episode, effective cooperation nevertheless continued among the four riparian countries thanks to what is called ‘The Mekong Spirit’, the material expression whereof is expressed as follows : “Whatever the political differences of their governments, the representatives of the four riparian countries have always met in a spirit of perfect understanding for constructive discussions – a marvelous and may be unique example of cooperation which has surpassed even the most optimistic expectations.”³⁰

As regards the legal framework of Lower Mekong Basin development, two major studies were undertaken by the Mekong Secretariat in 1969, one on the legal aspects of Mekong navigation³¹ and the other one on the legal aspects of Lower Mekong Basin development,³² which studies served as the background against which a Draft Lower Mekong Basin Water Charter³³ was issued by the Mekong Secretariat in 1971.

Consisting of 76 Articles, this Draft Water Charter was patterned on the 1966 Helsinki Rules and adjusted to the specificities of the Lower Mekong Basin. In addition to those Rules, it included provisions on integrated water resources planning and financing.

In 1975, Cambodia, Laos, Thailand and Viet-Nam had adopted a Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin³⁴ which, with its 35 Articles, constitutes an abridged, but substantially identical, version of the Draft Water Charter sanctioning the move from river to drainage basin management.

It is not until 5 April 1995 however that, with the adoption of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, all prior arrangements and all rules of procedure adopted thereunder were ultimately superseded.

The brief analysis which follows will serve to illustrate those emerging principles and rules which happen to be part and parcel of this recent Agreement (Text given in the Annex).

2. The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, signed in Chiang Rai, Thailand, on 5 April 1995

This Agreement is made out of 42 Articles classified into 6 Chapters : I Preamble, II Definition of Terms, III Objectives and Principles of Cooperation, IV Institutional Framework, V Addressing Differences and Disputes, and VI Final Provisions.

The Preamble recalls the 1957 Statute of the Mekong Committee and the Mekong Spirit, acknowledges the prior political, economic and social changes which have affected the region, recognizes that the Mekong River Basin, related natural resources and environment are essential values for the well-being of its people, reaffirms the determination of the member countries to pursue the sustained development of the Basin, affirms the determination to promote the cooperation among the community of Mekong nations taking into account the multi-purpose beneficial uses and the mitigation of the harmful effects of water resources of the Basin, confirms the need for an efficient and functional institutional framework for the implementation the planned activities and for the amicable settlement of

differences and disputes, and proclaims the will to implement the objectives of the Agreement in accordance with its set principles, those of the Charter of the United Nations and international law.

The basic concepts, principles and rules established by this Agreement are briefly discussed herebelow :

a) The Drainage Basin concept

If the Title, Preamble and most Articles of the Agreement refer to the Mekong River Basin, and although no mention is made of groundwater resources, the definition of the term 'Proposed use' in Chapter II refers to the 'river system', as does Article 7 on the prevention and cessation of harmful effects which refers to 'the aquatic (eco-system) conditions, and ecological balance of the river system', from which it may be inferred that the Mekong Basin consists essentially of the aggregate of the mainstream and tributary watersheds and that groundwaters are to be taken into account as elements of the ecosystem comprised of the water and related resources of the Basin. This point of view is further corroborated by the definition of the Environment at Chapter II which is said to encompass 'the conditions of water and land resources, air, flora and fauna that exist in a particular region' or a particular ecosystem.

In the absence of a specific definition of the Basin and of a reference to the Mekong Delta as its common terminus, it may nevertheless be asserted that, even if falling short of it, the object of this Agreement is in substance the Drainage Basin as defined in the 1966 Helsinki Rules.

b) The State Sovereignty and State Responsibility principles

Article 4 entitled 'Sovereign Equality and Territorial Integrity' sets the rule for the contracting parties 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.'

This Article is remarkable in that, by affirming 'Sovereign Equality', the contracting parties have clearly ignored their geographical position as upstream or downstream States and, by instituting cooperation in the utilization and protection of the water resources of the Basin, have not less clearly establish their status as Basin States. This position is further underlined by the provision of Article 1 on Areas of Cooperation which refers to 'the multiple use and mutual benefits of all riparians', an expression evidencing the fact that the contracting States do consider the water and related resources of the Basin as 'natural assets of immense value to all riparian countries', or as their 'common wealth'.

And by combining Sovereign Equality with Territorial Integrity, the contracting States have formally ignored such principles as 'Absolute Territorial Sovereignty and Integrity' to recognize the principles of State Sovereignty and its corollary of State Responsibility according to which each Basin State is free to act within its own territory but becomes liable in the event that its activities cause a prejudice to the territorial integrity of another Basin State.

State responsibility *per se* is further specified in Article 8, State Responsibility for Damages, which provides that any harmful effect resulting for one riparian State from the use of, and/or discharge into, the waters of the Mekong River by another riparian State, shall be evaluated for its cause and damageable effects by the parties concerned ‘in conformity with the principles of international law relating to State responsibility and any related difference or dispute settled amicably as provided for by the Agreement and in conformity with the Charter of the United Nations’.

c) The Precautionary, so-called No-Harm and Polluter-Pay Principles

The wording of Article 7, Prevention and Cessation of Harmful Effects, is of major interest and is therefore quoted in full herebelow :

“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 or wastes and return flow. Where one or more States is notified with proper and valid evidence that it is causing substantial harm to one or more riparians from the use 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.”

Interestingly enough, although based on the precautionary principle, this provision rightly so does not recognize nor create an obligation for a Basin State not to cause harm to the territory of another State. It is couched in terms of a recommendation by which conforming Basin States undertake, on a best efforts basis, to take into due consideration the possible harmful effects their acts may cause to the territory of the other Basin States. It is only when a Basin State is duly notified of a harm which exists and can be evidenced, and only then in accordance with the State Sovereignty principle, that the responsibility of the State having caused the alleged harm may become engaged.

This rule is further complemented by the provision of Article 10, Emergency Situations, according to which whenever a contracting party becomes aware of a special water quality or quantity problem constituting an emergency requiring immediate action, that State is to notify and consult both the party or the parties concerned and the Joint Committee.

It is worth noting in this connection that the Agreement does not provide for the polluter-pay principle nor, as a matter of fact, for the principles of reparation or compensation. It is assumed, here again, that the purpose of the Agreement on this score has been to provide maximum flexibility in leaving such matters to the negotiating abilities of the Joint Committee and Council.

d) The Equitable Utilization principle

Consistent with the 1966 Helsinki Rules, this Agreement establishes at Article 5 the rule of Equitable Utilization pursuant to ‘all relevant factors and circumstances and to the specific rules’ further detailed in the Agreement. If, unlike in the 1966 Helsinki Rules, the relevant

factors are not specified, it may be asserted that by adding thereto the expression ‘and circumstances’ the contracting States have intended to give this expression a wider connotation than that of the enumeration, often wrongly criticized, given in the 1966 Helsinki rules.

It may be worth adding here that the general wording of this Agreement is such that nowhere a provision can be found that would lead to any reference to the now to be avoided rule of ‘equitable apportionment’.

As to the additional specific rules on equitable utilization contained in this Agreement, these relate to what is called ‘intra-basin uses’ and ‘inter-basin diversions’. Article 5 distinguishes between intra- and inter-basin water uses on the mainstream and on tributaries as well as, for the mainstream, between the wet season and the dry season. On tributaries, such uses are all year round subject to a prior notification to the Joint Committee. On the mainstream, during the wet season intra-basin uses are subject to a prior notification to the Joint Committee and inter-basin diversion are subject to prior consultation and to the agreement of the Joint Committee; during the dry season, intra-basin uses are subject to prior consultation and to the agreement of the Joint Committee, and any inter-basin diversion project is subject to a specific agreement which, according to the definition of Chapter I, means a decision of the Joint Committee resulting from prior consultation and project evaluation the objective of which is ‘to achieve an optimum use and prevention of waste of the waters through a dynamic and practical consensus in conformity with the Rules to be issued pursuant to the requirement of Article 26’.

As to Article 26, Rules for Water Utilization and Inter-Basin Diversion, it provides that the Joint Committee is to prepare such Rules providing, among other things, the time frame for the wet and the dry seasons, the location of hydrological stations for the maintenance of the flow level requirements at each season, criteria for the determination of surplus waters on the mainstream during the dry season, the improvement of intra-basin water uses and mechanisms for the monitoring of inter-basin diversions from the mainstream.

e) The Minimum Flow rule

Article 6, Maintenance of Flows on the Mainstream, provides for an articulated obligation for the Basin States, except in the cases of historically severe droughts and/or floods, to cooperate in the maintenance of the flows from mainstream diversions, storage releases or other actions of a permanent nature to the extent of a) not less than the acceptable minimum monthly natural flow during each month during the dry season, b) of enabling the acceptable natural reverse flow of the Tonle Sap to take place during the wet season, and of c) preventing average daily peak flows greater than what naturally occurs on the average during the wet season.

It is to be recalled here that, so far, no dam has been constructed on the mainstream and that, based on the availability of several decades of hydrological data, the natural stream flow of the Mekong River is well established and known. It is interesting to note, though, that rather than fixing a quantitative minimum flow, the flow regulation of the Mekong River is apprehended on a fully flexible basis taking into account annual, monthly and daily historical discharges.

f) The Beneficial Uses and Priority of Use rules

Article 1, Areas of Cooperation, provides for the contracting parties to cooperate in all fields of sustainable development, utilization, management and conservation of the water and related resources of the Basin, including without limitation irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism in order to optimize the multiple use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural occurrences or human activities.

Save for domestic and minor uses of water not having a significant impact on mainstream flows as provided for in the definition of Purpose of use in the Preamble, the Agreement does not establish water uses priorities. Article 9, Freedom of Navigation, does however require the protection of navigational uses on the mainstream in the event of the construction of a mainstream dam.

As a matter of fact, navigation is the only beneficial use subject to a specific provision of the Agreement, Article 26 providing for the Joint Committee to subsequently issue the required Water Use Regulations. In accordance with the principle of equality of right, Article 9 confirms the principle of freedom of navigation for all contracting States for transportation and communication to promote regional cooperation and satisfactorily implement projects under the Agreement. This provision is assorted with the obligation for the riparian States to keep the river free from obstructions, measures, conduct and actions that might directly or indirectly impair navigability, interfere with this right or permanently make it more difficult. In accordance with international law, each riparian State is however free to issue regulations applicable within its respective territory on such matters as sanitation, customs and immigration, police and general security.

g) The Integrated Water Resources Management concept

Conceptually, integrated water resources management should be construed as the sum total of activities that will ensure ‘the conservation, development and utilization of the water resources of the drainage basin for the benefit of the basin community’.

Unfortunately, the Agreement makes reference to a variety of vague terms and expressions such as ‘sustainable development, utilization, conservation and management’ (Preamble and Articles 1 & 18) or ‘sustainable benefits’ (Article 2) in which ‘management’ is to be understood in the restricted sense of technical ‘operation’ or ‘manipulation’ of water for specific purposes, but not in the global political, economic, technical, social, financial and administrative sense.

If the Agreement does not make use of the expression ‘integrated management’ a such, its Title refers to ‘sustainable development’ which, in accordance with its context, is qualified by such concepts as ‘multipurpose uses’, ‘ecological balance’, ‘social and economic development’ and ‘well-being of all riparian States’, ‘regional benefits’ and ‘prevention, mitigation and abatement of regional harmful effects’, ‘environmental impact’, ‘basin-wide development projects and basin programmes’, ‘basin development plan’, ‘identification, categorization and prioritization of projects and programmes’ and ‘joint organizational

structure’ which, together, cover all the constitutive elements of the ‘integrated basin water resources and related resources management’.

h) The Basin Water Resources Administration rule

Chapter IV, Institutional Framework, establishes the Mekong River Commission as the instrument of cooperation in the Basin. Article 11, Status, maintains for the Commission the same status of an inter-governmental organization enjoyed until then by the former Committee. Accordingly, it has the power to enter into agreement and to represent its member States towards donors and the international community. It is the full successor to the former Committee and Interim Committee (Article 13, Assumption of assets, obligations and rights) whose governing agreements, the 1957 Statute of the Mekong Committee, the 1975 Joint Declaration and the 1978 Declaration on the Interim Committee, are formally abrogated (Article 36, Entry into Force and Prior Agreements, Section B). This Article (Section A) provides however that the new Agreement does not have any retroactive effect upon prior activities and projects.

The Commission is composed of three permanent organs, the Council, the Joint Committee and the Secretariat (Article 12).

The Council is composed of one member of ministerial level from each participating State empowered to commit his Government (Article 15). It is chaired on an annual rotation basis by the representative of a member country in the alphabetical order (Article 16), regularly convenes once a year and at any time in special session as necessary or upon request of a member State; it may invite observers to its sessions (Article 17). The functions of the Council are to make policies and to take decisions on the activities of the Commission; to approve Rules, the Basin development plan and major component projects and programmes; to establish guidelines for financial and technical assistance from donors; and to attend to the prevention and resolution of differences and disputes (Article 18). The Council establishes its own rules of procedure (Article 19) and takes its decisions at the unanimity of its members, unless otherwise provided for in the rules of procedure (Article 20).

The Joint Committee is composed of one member of head of ministerial department level from each participating State (Article 21) and is chaired on an annual rotation basis by the representative of a member country in the reverse alphabetical order (Article 22). It holds at least two regular sessions every year and at any time in special session as necessary or upon request of a member State; it may invite observers to its sessions (Article 23). The Committee implements the policies and decisions of the Council; formulates the Basin development plan and component projects and programmes; attends to the regular collection, up-date and exchange of data in information; conducts environmental impact assessments; directs the Secretariat; addresses the prevention and resolution of differences and disputes arising between sessions of the Council; reviews and approves studies and training for the personnel of the riparian countries involved in Mekong affairs; and makes recommendation to the Council on organizational and institutional matters (Article 24).

The Committee proposes its rules of procedure to the approval of the Council (Article 25) and takes its decisions at the unanimity of its members, unless otherwise provided for in the rules of procedure (Article 27).

The purpose of the Secretariat is to render technical and administrative services to the Council and to the Joint Committee (Article 28). It is headed by a Chief Executive Officer (CEO) selected by the Committee and appointed by the Council; his terms of reference are established by the Council (Article 31). The CEO is assisted by an Assistant to the CEO, an incumbent of the same nationality as the Chairman of the Committee with whom he serves and co-terminus one year term (Article 32). The staff of the Secretariat is recruited on an equal basis from among the member countries and serves in principle for a maximum of two three-year terms (Article 33)

i) The Basin Development Plan rule

The recognition of such principles as those of ‘common wealth’ or ‘Community interest’ and ‘equitable utilization’ no doubt constitute the achievement of the 20th Century in water resources legal doctrine, if not in state practice. In promoting such principles and in setting-up mechanisms for the administration of international water resources and for the settlement of disputes, the Helsinki Rules omitted however to institutionalize the necessary instrument allowing to convert the still subjective concept of ‘equitable utilization’ into an objective term of reference for integrated water resources management : ‘the water resources management plan’³⁵.

It is therefore remarkable that the Mekong Agreement, based on some three decades of Mekong Committee experience in basin planning, appropriately provides therefor. At Chapter II, Definition of Terms, the Basin Development Plan is defined as ‘the general planning tool and process that the Joint Committee would use as a blueprint to identify, categorize and prioritize the projects and programmes to seek assistance for and to implement the plan at the basin level’. Article 2 (Projects, Programmes and Planning), provision is made for such a basin development plan to serve as the basis for the promotion, support, cooperation and coordination of the development of the full potential of sustainable benefits to all riparian States and for the prevention of wasteful uses of the Mekong River Basin waters, with emphasis and preference on joint and/or basin-wide development projects and basin programmes, by identifying, categorizing and prioritizing such projects and programmes. In addition, Article 24 B., provides for the Basin Development Plan to be formulated by the Joint Committee, to be periodically reviewed and revised as necessary, to be submitted to the approval of the Council together with related projects and programmes, and to serve as the basis for obtaining the financial and technical assistance necessary for project and programme implementation.

In this way, the Mekong Commission has provided itself with the necessary instrument against which to measure time- and space-wise the equitable character of all Basin water uses.

j) The Cost Sharing rule

Except for Article 14, Budget of the Commission, which provides that the budget of the Commission is to consist in contributions from member countries, ‘on an equal basis’ unless otherwise decided by the Council, as well as from donor countries and other sources, the Agreement provides no specific rules on cost sharing. It may be assumed, however, that such a sharing, when considered on a project and programme basis, will follow the principle of equality of treatment in line with those principles of sovereign equality, equitable utilization and mutual sharing of benefits prevailing throughout the context of the Agreement.

k) The Dispute Prevention and Settlement Procedure

Chapter V of the Agreement addressing the resolution of differences and disputes relating to the rights of member States, to the interpretation or to matters of implementation of the Agreement provides in Articles 34, as in the 1966 Helsinki Rules, for the basin administration, in this case the Joint Committee (Article 24 F) and then the Council (Article 18 C), to assist in negotiating amicable settlement among the parties concerned. The Commission failing to resolve the disputed matter, Article 35 similarly provides for referral of the matter to the Governments concerned for settlement through the diplomatic channels and, in the event of failure in settling the matter by mutual agreement, for having recourse to third-party mediation and, therefore, for proceeding in accordance with the applicable principles of international law.

l) The Validity of Prior Agreements and Subsequent Modifications

In addition to repealing all previous agreements having established a Mekong institutional structure, Article 36, Entry into Force and Prior Agreements, provides that the 1995 Agreement does not affect prior nor subsequent bi- and multi-lateral arrangements relating to activities and projects within the Basin or corresponding institutions (Article 38, Scope of Agreement) provided, however, such arrangements are not in contradiction with the provisions of the 1995 Agreement. In case of conflicting provisions, the issue is to be addressed to the participating Governments for consideration and eventual resolution.

In accordance with Article 37, Amendments, Modifications, Supersession and Termination, the Agreement may be amended, modified, superseded or terminated at any time by mutual consent. Furthermore, Article 40, Suspension and Withdrawal, allows any participating State to withdraw or suspend its participation effective one year from due notification of its intent to the Council. State withdrawing or suspending its participation to the Agreement is not released however of its obligations in effect until the effective date of such a withdrawal or suspension.

Article 41, United Nations and International Community Involvement, and Article 42, Registration of Agreement, recall the past and encourages the United Nations, donors and the international community to continue providing assistance and guidance to the Mekong Commission and, in accordance with past practice, provide for the registration of the Agreement with the Secretariat of the United Nations.

Finally, a most interesting feature of the Agreement which, currently, relates to what was used to be called the Lower Mekong Basin, I open to accession by the upper riparian States, Myanmar and China, if not Tibet one day (Article 41).

3. Concluding Remarks

If it has taken some twenty years to the Mekong Basin States from their first exposition to the 1966 Helsinki Rules to frame their 1995 Agreement, the result is however praiseworthy. In effect, by incorporating such principles of international law as State Sovereignty, Sovereign Equality and State Responsibility, in institutionalizing such emerging concepts, principles and rules as those governing the Drainage Basin, Equitable Utilization, Integrated Water Resources Management and Administration, they have gone even much further, keeping away from the environmental management fancy but fully respectful of the maintenance of the ecological balance of the Basin, by institutionalizing the Basin Development Plan as the term of reference for the effective measurement of the equitable character of each particular water resources use, programme and project.

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Notes

1. See : **The Teaching of the Most Highly Qualified Publicists as a Subsidiary Source of International Water Resources Law**, by Bernard J. Wohlwend, Consultant, March 2001, 30 pp., paper submitted to the Regional International Conference on Legal Aspects of Sustainable Water Resources Management, Institute for Waters of the Republic of Srpska, Bijeljina, to be held in Teslic, Bosnia-Herzegovina, 14-18 May 2001(to be published in the Proceedings).
2. Text in : Doc. ENVWA/R.53 (also available from Dundee University database <http://www.dundee.ac.uk/cepmlp/water/assets/images/UNCONV.doc>).
3. Text in : Doc. A/51/869 (also available from Dundee University database <http://www.dundee.ac.uk/cepmlp/water/assets/images/UNCONV.doc>).
4. 34 I.L.M.864 (1995). Full text given in the Annex.
5. 7, LNTS, 36
6. 36, LNTS, 75
7. A/CN.4/274 (Vo. II) (in French).
8. See in particular the analysis of the comments to the Articles on the relationship of international water resources with other natural resources and the environment in the Report of the Water Resources Committee to the ILA Conference in Belgrade in 1980 in : **International Law Association Rules on International Water Resources**, edited by Slavko Bogdanovic, Yugoslav Association for Water Law, Yugoslav Branch of the International Law Association in Novi Sad, and the European Centre for Peace and Development (ECPD) in Belgrade, Prometej, Novi Sad, Yugoslavia, 1999, a bilingual publication, pp. 41-43.
9. **The Relationship between the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses**, by Prof. Attila Tanzi, Report to the UN/ECE Task Force on Legal and Administrative Aspects, Doc. ECE/ENHS/NONE/00/2, GE.00-30528, Geneva, Switzerland, February 2000, 56 pp.
10. Ibidem, pp. 42-43. The author does however concur with our view on the inapplicability of the *lex posterior derogat priori* rule in this particular case. Ibidem, p. 54.
11. **Instruments for Protecting and Managing Shared Water Resources in the ECE Region : The 1992 Helsinki Convention**, by Dr. Branko Bosnjakovic, UN-ECE, paper presented to the EGM on Legal Aspects of the Management of Shared Water Resources, ESCWA, Sharm E-Sheikh, Egypt, Doc. ESCWA/EBR/2000/WG.1/15, 8 June 200, p. 2, *in fine*.

12. Op. cit., at Note 10., supra, p. 3.
13. Ibidem.
14. Op. cit., at Note 9, supra, p. 8.
15. Ibidem, p. 6.
16. Ibidem, pp. 10-11.
17. **Systematic Index of International Water Resources Treaties, Declarations, Acts and Cases By Basin**, Vol. I & II, Legislative Studies Nos. 15 & 34, FAO, Rome, Italy, 1978, 481 pp., and 1984, 332 pp. For subsequent treaties, see <http://www.fao.org> selecting “Legal Office” - “FAOLEX” - “International Treaties”, on FAO’s electronic legislative data base.
18. See : **Integrated Water Resources Management, National and International Legal and Institutional Requirements – A New Vision**, by Bernard J. Wohlwend, Consultant, Economic Commission for Western Asia, Expert Group Meeting on Legal Aspects of the Management of Shared Water Resources, Sharm El-Sheikh, Egypt, 8-11 June 2000, Doc. E/ESCWA/ENR/2000/WG.1/6, 39 pp., Annex 1
19. Cited in : op. cit., at Note 9, supra, p. 7, Note 4
20. Registered under No. 14907 with the United Nations Secretariat.
21. Cited by Ibrahim Kaya in : **The Euphrates-Tigris Basin : An overview and opportunities for cooperation under international law**, in ARIDLANDS, No. 44, Fall/Winter 1998.
22. 27, I.L.M., 1109 (1988), cited in : op. cit., at Note 9, supra, p. 7, Note 4.
23. See : FAOLEX, bi-16754pdf bi-16754.doc.
24. Cited in : **Water Disputes in the Jordan Basin Region and their Role in the Resolution of the Arab-Israeli Conflict**, Environment and Conflicts Project (ENCOP) Occasional Paper No. 13, by Stephan Libiszewski, Center for Security Studies and Conflict Research, Swiss Federal Institute of Technology, Zürich, Switzerland, and Swiss Peace Foundation, Bern, Switzerland, August 1995, 108 pp., available at : <http://www.fsk.ethz.ch/fsk/encop/encop.html>, p. 78.
25. 34, I.L.M., 864 (1995), cited in : op. cit., at Note 9, supra, p. 7, Note 4.
26. 34, I.L.M., 864 (1995), cited in : op. cit., at Note 9, supra, p. 7, Note 4.

27. **Statute of the Committee for Coordination of Investigations of the Lower Mekong Basin**, Bangkok, Thailand, 18 September 1957, as amended on 31 October 1957, 26 March 1962 and 13 August 1965, text in : Document ECAFE/WRD/7, 18 September 1957, Annex III. For the amendments, see : Document cited at Note 29, *infra*, Volume II, Appendix X.
28. **Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin**, signed at Vientiane, Laos, on 5 January 1978 by the Representatives of the Governments of Laos, Thailand and Vietnam, text in : *Treaties Concerning the Non-Navigational Uses of International Watercourses - Asia*, FAO Legislative Study No.55, Rome, 1995, pp. 21-22.
29. Also available from the Web : <http://www.mrcmekong.org/pdf/agree95.pdf>
30. Statement of Princess Souvanna Phouma, Head of the Lao Delegation to the Twenty-First Session of ECAFE, Document E/CN.11/WRD/MKG/L.120, 20 March 1964, Annex 9, p. 4.
31. **Legal Aspects of Mekong Navigation**, by Dante A. Caponera in collaboration with Bernard J. Wohlwend, Doc. WRD/MKG/INF/L. 309, Vol. I & II, Rev. 1, ECAFE, Bangkok, Thailand, April 1969, 50 pp. (Also available in French).
32. **Legal Aspects of Mekong Basin Development**, by Bernard J. Wohlwend, Doc. WRD/MKG/INF/L. 313, Rev. 1, ECAFE, Bangkok, Thailand, September 1969, 71 pp. (Also available in French).
33. **Draft Lower Mekong Basin Water Charter (with Commentary)**, by Bernard J. Wohlwend, Doc. WRD/MKG/INF/L. 427, ECAFE, Bangkok, Thailand, March 1971, 38 pp. (Also available in French).
34. **Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin**, signed at Vientiane, Laos, on 31 January 1975 by the Representatives of the Governments of Cambodia, Laos, Thailand and Vietnam and adopted by the Committee for Coordination of Investigations of the Lower Mekong Basin at its 68th Session, Vientiane, Laos, 29 January - 3 February 1975, Document E/CN.11/WRD/MKG/R/L.405, p.19. Text available in : *Treaties Concerning the Non-Navigational Uses of International Watercourses - Asia*, FAO Legislative Study No.55, Rome, 1995, pp. 11-20.
35. For a discussion of the integrated water resources management concept, see : **Transboundary Drainage Basins – A New Vision**, by Bernard J. Wohlwend, Consultant, International Water Resources Association, Expert Consultation on ‘Policy and Institutions for Integrated Water Resources Management’, Salvador de Bahia, Brazil, 3-6 September 2000, published in *Proceedings, IWRA*, December 2000, pp. 33-47, at Sections 1.3 & 1.4.

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Annex

**AGREEMENT ON COOPERATION FOR THE SUSTAINABLE DEVELOPMENT
OF THE MEKONG RIVER BASIN**

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CHAPTER I - PREAMBLE

RECALLING the establishment of the Committee for the Coordination of Investigations of the Lower Mekong Basin on 17 September 1957 by the Governments of these countries by Statute endorsed by the United Nations,

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 that have been achieved through its efforts,

ACKNOWLEDGING the great political, economic and social changes that have taken place in these countries of the region during this period of time which necessitated these efforts to re-assess, re-define and establish the future framework for cooperation,

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 thereunder 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 neighbourly 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:

CHAPTER II - DEFINITION OF TERMS

For the purposes of this Agreement, it shall be understood that the following meanings to the underlined terms shall apply except where otherwise inconsistent with the context:

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.

Acceptable minimum monthly natural flow: The acceptable minimum monthly natural flow during each month of the dry season.

Acceptable natural reverse flow: The wet season flow level in the Mekong River at Kratie that allows the reverse flow of the Tonle Sap to an agreed upon optimum level of the Great Lake.

Basin Development Plan: The general planning tool and process that the Joint Committee would use as a blueprint to identify, categorize and prioritize the projects and programmes to seek assistance for and to implement the plan at the basin level.

Environment: The conditions of water and land resources, air, flora and fauna that exists in a particular region.

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

Prior consultation: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin 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 effects, which is the basis for arriving at an agreement. Prior consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other riparians' rights.

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

CHAPTER III - OBJECTIVES AND PRINCIPLES OF COOPERATION

The parties agree:

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 2: Projects, Programmes and Planning

To promote, support, cooperate and coordinate in the development of the full potential of sustainable benefits to all riparian states and the prevention of wasteful use of Mekong River basin waters, with emphasis and preference on joint and/or basin-wide development projects and basin programmes through the formulation of a basin development plan, that would be used to identify, categorize and prioritize the projects and programmes to seek assistance for and to implement at the basin level.

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 and 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.

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 Diversion provided for under Article 26 and the provisions of A and B below:

A. On tributaries of the Mekong River, including 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.

Article 6: Maintenance of Flows on the Mainstream

To cooperate in the maintenance of the flows on the mainstream from diversions, storage releases, or other actions of a permanent nature; except in the cases of historically severe droughts and/or floods:

- A. Of not less than the acceptable minimum monthly natural flow during each month of the dry season;
- B. To enable the acceptable natural reverse flow of the Tonle Sap to take place during the wet season; and,
- C. To prevent average daily peak flows greater than what naturally occur on the average during the flood season.

The Joint Committee shall adopt guidelines for the locations and levels of the flows, and monitor and take action necessary for their maintenance as provided in Article 26.

Article 7: Prevention and Cessation of Harmful Effects

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

Article 8: State Responsibility for Damages

Where harmful effects cause substantial damage to one or more riparians 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 to 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.

Article 9: Freedom of Navigation

On the basis of equality of right, freedom of navigation shall be accorded throughout the mainstream of the Mekong River without regard to the territorial boundaries, for transportation and communication to promote regional cooperation and to satisfactorily implement projects under this Agreement. The Mekong River shall be kept free from obstructions, measures, conduct and actions that might directly or indirectly impair navigability, interfere with this right or permanently make it more difficult. Navigational uses are not assured priority over other uses, but will be incorporated into any mainstream project. Riparians may issue regulations for the portions of the Mekong River within their territories, particularly in sanitary, custom and immigration matters, police and general security.

Article 10: Emergency Situations

Whenever a Party becomes aware of any special water quantity or quality problems constituting an emergency that requires an immediate response, it shall notify and consult directly with the party(ies) concerned and the Joint Committee without delay in order to take appropriate remedial action.

CHAPTER IV - INSTITUTIONAL FRAMEWORK

A. MEKONG RIVER COMMISSION

Article 11: Status

The institutional framework for cooperation in the Mekong River basin under this Agreement shall be called the Mekong River Commission and shall, for the purpose of the exercise of its functions, enjoy the status of an international body, including entering into agreements and obligations with donors and the international community.

Article 12: Composition of the Commission

The Commission shall consist of three permanent bodies:

- Council,
- Joint Committee, and
- Secretariat.

Article 13: Assumption of assets, obligations and rights

The Commission shall assume all the assets, rights and obligations of the Committee for Coordination of Investigations of the Lower Mekong Basin (MC/IMC) and the Mekong Secretariat.

Article 14: Budget of the Commission

The budget of the Commission shall be drawn up by the Joint Committee and approved by the Council, and shall consist of contributions from member countries on an equal basis unless otherwise decided by the Council, from the international community (donor countries) and other sources.

B. COUNCIL

Article 15: Composition of the Council

The Council shall be composed of one member from each participating riparian state at the Ministerial and Cabinet level, (no less than Vice-Minister level) who would be empowered to make policy decisions on behalf of his/her government.

Article 16: Chairmanship of the Council

The chairmanship of the Council shall be for a term of one year and rotate according to the alphabetical listing of the participating countries.

Article 17: Sessions of the Council

The Council shall convene at least one regular session every year and may convene special sessions whenever it considers it necessary or upon the request of a member state. It may invite observers to its sessions as it deems appropriate.

Article 18: Functions of the Council

The functions of the Council are:

- A. to make policies and decisions, and provide other necessary guidance concerning the promotion, support, cooperation and coordination in joint activities and projects in a constructive and mutually beneficial manner for the sustainable development, utilization, conservation and management of the Mekong River basin waters and related resources, and protection of the environment and aquatic conditions in the basin as provided for in this Agreement;
- B. to decide any other policy-making matters and make the decisions necessary to successfully implement this Agreement, including but not limited to approval of the Rules of Procedure of the Joint Committee under Article 25, Rules on Water Utilization and Inter-Basin Diversions proposed by the Joint Committee under Article 26, and the basin development plan and major component projects/programmes; to

establish guidelines for financial and technical assistance to development projects and programmes; and if considered necessary, to invite donors to coordinate their support through a Donor Consultative Group; and

- 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 19: Rules of Procedure

The Council shall adopt its own Rules of procedure, and may seek technical advisory services as it deems necessary.

Article 20: Decisions of the Council

Decisions of the Council shall be by unanimous vote except as otherwise provided for in the Rules of Procedure.

C. JOINT COMMITTEE

Article 21: Composition of the Joint Committee

The Joint Committee shall be composed of one member from each participating riparian state at no less than Head of Department level.

Article 22: Chairmanship of the Committee

The chairmanship of the Joint Committee shall rotate according to the reverse alphabetical listing of the participating countries and the Chairperson shall serve for a term of one year.

Article 23: Sessions of the Joint Committee

The Joint Committee shall convene at least two regular sessions every year and may convene special sessions whenever it considers it necessary or upon the request of a member state. It may invite observers to its sessions as it deems appropriate.

Article 24: Functions of the Joint Committee

The functions of the Joint Committee are:

- A. To implement the policies and decisions of the Council and such other tasks as may be assigned by the Council;
- B. To formulate a basin development plan, which would be periodically reviewed and revised as necessary; to submit to the Council for approval the basin development plan and joint development projects/programmes to be implemented in connection with it; and to confer with donors, directly or through their consultative group, to obtain the financial and technical support necessary for project/programme implementation;

- C. To regularly obtain, update and exchange the information and data necessary to implement this Agreement;
- D. To conduct appropriate studies and assessments for the protection of the environment and maintenance of the ecological balance of the Mekong River system;
- E. To assign tasks and supervise the activities of the Secretariat as is required to implement this Agreement and the policies, decisions, projects and programmes adopted thereunder, including the maintenance of databases and information necessary for the Council and Joint Committee to perform their functions, and approval of the annual work programme prepared by the Secretariat;
- 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;
- G. To review and approve studies and training for the personnel of the riparian member countries involved in Mekong River Basin activities as appropriate and necessary to strengthen the capability to implement this Agreement;
- H. To make recommendations to the Council for approval of the organizational structure, modifications and restructuring of the Secretariat.

Article 25: Rules of Procedure

The Joint Committee shall propose its own Rules of Procedure to be approved by the Council. It may form ad hoc and/or permanent sub-committees or working groups as considered necessary, and may seek technical advisory services except as may be provided for in the Council's Rules of Procedure or decisions.

Article 26: Rules for Water Utilization and Inter-Basin Diversions

The Joint Committee shall prepare and propose for approval of the Council, inter alia, rules for water utilization and inter-basin diversion pursuant to Articles 5 and 6, including, but not limited to: (1) establishing the time frame for the wet and dry seasons; (2) establishing the location of hydrological stations, and determining and maintaining the flow level requirement at each station; (3) setting out criteria for determining surplus quantities of water during the dry season on the mainstream; (4) improving upon the mechanism to improve intra-basin use; (5) setting up a mechanism to monitor inter-basin diversions from the mainstream.

Article 27: Decisions of the Joint Committee

Decisions of the Joint Committee shall be by unanimous vote except as otherwise provided for in the Rules of Procedure.

D. SECRETARIAT

Article 28: Purpose of Secretariat

The Secretariat shall render technical and administrative services to the Council and Joint Committee, and be under the supervision of the Joint Committee.

Article 29: Location of Secretariat

The location and structure of the permanent office of the Secretariat shall be decided upon by the Council and, if necessary, a headquarters agreement shall be negotiated and entered into with the host government.

Article 30: Functions of the Secretariat

The functions and duties of the Secretariat will be to:

- A. Carry out the decisions and tasks assigned by the Council and Joint Committee under the direction of and directly responsible to the Joint Committee;
- B. Provide technical services and financial administration and advise as requested by the Council and Joint Committee;
- C. Formulate the annual work programme, and prepare all other plans, project and programme documents, studies and assessments, as may be required;
- D. Assist the Joint Committee in the implementation and management of projects and programmes as requested;
- E. Maintain databases of information, as directed;
- F. Make preparations for sessions of the Council and Joint Committee; and
- G. Carry out all other assignments, as may be requested.

Article 31: Chief Executive Officer

The Secretariat shall be under the direction of a Chief Executive Officer (CEO), who shall be appointed by the Council from a shortlist of qualified candidates selected by the Joint Committee. The Terms of Reference of the CEO shall be prepared by the Joint Committee and approved by the Council.

Article 32: Assistant Chief Executive Officer

There shall be one Assistant to the CEO, nominated by the CEO and approved by the Chairman of the Joint Committee. Such Assistant will be of the same nationality as the Chairman of the Joint Committee and shall serve for a co-terminus one-year term.

Article 33: Riparian Staff

Riparian technical staff of the Secretariat are to be recruited on the basis of technical competence, and the number of posts shall be assigned on an equal basis among the members. Riparian technical staff shall be assigned to the Secretariat for no more than two three-year terms, except as otherwise decided by the Joint Committee.

CHAPTER V - ADDRESSING DIFFERENCES AND DISPUTES

Article 34: Resolution by Mekong River Commission

Whenever any difference and 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 in a timely manner, the issue shall be referred to the governments to take cognizance of the matter for resolution by negotiation through diplomatic channels in 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 therefore to proceed according to the principles of international law.

CHAPTER VI - FINAL PROVISIONS

Article 36: Entry into Force and Prior Agreements

This Agreement shall:

- A. Enter into force among all parties, with no retroactive effect upon activities and projects previously existing, on the date of signature by the appointed plenipotentiaries.

- C. Replace the 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, the Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin of 1978, and all Rules of Procedure adopted under such agreements. This Agreement shall not replace or take precedence over any other treaties, acts or agreements entered into by and among any of the parties hereto, except that where a conflict in terms,

- D. areas of jurisdiction of subject matter or operation of any entities created under existing agreements occurs with any provisions of this Agreement, the issues shall be submitted to the respective governments to address and resolve.

Article 37: Amendments, Modification, Supersession and Termination

This Agreement may be amended, modified, superseded or terminated by the mutual agreement of all parties hereto at the time of such action.

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- and multi-lateral special agreements or arrangements for implementation and management of any programmes and projects to be undertaken within the framework of this Agreement, which agreements shall not be in conflict with this Agreement and shall not confer any rights or obligations upon the parties not signatories thereto, except as otherwise conferred under this Agreement.

Article 39: Additional Parties to Agreement

Any other riparian state accepting the rights and obligations under this Agreement may become a party with the consent of the parties.

Article 40: Suspension and Withdrawal

Any party to this Agreement may withdraw or suspend their participation under present Agreement by giving written notice to the Chairman of the Council of the Mekong River Commission, who shall acknowledge receipt thereof and immediately communicate it to the Council representatives of all remaining parties. Such notice of withdrawal or suspension shall take effect one year after the date of acknowledgment or receipt unless such notice is withdrawn beforehand or the parties mutually agree otherwise. Unless mutually agreed upon to the contrary by all remaining parties to this Agreement, such notice shall not be prejudicial to nor relieve the noticing party of any commitments entered into concerning programmes, projects, studies or other recognized rights and interests of any riparians, or under international law.

Article 41: United Nations and International Community Involvement

The member countries to this Agreement acknowledge the important contribution in the assistance and guidance of the United Nations, donors and the international community and wish to continue the relationship under this Agreement.

Article 42: Registration of Agreement

This Agreement shall be registered and deposited, in English and French, with the Secretary General of the United Nations.

IN WITNESS WHEREOF, the undersigned, duly authorized by their respective governments have signed this Agreement.

DONE on 5 April 1995 at Chiang Rai, Thailand, in English and French, both texts being equally authentic. In the case of any inconsistency, the text in the English language, in which language the Agreement was drawn up, shall prevail.

For the Kingdom of Cambodia:

(Signed)

Ing Kieth
Deputy Prime Minister and Minister of Public Works and Transport

For the Lao People's Democratic Republic:

(Signed)

Somsavat Lengsavad
Minister of Foreign Affairs

For the Kingdom of Thailand:

(Signed)

Krasae Chanawongse
Minister of Foreign Affairs

For the Socialist Republic of Viet Nam:

(Signed)

Nguyen Manh Cam
Minister of Foreign Affairs