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Necessitating Basin-wide Agreement in Transboundary Waters Management: the Case of the Mekong

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Is there Crisis in Transboundary Water Treaties?

- 3600 treaties since 800 (most navigation); 400 treaties (non-navigational) since 1820.
- But 158 of 263 international basins lack an agreement
- 106 basins are multi-lateral, but only 20% of agreements are multi-lateral

What is meant by Basin-wide Agreement?

- All riparian states are entitled to participate in the negotiation from very beginning on the equitable bases.
- Such an agreement should be entered into with respect to the entire river basin other than any part thereof or a particular project, programme or use.

- All riparian states agree to consider harmonizing such agreements with the basic principles of the universal Conventions
- All riparian states should be finally the party members and will participate in any relevant consultations through the entire implementation process.
- Such an Agreement may be amended, modified, superceded or terminated by the mutual agreement of all parties hereto at the time of such action.

Effects of Non Basin-wide Agreement

- (1) The unbalanced rights and obligations could be aggravated;
- (2) The rights are not respected but obligations are posed;
- (3) The “third State” status remains;
- (4) The uses and developments are suspected;
- (5) Non-optimal and unsustainable utilization with an inadequate protection still prevail.

A Lesson from the Mekong River Basin



- Water resources shared by six countries hydropolitically grouped into two upper Mekong countries and four lower Mekong countries.
- No basin-wide agreement but 1995 Mekong Agreement and Mekong River Commission for 4 Lower Mekong Countries, excluding China and Myanmar.
- Donor-driven Extensive research programs in lower Mekong Basin, but few extensive projects implemented; none yet on the whole basin.
- No agreed but different and often individual ways of water development in tributaries.
- Lack of strategic transboundary environment impact assessment and management

Is Basic Applicable Law in place?

United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted at United Nations Headquarters in New York, 21 May 1997, not yet entered into force) (1997 UN IWC)

- Adopted 103/3/27.
- Not legally binding until ratified by 35 countries. To date, 14 countries have ratified
- Rules reflecting customary international law apply!

Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin⁵ April (adopted at Chiannng, 1995) (1995 Mekong Agreement)

- The parties are Lao PDR, Thailand, Cambodia and Vietnam. China and Myanmar are not parties to the Agreement).

1995 Mekong Agreement: An Intended Basin-wide Agreement?

- Why are China and Myanmar unwilling to become a party and willing to just remain as a third State bound only by the rules reflecting customary international law?
- How relevant is the 1995 Mekong Agreement to customary international law?
- How relevant is the 1995 Mekong Agreement to 1997 UN Watercourses Convention?

Rules reflecting customary international law?

Equitable and Reasonable Use

1997 UN IWC

Watercourse States shall in their respective territories utilize an international watercourse in **an equitable and reasonable** manner.

- **attaining** optimal and sustainable utilization and benefits;
- **taking into account** the interests of the watercourse States concerned;
- **consistent with** adequate protection of the watercourse.

1995 Mekong Agreement

To utilize the waters of the Mekong River system in **a reasonable and equitable** manner in the respective territories, pursuant to all factors and circumstances, the Rules for Water Utilization and Inter-basin Diversion and the provisions (concerning notification and prior consultation)).

Obligation not to cause significant harm or State responsibility not to cause substantial damage ?

1997 UN IWC

- 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.
- Significant harm is caused
 - to eliminate or mitigate such harm
 - to discuss the question of compensation.

1995 Mekong Agreement

- To make every effort to avoid, minimize and mitigate harmful effects.
- Cease immediately the alleged cause of harm.
- Substantial damage to be determined in conformity with the principles of international law relating to state responsibility.
- To resolve relevant differences and disputes in an amicable and timely manner by peaceful means.

Protection and preservation of ecosystems or Protection of the environment and ecological balance?

1997 UN IWC

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

- Prevention, reduction and control of pollution
- Prevention of introduction of alien or new species
- Protection and preservation of the marine environment

1995 Mekong Agreement

To protect the environment, natural resources, aquatic life and conditions, and ecological balance of the Mekong River Basin from pollution or other harmful effects resulting from any development plans and uses of water and related resources in the Basin.

Notification of planned measures or notification and prior consultation of proposed use?

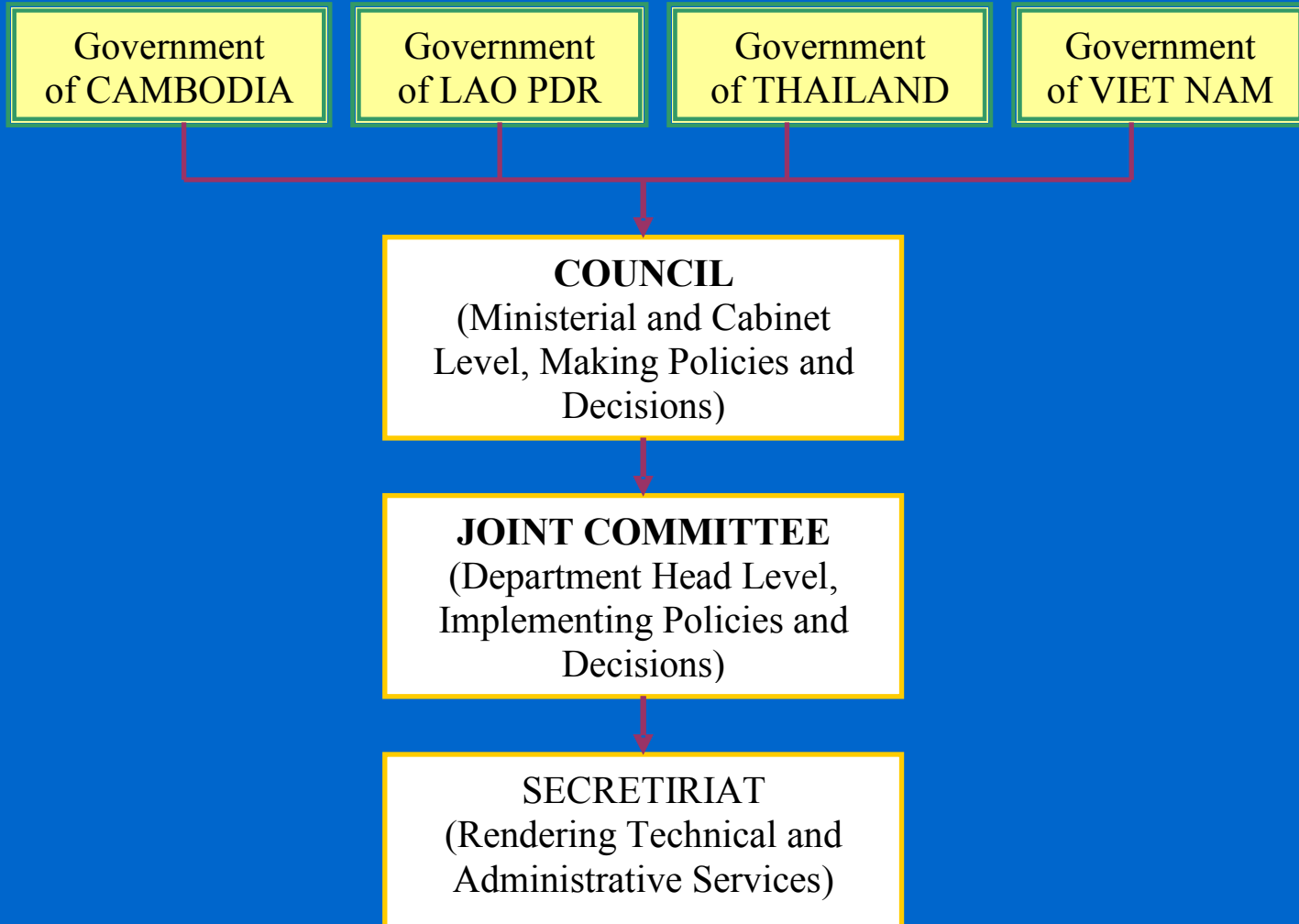
1997 UN IWC

Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof

Summary of Article 9 of the 1997 Mekong Agreement

River	Season	Use Type	Notification	Prior Consultation	Specific Agreement
Mainstream	Dry Season	Inter-Basin Diversion			XXX
		Intra-Basin Use		XXX	
	Wet Season	Inter-Basin Diversion		XXX	
		Intra-Basin Use	XXX		
Tributaries	Wet & Dry Seasons	Inter-Basin Diversion and Intra-Basin Use	XXX		

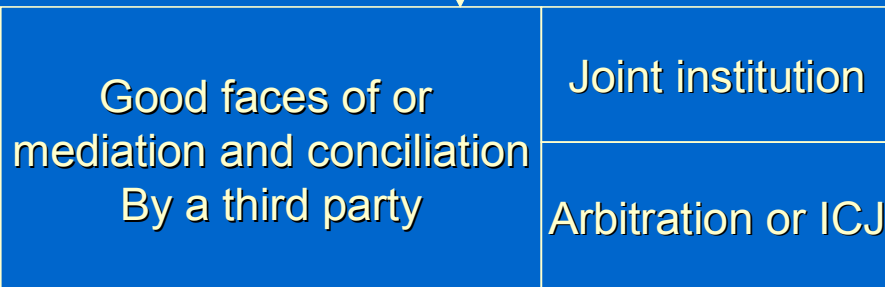
Is Institutional Framework Appropriate?



Addressing Differences and Disputes?

1997 UN IWC

Negotiation



failed

Fact-finding

1995 Mekong Agreement

Resolution by Mekong Commission

The Council:

The Joint Committee

failed

Resolution by Governments

Direct negotiation through
diplomatic channel
Mediation through an
agreed entity or party

Riparian Countries' Attitude towards to 1997 UN IWC

**Summary of Recorded Vote of the UN Six Committee
(Working Group of the Whole) the Six Countries of the Mekong River Basin**

State	Vote on Convention	Convention as a whole	Article 3	Article 5, 6 and 7	Article 33
Cambodia	Y	Y	A		Y
China	N	N	A	N	N
Lao PDR	Y	Y			
Myanmar				Y	
Thailand	Y	Y	Y	Y	Y
Viet Nam	Y	Y	Y	Y	Y

Y: Yes N: No A: Abstain

Up to date, no country ratifies or accedes it!

1995 Mekong Agreement: Agreement to be Agreed?

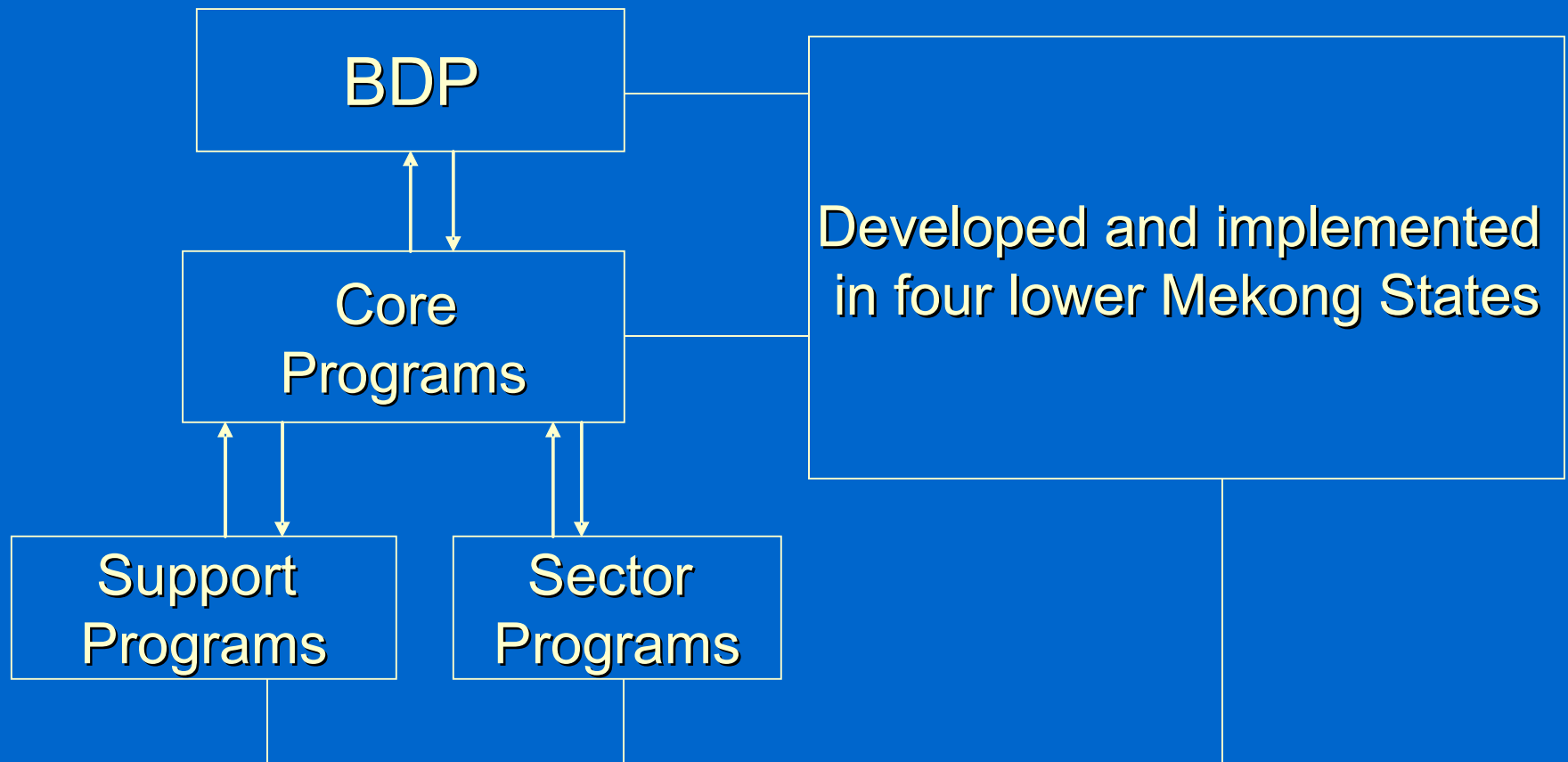
1. No agreed amendments and modifications

2. Delayed 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....

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

Delayed and uncertain Basin Development Plan!



Delayed and imperfect ecosystem protection and preservation!

- Highlighting fish population preservation and ecological balance through flow regulation
- Not providing procedural to prevention, reduction and control of pollution
- Not referring to introduction of alien or new species.
- Not referring to protection and preservation of maritime environment

- Monitoring network was completed in 2003 and monitoring in 2004
- Basin-wide diagnostic study on water quality, ecological health and environmental risk assessment is being implemented

Unregulated hydropower development!

- China cascading hydropower development plan of upper Mekong
- No dam on the lower Mekong mainstream
- Competing tributary damming and hydropower development between lower Mekong countries
- Unclear accumulated effects

Hydropower projects more than 10MW developed in the Mekong

Country	Name	Location	Type	Capacity (MW)	Output GWh/year	Year of completion
China	Manwan	M	RoR	1,500	7,870	1993
	Dachaoshan	M	ROR	1,350	5,930	2000
Lao PDR	Nam Ngum	TR	SS	150	900	1971-85
	Xeset	TR	RoR	45	150	1991
	Theun Hinboun	TR	RoR	210	1,645	1998
	Houay Ho	TR	SS	150	600	1999
	Nam Leuk	TR	SS	60	184	2000
Thailand	Sirindhorn	TR	SS	36	115	1968
	Chulabhorn	TR	SS	15	62	1971
	Ubolratana	TR	SS	25	75	1966
	Pak Mun	TR	RoR	136	462	1997
Vietnam	Dray Ling	TR	RoR	13	70	1995
	Yaly	TR	SS	720	3,642	2000-1

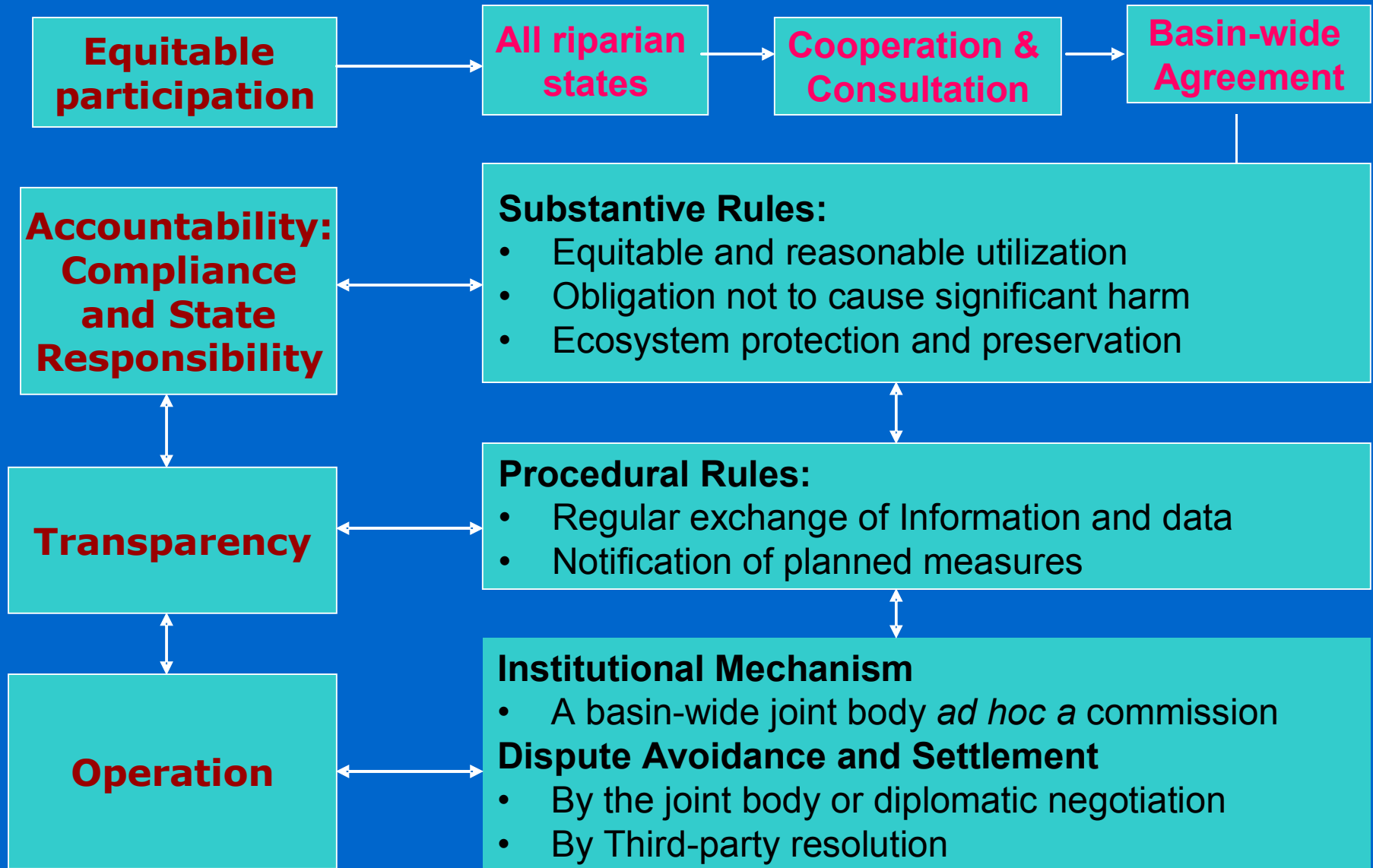
Source: MRC, MRC Hydropower Development Strategy 2001. Legend: M = Mainstream, TR = Tributary. SS = Seasonal Storage, RoR = Run-of-River.

MRC supports sustainable hydropower developed within the framework of the 1995 Mekong Agreement for the mutual benefit of member states!

(Chief Executive Officer, MRCS, Regional Multi-Stakeholder Consultation on the MRC Hydropower Programme, 25-27 September 2008 Vientiane, Lao PDR)



Exemplary Basin-wide Comprehensive Agreement Integrating Governance Elements



Conclusion remarks

- Universal and regional conventions have provided for a framework for guiding all riparian States to participate and negotiate a basin-wide agreement under which their rights and obligations are established.
- A basin-wide comprehensive agreement, embodied with substantive rules and procedural rules in harmonization with universal and regional conventions, and negotiated and agreed by participation of all riparian countries, is necessary if effective transboundary waters management is anticipated in such basin.

- Well-structured and properly functioned institutional framework with participation of all riparian states can facilitate basin-wide cooperation and coordination and support to the effective implementation of such agreement.
- Favorable mechanism, should be established in place for dispute avoidance and settlement.
- A river basin management plan or basin development plan should be formulated in accordance with principles of IWRM and by full participation and consultation of all states.

Thank you for your attention!