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March 2011

# Flood Management and Mitigation Programme

## **Component 3:** Enhancing Cooperation in Addressing Transboundary Flood Issues

## Pocket Version of Explanatory Note

Supporting Document
to the FMMP Working Paper:
The Legal Aspects of the
Mandate of the 1995 Mekong Agreement
For Enhancing Cooperation in Addressing
Transboundary Flood and Related Issues
(LA-MA95)

Mekong River Commission
For Sustainable Developement

The MRC Flood Management and Mitigation Programme

Component 3: Enhancing Cooperation in Addressing Transboundary Flood Issues

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# Supporting Document to the FMMP Working Paper: The Legal Aspects of the Mandate of the 1995 Mekong Agreement For Enhancing Cooperation in Addressing Transboundary Flood and Related Issues (LA-MA95)

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## Supporting Document
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### The Legal Aspects of the Mandate of the 1995 Mekong Agreement for Enhancing Cooperation in Addressing Transboundary Flood and Related Issues
### (LA-MA95)

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## Abbreviations and Acronyms

| | |
|---|---|
| ADR | Alternative/Appropriate Dispute Resolution |
| ASEAN | Association of South East Asian Nations |
| BDP | Basin Development Plan (of MRC) |
| EN | An Explanatory Note – A Supporting Document to the FMMP Working Paper on: The Legal Aspects of the Mandate of the 1995 Mekong Agreement for Enhancing Cooperation in Addressing Transboundary Flood and Related Issues |
| EP | Environmental Programme (of MRC) |
| FMMP | Flood Management and Mitigation Programme (of MRC) |
| GIS | Geographic Information System |
| IDFA | Intensity, Duration and Frequency Analysis (floods, droughts, and other incidents) |
| IKMP | Information and Knowledge Management Programme (of MRC) |
| IRBM | Integrated River Basin Management |
| IWRM | Integrated Water Resources Management |
| LA-MA95 | The Legal Aspects of the Mandate of the 1995 Mekong Agreement for Enhancing Cooperation in Addressing Transboundary Flood and Related Issues, also known as "Working Paper" (WP) and "Mandate Paper" |
| LMRB | Lower Mekong River Basin |
| MA95 | 1995 Mekong Agreement (The Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin) |
| MC | Mekong Committee |
| MOU | Memorandum of Understanding |
| MRB | Mekong River Basin |
| MRC | Mekong River Commission |
| MRCS | Mekong River Commission Secretariat |
| MWG | Mekong Working Group |
| NAP | Navigation Programme (of MRC) |
| NE | National Expert |
| NMCs | National Mekong Committees (of MRC member States) |
| OCEO | Office of Chief Executive Officer of MRCS |
| PDIES | Procedures for Data and Information Exchange and Sharing (of MRC) |
| PWUM | Procedures for Water Use Monitoring (of MRC) |
| RIR | Rights, Interests and Responsibilities |
| ROPs | Rules of Procedures |
| SILA | Senior International Legal Advisor |
| SWOT | Strengths, Weakness, Opportunities and Threats Analysis |
| TBIDD | Transboundary Issues, Differences and Disputes |
| TBFI | Transboundary Flood Issues |
| TBHS | Transboundary Hot Spots |
| TDA | Transboundary Diagnostic Analysis |
| WUP | Water Utilization Project Start-up Project (of MRC) |

## Purpose of the Pocket Version

The purpose of this "Pocket Version On the Legal Aspects for Enhancing Cooperation in Addressing Transboundary Flood and Related Issues Under the 1995 Mekong Agreement" is to provide a condensed and summarized document of the two leading reports on this subject – "Working Paper On The Legal Aspects of the Mandate of the 1995 Mekong Agreement For Enhancing Cooperation in Addressing Transboundary Flood and Related Issues, October 2007" (LA-MA95 or WP)and "An Explanatory Note – Supporting Document To FMMP Working Paper: The Legal Aspects of the Mandate of the 1995 Mekong Agreement For Enhancing Cooperation in Addressing Transboundary Flood and Related Issues, December 2009" (EN). Those two documents were prepared for more practical use by the MRC, NMCs and top officials of the relevant line agencies; they are lengthy and may appear too complex or detailed for practical use at field and local levels. This "Pocket Version" is intended to be more usable within the member countries; it is expected that each MRC member country will translate this version into their respective languages for internal use to address and amicable resolve the types of transboundary flood and related water issues that might arise during the implementation of the 1995 Mekong Agreement in the Mekong River Basin. If more explanation or references are needed, the two main reports should be consulted. In any event, none of the three FMMP produced reports are official documents that "must be applied"; they are reference and supporting documents to assist parties concerned with addressing and resolving transboundary flood and related issues.

In April 1995, the four member countries of the Lower Mekong River Basin (Cambodia, Lao PDR, Thailand and Vietnam) adopted a new water treaty to promote cooperation in the sustainable development and management of the Mekong River waters and related natural resources, and specifically to address the twin hazards of flood and droughts in the basin.[1] After twenty-one months of discussions, negotiations and drafting of this comprehensive and integrated agreement to replace the previous three agreements adopted in 1957 (Statute of the Committee of Investigations of the Lower Mekong Basin), 1975 (Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin) and 1978 (Declaration Concerning the Interim Committee for Coordination of Investigations of the Lower Mekong Basin). The focus and expectation of this new treaty was to promote mutual cooperation and address transboundary water related problem through responsible stewardship by the four member countries while engaging all six Mekong Basin riparians to work together for the benefit of the entire river basin.

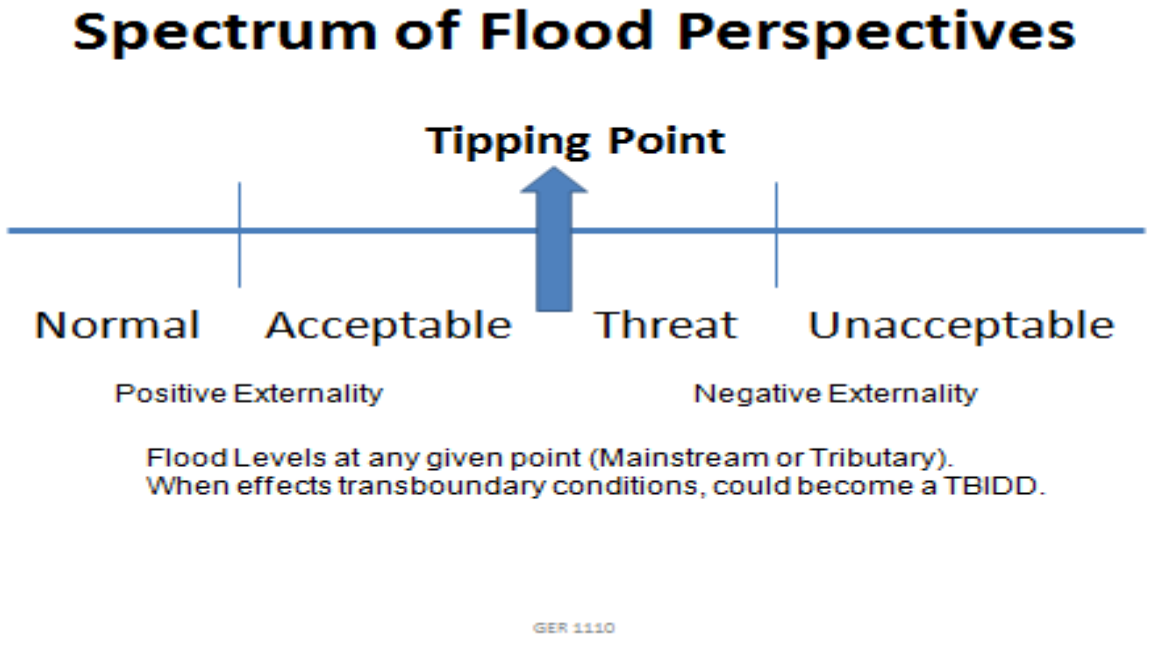
FMMP is specifically concerned with the transboundary flood issues, but it was quickly realized that approaches and solutions provided under the 1995 Mekong Agreement and international water law also pertain to other water and related resources issues and problem basin. Transboundary floods (natural or human caused) can cause very serious harm and damage, but it is conclusive that floods and droughts are interdependent along with other transboundary water and natural related issues and problems and that both may be instigated by natural causes or human interventions. Climate change may also be a strong contributing factor, but more recent studies indicate that even certain aspects of climate change are induced or exacerbated by government and human activities

[1] The author of the three reports on addressing and resolving transboundary flood and related issues also had the opportunity of serving as Senior Legal Advisor under UDNP assistance to the four MRC member countries in the negotiations and drafting of the 1995 Mekong Agreement.

leading to contentious issues, differences and disputes between riparians in the MRB. This “Pocket Version” highlights the range of approaches and solutions available to MRC member countries and all riparians in addressing and resolving transboundary flood and related issues. But it must be kept in mind, that first signs of an emerging issue, difference or dispute generally are detected at the “field level” even though the ultimate issue or problem will be dealt with at higher levels of government and the MRC. The issues, legal positions and potential solutions, and processes that can be applied are of great importance at all levels, but the focus of this shortened document is to provide information and references for use at the line agency, field and local levels.

## Preface to Understanding the Nature and Occurrences of TB Flood IDDs

In most all river systems, floods and flooding are a natural, normal and essential phenomenon occurring from time immemorial, and will or should occur forever if the river system and its dependent inhabitants are to remain healthy. Most species of living creatures adapt to natures' cyclical flood conditions with the exception of man (or more politically and socially correct -human beings). Throughout time, man has attempted to alter, change, minimize or eliminate what has changed over time and space is the point for different social and economic groups of peoples where flooding and flood levels are acceptable and where they become a threat which may become unacceptable and lead to human interventions whose consequences may reach far beyond the intended flood area. This situation is illustrated by the following figure.




Overtime and at specific locations, efforts to control floods and their impacts through structural measures that alter natural flow regimes to "harness the wild river" may eliminate or minimize harm and may even attempt to retain acceptable flood levels to gain the benefits that occur. It can now be observed that a dramatic shift has taken place in addressing flood issues by incorporating "non-structural measures" to manage floods and provide flood risk protection. There are ever increasing policies, laws and institutions supported by more sophisticated technical techniques from improved structural measures to analytical tools and computer-driven models. These are further supported by more highly refined, intensive and timely data and information gathering, sharing and analysis amongst the concerned parties that includes not only the technical and scientific, but also the social, economic and environmental inputs. The limits of human interventions are infinite and indefinite.

Where has that gotten us throughout the course of history, and where will it take us in the future? Most all the efforts have enabled better forecasting and predictions from a wide range of data types and sources, and have improved preparedness to cope with floods and related threats, at least in

river systems where the economic where-with-all is available or provided. This state of development has greatly enhanced coping with the "known unknowns" or more precisely, the predictable and foreseeable flood occurrences and events. But we still face the inability and insecurity of unexpected flood occurrences, the "unknown unknowns" that suddenly take place and often radically alter our way and the course of life.[2] Worse yet, too often these unexpected flood occurrences are not "natural"; they have been exacerbated in intensity, duration and frequency and even outside the normal flood cycle occurring during low flow and dry seasons.[3]

Of course, we should have in every inhabited river system of noticeable size and need, a combined, comprehensive and integrated flood control and management system to at least provide early warning and to minimize the risks of harm and destruction. Such a system gives us flood security and can be indexed to demonstrate our refined abilities. This has now been extended beyond inland river systems to coastal areas threatened by "flood waters" from tsunamis and rising seas. In recent years great attention has been paid to these types of "flooding" events most likely due to heightened media attention, such that flood security has taken on another source and direction in many coastal countries and islands apart from the more typical inland river system concerns.

But has this prevented or minimized the threat and harm of flooding? Post-flood analyses always seems to indicate more could have been done or "errors" occurred somewhere in the flood control and management links (structural, operational, data and information, analytical, and/or inadequate policies, laws, programs, funds and intuitional capacities. The literature is awash with flood experiences and lessons learned, and often integrated into the larger picture of water and river basin management. Much attention has been paid to harnessing the twin menaces of river systems – floods and droughts. And since the early 1990's, at least in theory, a new conceptual moniker has been globally adopted at all levels to put at ease nations and locals – IWRM.

But has it? The record is far from clear with very poor showing of performance and results relative to the tremendous expectations, efforts and expenditures. Does that mean IWRM is wrong and should be discarded? No, as a theory and concept of a goal to be achieved, it paints a beautiful and clear picture. In reality, however, it appears we are better "tasters" than "chefs" for somehow the ingredients and sequence to adequately implement have not been identified or understood, as well as determining the "size of the pie" and who is to be served.[4]

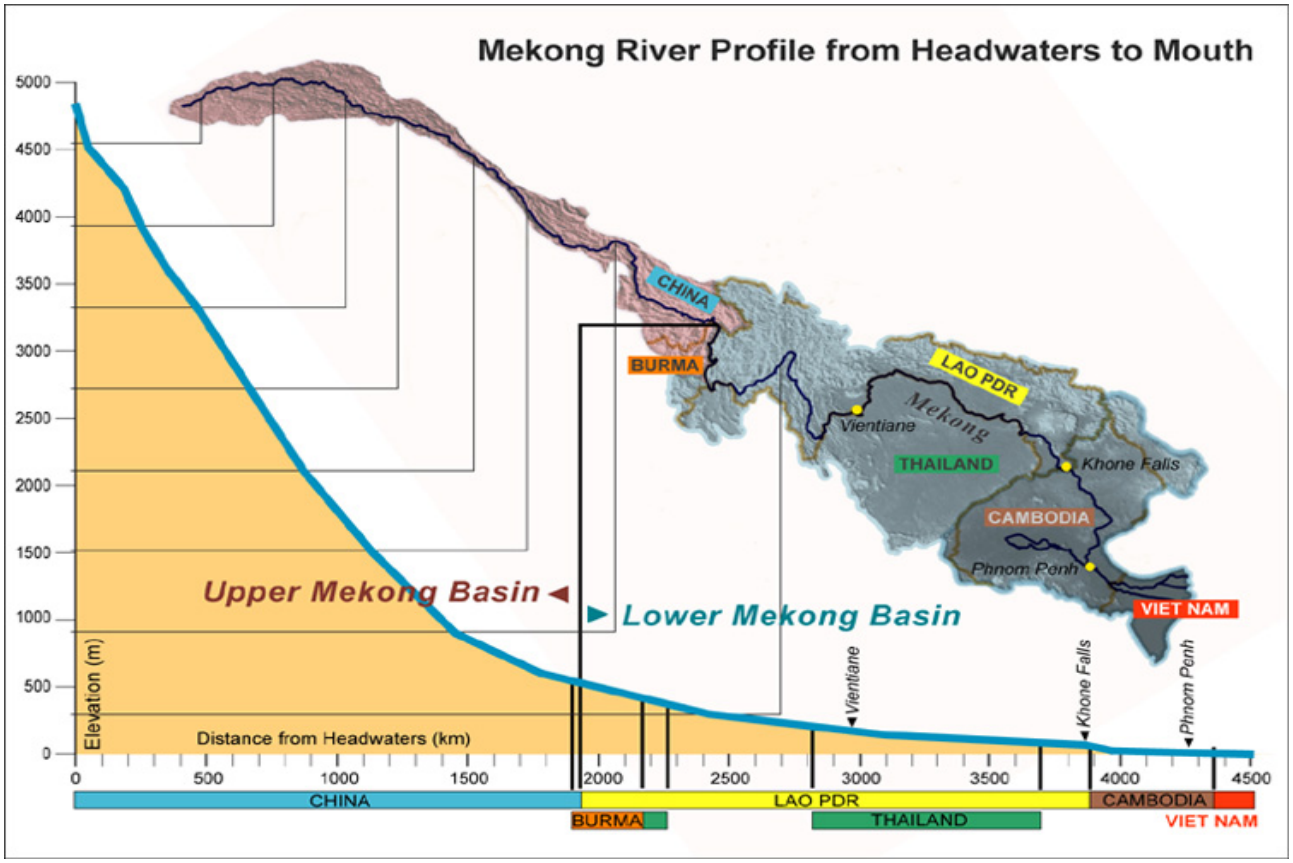
What has all this got to do with the Mekong River system, the MRC and its member States, and more specifically, the FMMP effort and outputs during this first project? Everything! If we want to

[2] This distinction is made between the "known unknowns" which we include in flood forecasting and decision making and those seemingly ever occurring and unexpected "unknown unknown" floods that exceed expectations of cause and effect and often are connected with other unexpected events like earthquakes or typhoons.

[3] As a water lawyer, the SILA Dr. G. Radosevich, who produced for FMMP two previous documents, the mandate paper or Working Paper (LA-MA95) and the Explanatory Note as supporting document to the Working Paper, uses the phrase "intensity, duration and frequency analysis" (IDFA), to describe the essential flood characteristics; technical folks may use other terms to describe these essential elements and the models and other analytical tools applied. But the scope must be very similar if adequate decisions are to be made.

[4] Is applying IWRM like the dog that chases a cat into the forest only to discover it has been barking up the wrong tree? Most evidence of IWRM implementation efforts and results say "yes", but intuition says IWRM is not a bad concept; it has just being misapplied to too many parameters at once or not over a long enough period.

benefit from what we now know and the tools and instruments available to us, we have to know and appreciate how they can be applied. It is essential if we are to make improvements and innovations to meet the challenges of today and the future. This Pocket Version of the two longer reports (WP and EN) in a simplified form is intended to make the reader at any level, from the field to province to ministry, familiar with what has been produced under FMMP and to set out a clear implementation process framework for addressing transboundary flood issues in the Mekong River Basin by applying administrative and technical tools of the MRC and of the member States. As illustrated by the map below, the MRB is a unique and complex geo-hydrological basin with many flood potential areas and challenges in transboundary water relationships amongst the six riparians of MRB and particularly of the four members of the MRC in the LMRB emanating from nature or human decisions and activities. Of course, historical data can identify particular areas and regions of the MRB subject to serious floods and flooding, i.e. “hotspots”, and most of them are located within the boundaries of one of the riparian countries.



# Chapter 1 Introduction

## 1.1 Introduction on TBIDDs - Needs, Approaches and Processes for Addressing TBIDDs

The issue of identifying and addressing transboundary issues, differences and disputes (TBIDDs) begins with describing what is the basis and extent of "transboundary" within the context of natural conditions and those that may be caused through human-interventions or man-made conditions in an international river basin.

**Box 1-1: What is "Transboundary"?**

**Basically, any activity in one country affecting the quantity and quality of water resources anywhere in the basin (mainstream basin or tributary sub-basin) that causes a change in water resources conditions in another riparian country is considered as having transboundary affects.**

This is the general scope under international law and the MA95. If the effects on other riparians are positive, there is generally no objection since the sovereign rights, interests and responsibilities (RIR) of a basin riparian nation has not been interfered with or harmed. However, should the transboundary affect be negative, then it is possible that the rights and interests of one or more other riparians may be adversely affected and/or that the riparian causing the adverse affect has not acted responsibly. It is not necessary to wait until an adverse affect is caused before potential adversely affected riparians can raise the issue of avoidance or mitigation. It is possible that an adverse affect can be anticipated both by the causing party and/or the potentially harmed parties through examination of data and information of the river, review of proposed project or actions, plans, feasibility studies, environmental impact statements, etc.

**Box 1-2: What are "Rights, Interests and Responsibilities" (RIR) of Nations**

**Under the international law of nations and the U.N Charter, each nation is entitled to principles of sovereignty, integrity and reciprocity. Within these principles are protected the rights and interests of a sovereign nation and correspondingly, its responsibilities as a sovereign nation to other sovereigns.**

The most important "needs" to identify and address real or potentially adverse TBIs that might be avoided or mitigated, or those that might develop into differences or disputes are: relevant data, information and analytical capabilities; willingness of the riparians to cooperate and inform each other of actions and activities that are planned or underway (in a timely and complete manner); and a forum to raise, discuss and address the real or potential transboundary issue.

TBIDDs are not confined to flooding conditions that occur naturally or exacerbated through man-made activities and exceed the level of a "beneficial" flood to a range of harmful or damaging flood conditions; exclusively for FMMP the transboundary flood issues are referred to as "TBFIs". TBIDDs include any activity (natural or man-made) that directly or indirectly affects transboundary water resources quantity or quality and associated environments of the rights and interests of another riparian, regardless of spatial (upstream/downstream or right/left bank on the mainstream or tributaries) or temporal (seasonal, annual or accumulative over time) dimensions. Hence, for example, mining operations high on a fourth level tributary discharging contaminated mine-tailing that crosses another riparian through a second level tributary and reaches the mainstream in yet another riparian may cause adverse impacts in both transboundary tributaries as well as the mainstream. A wide range of examples can be identified for both direct and indirect water resources related uses and impacts on quantity and quality of surface and ground water from land and other resources uses to agricultural water uses and applications of agriculture chemicals to resulting return flows and discharges of wastewater, to on- and in-stream water uses for fisheries, transportation, recreation, etc., to construction of hydro-power facilities that may also be multiple purpose for flood control, recreation, etc.

In addition to exploring the development potentials related to using the water and related resources of the Mekong River system in the lower portion of the basin, the drafters of the MA95 considered a wide range of possibilities to anticipate, avoid, mitigate, address and resolve adverse impacts that do or may occur in the MRB from natural or man-made causes. The language was drafted in such a manner that standard approaches and processes are listed in the MA95 e.g., Articles 7, 8, 34 and 35; approaches, legal theories, etc. that are not listed can be identified, negotiated and adopted at both technical and policy levels by the MRC Council and Joint Committee. It was anticipated that conditions and needs would change as well as technology and communication would advance to allow new approaches to be advanced and adopted in an innovative and intelligent manner. The mark of a successful agreement and implementing organization is the ability of it and its member countries to adapt and innovate in carrying out the provisions of the MA95 and in observing the RIR of an international river basin riparian. To accomplish this status relies not only on the written word of the agreement, but knowledge and cooperation of the riparian members of the MRC through their commitment and good faith discussions and negotiations in the context of the MRC and as sovereign states. The rights, interests and responsibilities of a sovereign extend to all its citizens and its and their activities; authority to utilize features of the RIR but not ultimate responsibility to other sovereign states can be delegated or transferred to its citizens or clients. For this reason, it is important to know and understand each other's laws and practices in these regards.

## 1.2 Summary of MRC Countries' Applied Approaches/Mechanisms and Support Needed

Each riparian nation of the MRB and more specifically, the four members of the MRC in the Lower Mekong River Basin region, have developed and adopted ways and means to promote

development and to address contentious issues, differences and disputes that might occur within the MRB boundaries. All four MRC members have subscribed to the principles of peaceful coexistence and peaceful settlement of disputes set out in the UN Charter, and each have enjoyed inter-country/ governmental relations with their neighbors as well as joint participation in the cooperative ventures set out in the MA95. Within the scope of the MA95 and operations of the MRC, approaches and mechanisms have been identified and addressed in the Working Paper and several will be elaborated on more fully in this EN. In addition, through the national papers prepared by national experts of each member country, the constitutional and legal provisions, processes and practices of each country are set out in summary in Chapter 3.3 of this document.

It is important to understand and appreciate that in many cases, identification of the TBIDDs will not originate at the highest levels of a government or within the MRC; they will originate in some obscure field site through the awareness of local people or local officials who may not be aware of the transboundary significance of the incident or potential incident. Often when the issue is brought to the attention of higher level officials of government, all the facts and impacts may not be known, yet understandably, it cannot be ignored or if so, at the peril of the party. For this and other reasons, countries are more prone to raise the issue in a bilateral or multilateral setting, and more informally and cautiously before addressing the issue in that context or bringing it up to the MRC. A member country can formally raise the issue, difference or dispute with another riparian with the MRC Council and/or Joint Committee, but often it might prefer to request the less formal input from the MRCS to facilitate the identification, extend of real or potential harm and options available. The MRCS can respond if it has the authority from the JC or it can request the approval of the JC to facilitate the member(s) request.

# Chapter 2 TBIDDs in the Mekong Region

## 2.1 Why this topic is important to MRC and Member States

**Box 2-1: Preparedness on TBIDD Is Important**

**Each MRB riparian nation is a sovereign State entitle to certain rights, interests and responsibilities (RIR) within its borders in the waters and environment of the MRB. Identifying and addressing TBIs is essential to protect and assert these rights and interests and to insure meeting responsibilities.**

Whenever any nation, agency or anyone confronts the issue of sharing water amongst competing parties at the international, national, basin or local levels in usable and timely quantities and qualities while avoiding, preventing, mitigating or addressing and resolving natural or human caused damages or disasters, they and their decision makers are immediately faced with identifying and defining their and others rights, interests and responsibilities relative to the real, perceived or anticipated circumstances and consequences before them. National laws normally address the relationships of people and water and other resources and how they are to be allocated and used, and defining the rights and obligations of water users and directing mandated agencies on how to implement the laws. International law and the UN Charter provide the framework for addressing shared water resources and the rights and obligations of sovereign nations. In particular, the UN Charter strives to achieve good neighborly relations and good faith actions that address and resolve transboundary issues, differences and disputes in an amicable, cooperative and timely manner. International law and specifically international water law provides the principles, processes and general framework. For the four Lower Mekong River Basin countries these principles, processes and the general framework have been refined and mutually accepted in the 1995 Mekong Agreement, a treaty that established the MRC as an international intergovernmental body to carry out its provisions and expectations. Normally the national water law and national means for addressing and resolving water issues, differences and disputes would not be applied in transboundary situations. However, they may provide a rich array of options to facilitate the interpretation and application of the MA95 and optionally for bi- and multi-lateral efforts.

The intentions and expectations of the MA95 are the expressed desire and commitment by the four LMRB countries: forthright but voluntary and timely cooperation and transparency of what is known about the MRB in terms of sources and uses of water and the environment and what uses are planned to make the best, most beneficial and optimum uses of the water and related resources of the MRB and protection of its environment. They also expressed their intention of engaging in cooperation and understandings with the two upper non-signatory riparian countries. Relevant to understanding how important this topic is to signatory and member States of the MA95 and MRC are the quotations set out in Box 2.2.

It should be clear from the provisions of the MA95 that water management in the MRB by the MRC includes not only planning and developing the water and related resources of the Basin, or even in maintaining the status quo, but also includes preventing or addressing and resolving contentious issues, differences or disputes that might arise amongst the member States of the MRC. This is the meaning of "integrated river basin management" (IRBM) as a component of IWRM subscribed to by the member States and a major feature of the MRC Strategic Plan: 2006-2010; it requires "institutional" integration in planning, analyses and decision-making by representatives of the four members States in their capacities on the Council, Joint Committee and MRCS.

**Box 2.2: MA95 Provisions**

**Chapter 1. Preamble**

**Reaffirming** … sustainable development, utilization, conservation and management of the Mekong River Basin water and related resources…

**Affirming** … 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 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.

**Chapter III. Objectives and Principles of Cooperation**

**Article 1. Areas of Cooperation**

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

**Article 3. Protection of the Environment and Ecological Balance**

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

**Article 7. Prevention and Cessation of Harmful Effects**

To make every effort to avoid, minimize and mitigate harmful effects that might occur …, from the development and use of the Mekong River Basin water resources.

In general, most all has gone well in the MRB; a good understanding of the MRB exists through data and analyses and both national and basin projects have been undertaken with few "hotspots" or hiccups that have emerged since 1995. A commendable implementing international organization has been established – the MRC with its three principle organs - to carry on and enhance the work and achievements of its predecessor organizations under the terms of a more comprehensive agreement that replaced the two previous agreements amongst the four parties. A lot of progress has been made under programmes and activities of the MRC in close cooperation with relevant national Mekong committees and line agencies.

But, inevitably in carry out such a challenging mandate of the MA95, contentious issues and differences are bound to arise between the rights, interests and obligations of one party with those of another over real, perceived or anticipated incidents. The LA-MA95 provides an interpretation and analysis of the MA95 mandate in identifying, avoiding, mitigating or addressing and resolving the TBIDDs of the MRC within the framework acceptable and accepted by the four member countries and in the context of international law. This includes both the technical and legal aspects tempered by the social, economic and cultural attributes of each member country. Although the LA-MA95 and this document are being prepared under the FMMP with direct concern over TBIDDs that concern floods, these two reference documents are equally applicable to most all other water and related resources and environmental transboundary concerns that might arise, and may linked with broader flood prevention and management issues at national and basin levels.

With the inevitability of TBIDDs occurring, particularly in light of the economic developments and resource requirements in each of the MRC member States and in upstream China, the MA95 only sets out a general but comprehensive framework for promoting the cooperative development and sharing of the water and related resources and protection of the basin's environment as well as for conflict avoidance and management (or alternative dispute resolution – ADR – as is now more commonly used). The substance of options and processes of the MA95 is set out in the LA-MA95.

The sooner and better that the MRC and all riparians of the MRB can anticipate and identify a real or perceive natural or human induced incidents before "substantial damages" or "significant impacts" occur, the more amicable it can be addressed through cooperation. These are the purposes of the data and information gathering, exchange and analyses systems and other MRC Procedures and technical guidelines put in place under WUP, and many of the activities and efforts of the EP, NAP and other programmes and projects of the MRC. The reality of international and national river basin development and management is of course, not so simple. True, transboundary intentional harm by one riparian to another should not occur and for the most part can be avoided through accurate forecasting and projections, careful planning and transparent utilization. But it may not be possible to anticipate all the consequences of upstream/downstream, left bank/right bank, in-stream/on-stream/off-stream uses and occasional unpredictable natural occurrences resulting in substantial damage to the rights and interests of one or more riparians and/or significant adverse impact to the Mekong mainstream and on transboundary tributaries. When such an adverse consequence or occurrence happens, such an incident triggers activation of provisions in the MA95 or international law that has remained dormant until needed.

The MRC and Mekong Riparians do not need to be "overly prepared" nor on high alert status boarding on paranoia regarding addressing and resolving contentious transboundary issues, differences and disputes. But it is suggested that an increased knowledge and capability be available at MRC and member States to identify real or potential "hotspots", and what, who, how and when to react should an incident be real, perceived to be real or anticipated. That is why this topic is or should be important to the MRC, its member States and all MRB riparian

nations. The old cliché applies that it is better to be prepared than to be sorry. Preparedness is the first criteria of cooperation and cooperation is the mantra of the MA95. To know what TBIDDs are, and how to identify them is the first step.

## 2.2 The Nature of TBIDDs

The subtle but genuine basis for TBIDDs is set out in Box 2-3.

**Box 2-3: Nature of TBIDDs**

**The nature of most all transboundary (inter-jurisdictional) water (flood) differences and disputes comes not from the hydrologic unit of the river basin or groundwater aquifer or the associated environments, e.g., not from nature and the peculiar characteristics of water resources. TBIDDs come from the notion of the nation-state and concepts of sovereignty and the impacts on water and related resources due to the action of humans (governments) in the quest to develop or alter the nature of water resources for the benefit of their inhabitants. TBIDDs occur at the national level due to administrative boundaries at various levels bisected or traversed by a river basin boundary.**

The very meaning of "transboundary" is something that happens in one country that has positive or negative impacts in one or more other countries, an impact that crosses a national boundary in the basin.[5] These impacts are "inter-jurisdictional". In the case of river basins with two or more riparians this transboundary/cross-border gives rise to the up-stream/downstream (consecutive) or left bank/right bank (concurrent) legal relationship depending upon the location of the national boundaries/borders as they bisect the mainstream or tributaries or use the watercourse as the boundary line. The point is, regardless that the positive or negative impacts may geographically occur whether the river basin was one nation or six riparians as in the case of the Mekong River Basin, TBIDDs only occur because two or more sovereign nations are involved, each with rights, interests and responsibilities obligations due to their state-hood status under international law. Similar impacts occur within a nation, but national law, policies and practices are employed to address them. Only when negative cross-border impacts occur or are anticipated does it activate the TBIDD.

TBFIs and other causes of TBIDDs that fit within the context of avoiding, mitigating, addressing and resolving are those that are caused or exacerbated by human interventions in the form of projects or activities that interrupt the normal or natural course and consequences

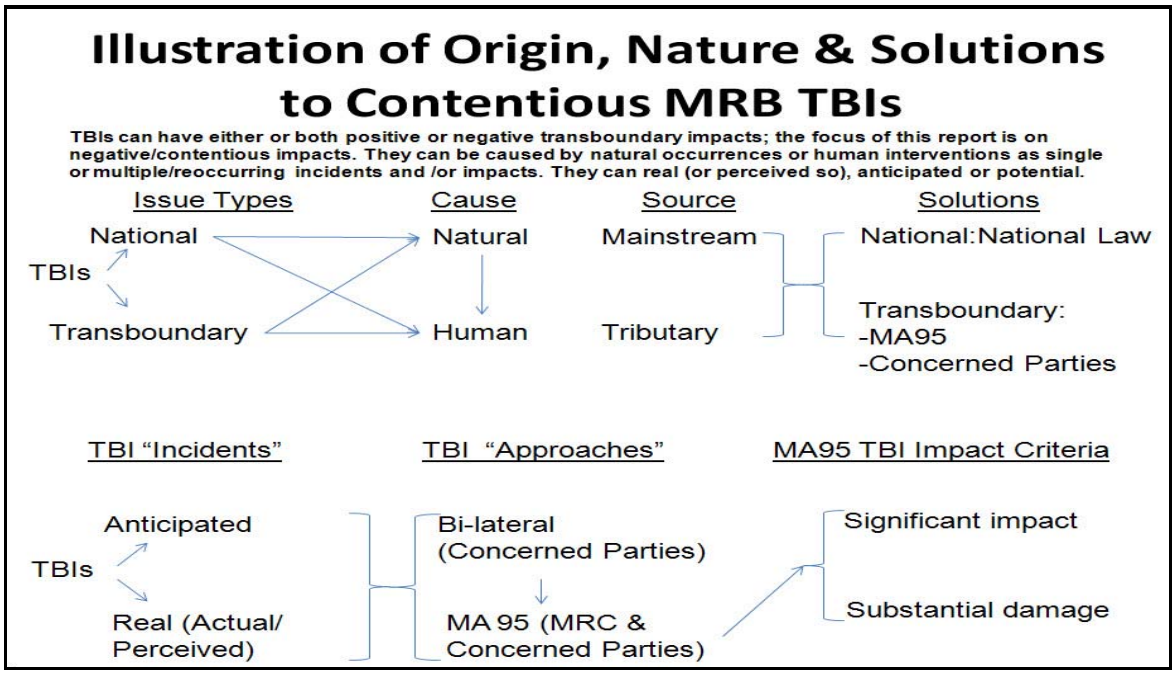
[5] In the FMMP "TBFI Identification" Report (0807), a working definition was adopted to identify and categorize types of floods and how they might impact Mekong riparians. The adopted TBFI definition, similar to the ECE 1992 Water Convention, states: *Any existing or potential substantial adverse impact on the natural, economic or social environment within an area of a Riparian State resulting from a change of the water conditions during the occurrence of floods and/or during the flood season of the Mekong River system caused by a human activity, originating wholly or in part from within one or more areas of one or more other Riparian States*. In the WP, EN and this "pocket version" report, TBFIs include both those of nature's origin and those caused or a natural condition worsened by human activities or interventions. The distinction being that TBFIs may be identified and avoided or mitigated through cooperation before an occurrence, and only those floods caused or made worse by human activities may become contentious issues, differences or disputes that needs addressing and resolving if they can or have caused significant harm or substantial damage to another riparian.

of water in the mainstream and inflows from tributaries. Some such interventions may contribute positive consequences within and across borders of the international shared river system while other interventions may and can cause significant or substantial negative consequences to the flood rights and interests of another riparian and to other rights and interests of the basin riparian.[6] These cause and effect linkages and interdependencies can provide a very complex situation for the concerned parties, and often the anticipated and perceived incident is quite different from the "real" incident that might or has occurred determined on accurate and timely data and information and impartial analyses. For these reasons, most of this EN refers not so directly to TBFIs, but rather TBIDDs to insure the realism that must be applied in identifying, describing, addressing and resolving such incidents.

TBIDDs are multi-dimensional (physical, technical, social, economic, legal, institutional); the very nature of water, related resources and the environment creates situations for rise of contentious issues. TBIDDs necessitate first an accurate and timely physical and technical description and analyses to understand the circumstances that may or have caused or be considered an "incident" adversely affecting the rights, interests or obligations of one or members of the MRC, followed by then applying the "legal" framework and other intervening factors and concerns. The figure below was developed to illustrate the origin, nature and solutions to TBFIs. In reality, most TBFIs are the physical result of nature and thus generally beyond being an incident giving rise to one nation alleging a claim against another nation that it violated the former's rights or interests or was not in acceptable compliance with the latter's international obligations or responsibilities. In most river basins, an "intensity, duration and frequency analysis" (IDFA) of floods greatly facilitates the concerned countries with taking steps to avoid or mitigate harmful effects. The data, information and analysis also help to ascertain the spatial and temporal source and impacts, and to determine if the extent of harmful effects were the results of nature or human interventions. Flood issues within a nation are normally confined to addressing and resolution within the boundaries of that country under national laws and practices. Figure 2-1 summarizes the scope of TBIDDs applying a basic diagnostic analysis approach.

[6] In many FMMP and other MRCS program meetings, Thailand has emphasized the need not to forget about "positive" impacts and potentials while strongly focusing on negative impacts. Positive and negative impacts can occur from natural occurrences and human interventions, and identifying positive impacts is one way to promote cooperation amongst MRC members. However, for this EN, the emphasis is on the real or potential negative impacts and those provisions of the MA95 for avoiding or mitigating detrimental effects, or if necessary, to address and resolve the contentious issues, differences or disputes.

**Figure 2-1:**




The LA-MA95/WP (Chapter 3.1) provides a brief statement on the MRB transboundary issues and problems that existed in the 1990's and now, with conclusions on the prospects for and needs of the MRC and MCs to address them. It noted there are two distinct transboundary hydro-geographic river system conditions in the MRB under which TBIDDs might exist or arise:

1. The mainstream creating upstream/downstream (consecutive) and left bank/right bank (concurrent) relationships between the riparians with their respective tributary inflows; and
2. The transboundary/cross-border MRB tributaries that aside from their impacts on the Mekong River mainstream can and have created conditions of major concern to those respective riparians.

Again, we must be quick to acknowledge that there are both positive and negative real and potential causes and effects that can occur within the MRB, and particularly flood conditions. On the former, the MA95 is clear and unambiguous on the rights of the MRC riparian members and other basin riparians to utilize their share of the water in a reasonable and equitable manner (Article 5), maintenance of minimum flow levels (Article 6) and through cooperation to optimize the multiple-use and mutual benefits and to minimize harmful effects that might arise from natural occurrences and man-made activities (Article 1). Jointly developed projects, trade-offs and exchanges are examples of how this can be done under the MA95 provisions. On the negative effects, the LA-MA95 spells out the many provisions of the MA95 committed to by each MRC member State on their responsibilities not to cause harmful effects (Article 7) through negative externalities created by one or more riparians upon one or more of the other riparians. The cause and effect of negative externalities is any

action by one riparian the result of which creates a negative effect or impact upon the rights and interests of another riparian through substantial damage to the latter or significant impact on the mainstream. Examples may be through an unreasonable or inequitable off-stream, in-stream and on-stream utilization of waters of the Mekong River system, interference with the agreed upon maintenance of flows on the mainstream, untimely discharging of large volumes of water that may create flooding conditions and bank erosion to another riparian or of pollutants that adversely affect water uses, aquatic conditions and the environment of the basin.

The above Figure 2-1 illustrates causes of TBFIs and other TBIDDs can have their origin in nature or due to human interventions (as stated in Article 1 of the MA95). The LA-MA95 discusses the twin menace of nature – floods and droughts as natural occurrences – that create problems for riparians of an international river basin with the latter possibly made worse through climate changes in parts of the basin. But these conditions may be made worse for other riparians (downstream or opposite bank) and their rights and interests through human interventions by one or more riparians (upstream or opposite bank) who are protecting their interests in their territory (prevent damage and destruction to their people and their properties or operations along the river or increase diversions and storage capabilities either on the mainstream or tributaries for supplemental water supplies). Aside from human (government) interventions to lessen the adverse affects of nature, any other intervention intended to benefit the intervener country, whether for development or protection (like dams, bank protection works, diversions, discharging inadequately treated wastewaters, etc.), considered within their rights and interests that causes or may cause harm to another riparian's rights and interests brings into play the internationally accepted concept of state responsibility (MA95, Article 8). Cooperation is essential to avoid or mitigate the transboundary harmful effects of floods (i.e., TBFIs) and droughts caused by nature; cooperation, communication and coordination is required to avoid, mitigate, address and resolve problems caused or intensified by human interventions that could lead to a difference or dispute. From a legal perspective, the nature of TBIDDs is summarized in Box 2-4.

**Box 2-4: Legal Nature of TBIDDs**

**There is a clear distinction between natural causes and human causes to TBIs. TBIs can be from natural causes or human-made or made worse by human interventions. But TBDDs can (should) only arise from human-made or made worse interventions. With a right of an intervention for a benefit comes the corresponding responsibility of an intervention that causes harm to another riparians rights or interests.**

The first or immediate effort of the MRC through its range of capabilities in the Council, Joint Committee and MRCS and direct involvements of the member States through their NMCs is to assess natural conditions and insure measures to mitigate harmful effects by one riparian does not cause harmful effects to another riparian. On the flood issue side, the FMMP is attempting to carry out this role, and hopefully soon a strong drought management project will

be undertaken by the MRC – at last providing a real opportunity for integrated river basin management of at least these two menaces.

In Section 3.3 of the LA-MA95, a quick look was made at the TBIs now and prospects to address them and others that may arise in the future. In spite of the many accomplishments in the LMRB made by the MRC under the MA95 and MRC's predecessors under two prior agreements, there remains considerable real and potential harm from the twin menaces and many other TBIs that could develop into differences or disputes. A number of key questions were raised as to who should raise such issues, how to identify and raise the issues, and what tools are available to address and resolve them. The following chapters of the LA-MA95 provide answers from the MA95 and MRC documents to these questions as well as provisions under international law. This EN goes into greater depth in providing more examples and details to answers and explanations to approaches that are available. But first we must know what we are talking about, and if we are all talking about the same thing. Thus, identification is the starting point.

The FMMP C3 completed a study and report on the Transboundary Flood Issue Identification (MRC/FMMP, August 2007) which provided a broad examination of both natural and human made flood issues. That report summarizes results from regional consultations, providing a definition of TBFIs and identifying six broad groups of transboundary flood issues. That report is an important document to read in conjunction with the LA-MA95 and this EN. However, that report is a first general inventory/identification and does not go into related issues which may occur in the seasons or on tributary locations that may exacerbate natural or human-made flood issues, nor does it address the wide range of other non-flood water related issues of the MRB or the LMRB.

## 2.3 TBIDD Approach: Identification of Hotspots, Diagnostic Analysis and SWOT

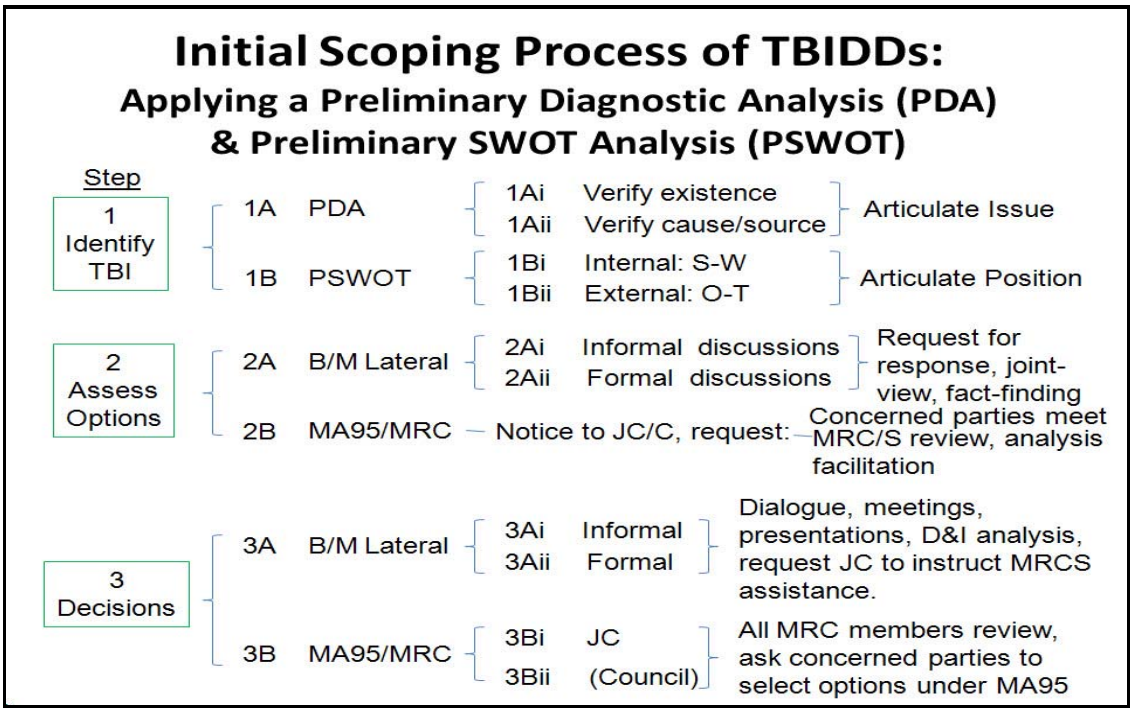
One approach to identification of TBIDDs is to begin with listing "transboundary hotspots" (TBHS) in the MRB identified through a process of preliminary transboundary diagnostic analysis (TDA) and preliminary SWOT analysis as illustrated in Figure 2.2.[7] TBHS can be defined as geographical locations in the Mekong River Basin that are of high concern to one or more riparians that have or may affect the riparian's rights, interests or responsibilities to other basin riparians. Initially this may be based upon knowledge and information of the MRC member Countries through their NMCs and data, information and analyses in the MRCS. The purpose for making this "hotspots" list is to begin with current information and perceptions as to where in the MRB there are situations, projects or activities that may or have already caused transboundary concerns, issues and differences. Annex 2.1 provides details on how to identify TBHS. Annex 2.2 provides reference material for a SWOT analysis approach discussed in Chapters 3.2 and 6.3 as an invaluable tool for MRC. For scoping TBIDDs,

[7] The term "hotspot" may not liked in the MRB as it might imply a negative connotation. In fact, it is a commonly used term in many professional and scientific fields to identify a significant event or occurrence, positive or negative, to focus the attention of concerned parties.

however, a quick preliminary SWOT analysis is recommended to get an understanding of the situation.

In the FMMP and other programmes and projects of the MRCS, TBHS identification could enable the MRC and member countries (MCs) and in particular the MRCS and the NMCs a dynamic "think-tank" method of diagnostic analysis (DA) of the current situation in the MRB relative to the rights, interests and responsibilities of all riparians (including the upper two non-MRC member riparian nations). Hotspots can be of positive or negative nature. For the FMMP, this would include flood-prone areas considered for their intensity, duration and frequency whether on the mainstream or tributaries any time during the year as well as other serious types of incidents of concern to the MRC and MCs.[8] An "intensity, duration and frequency analysis" (IDFA) is recommended for the identification of problem-causing reoccurring incidents caused by natural occurrences and/or human interventions. This goes beyond a single impact analysis to cumulative and repetitive impact analyses.

**Figure 2-2: Scoping TBIDDs**




## 2.4 MRC Identified TBIs

Various trans-boundary analyses activities were carried out in 2001 and 2002 under the WUP project during which the following six trans-boundary issues, as perceived by the member countries at the time, were identified:

(i) declining fish production,
(ii) increased magnitude of flooding,

[8] Currently, the MRCS EP and Eco-Asia in collaboration with other MRCS programmes are working to develop the criteria and identification of transboundary "hotspots" (TBHS). Consultations are ongoing and their reports are being eagerly awaited.

(iii) sedimentation (including bank erosion),
(iv) reduced dry season flow in the mainstream,
(v) dams on the mainstream, and
(vi) water quality deterioration.

FMMP utilized a TDA approach in the identification of transboundary flood issues in the LMRB in 2007 and concluded a list of six broad groups:[9]

(i) floodplain development within the Mekong Delta,
(ii) upstream development in the Lower Mekong Basin that has an impact on the Mekong Delta,
(iii) upstream hydropower development in the Upper Mekong Basin,
(iv) hydropower project development and operation in the Se San, Srepok and Se Kong river basins,
(v) bank protection and port development, sand excavation, dam-operation communications in the upper reaches of the Mekong mainstream, and
(vi) increased flooding on tributaries in northeast Cambodia.

## 2.5 Emerging Transboundary Concerns: Climate Change & Global Warming

There is another factor that may give rise to international water resources TBIDDs – impacts from climate changes and national responses to manage water. This issue is being discussed in international forums, national assessments and expert groups. A recent study completed in the USA, where the jurisdiction of states on inter-state rivers and water bodies is very similar to that of sovereign nations on an international river system, the projected impacts from climate change will adversely affect most all existing uses of water and present a real challenge to water managers and policy makers in making adjustment to minimize the adverse impacts while attempting to maintain sustainable development and environmental protection. The MRC EP has initiated a project in 2008 to focus on climate change entitled “Climate Change and Adaptive Initiative, and several member States, e.g. Viet Nam and China have also begun to place emphasis on possible impacts from climate change at the national level.

[9] “Transboundary Flood Issue Identification”, FMMP, MRC, August 2007. This was an initial effort at identification of flood issues; with subsequent knowledge and awareness should be repeated periodically.

# Chapter 3 Legal Aspects of TBIDDs

This chapter addresses three specific areas of law applicable to addressing transboundary issues, differences and disputes. The first area covers international law, practices and instruments that could be applied by concerned countries where a treaty between them on the subject matter does not exist or is not applicable due to omission of the contentious issue or the treaty is ambiguous. The second area expands upon the provisions of the 1995 Mekong Agreement and internal documents of the MRC beyond what is included in the LA-MA95 (Working Paper-WP). And the third area concerns the applicable national laws and practices of the four MRC member States.

## 3.1 International Law, Practices and Instruments to Address IDDs: ADR

The materials in Chapter 4 and Annexes 4 and 5 of the Working Paper are embellished in this section. That chapter provided a brief description of the sources of international law, the Alternative/Appropriate Dispute Resolution (ADR) approaches or mechanisms available under international law practices and a list of nine recommended references relevant to addressing and resolving TBIDDs in the MRB. Chapter 4 states that the approaches or mechanisms available under international law, popularly referred to as "ADR" (Alternative/Appropriate Dispute Resolution) would normally include one or more of the following tools-cum-processes in some form, and generally in a listed descending order, i.e., most amenable and amicable to most polarizing and confrontational:[10]

- Consultation & Mitigation;
- Negotiation & Conciliation;
- Mediation[11];
- Arbitration;
- Adjudication/Litigation.

This Section 3.1 expands upon the sources of international law, provisions in key international documents (UN Charter, treaties and conventions), and provides examples of State practice in promoting and mandating ADR. The texts of supporting materials are set out in annexes to this report. The focus is on applicable international best practices from international law (such as UN Charter, ASEAN Charter, judicial and arbitration tribunals, mediation, field surveys and investigations), from other water treaties and river basin organizations (such as US/MEX/CAN, in Europe and in Africa), and relevant national laws and practices (such as the ADR Act in the US and other countries, etc.).

## 3.2 Sources of International Law and Practices

Why examine the scope and content of applicable international law and practices with regards to TBIDDs in the MRB when the four sovereign nations of the LMRB have negotiated and

[10] All ADR approaches or mechanisms available under international law are also included in the MA95.
[11] See Annex 4 of the WP for an explanation of the key elements to a mediation process.

committed to the provisions of the 1995 Mekong Agreement? Because the MA95 acknowledges the importance and application of international law in its Preamble and Article 35 for addressing and resolving differences and disputes arising under the agreement. Furthermore, in any contentious issue, difference or dispute between any member State of the MRC and one or both upper non-MRC riparians, the principles of international law would be applied.

One of the most respected authoritative sources on international law is the two volume treatise "*Oppenheim's International Law*" first published in 1905 and updated in the 9th Edition by Jennings and Watts (1992, paperback 1997). The listing of possible sources of international law is applicable to the TBIDD issue for MRC members and it demonstrates the need for creativity and flexibility in seeking options and solutions to contentious issues, differences and disputes.

If international law consists of rules of conduct and legal techniques, what are the sources to be considered? Noting that "the source of a rule of law is to be found in the process by which it becomes identifiable as a rule of conduct with the legal force and from which it derives its legal validity", the Treatise identifies eight distinct sources of international law:[12]

1. **Custom** –
2. **Treaties** –
3. **General Principles of Law** –
4. **Decisions of Tribunals** –
5. **Writings of Authors** –
6. **Equity** –
7. **International Organizations and Sources of International Law** –
8. **International Comity and Morality** –

Why the emphasis on identifying these "sources of the rule of law" acknowledged under international law? Because this EN stresses the need to be flexible, creative and considerate in identifying, addressing and resolving TBIDDs through an understanding of range and scope of legal authorities that can be brought into the process. For example, international law (according to Oppenheimer and many other noted publicists) recognizes the significance of a treaty on a particular topic, such as the MA95 (No. 2 from above list), but also acknowledge that treaties are not perfect, complete nor may adapt to changing conditions, and for that reason, other sources may need to be applied to satisfactorily address and solve some issues that may come up (Nos. 1 and 3-8 from above list). This is also proclaimed in the MA95 (Chapter 1 Preamble, last paragraph and Articles 8 and 35). Thus, although the MA95 may be complete and clear as to the matter and means of avoiding, mitigating, addressing and resolving issues, differences and disputes, the options available to a MRC member State provide some flexibility on how they and others may act and respond. From a legal perspective it should be understood there are a wide range of sources to the rule of law upon which to find solutions as noted in the eight sources set out above. For these reasons, it is

[12] Supra Footnote 8, paraphrased from pages 23-52. Details of each source are set out in the EN.

important to identify and understand the sources of law and practices in each of the four MRC member States in addressing and resolving IDDs. Of course, there are also technical, social, cultural, economic and environmental considerations to be taken into account in addressing any particular TBIDD.

### 3.3 Relevant National Laws and Practices of MRC Member States

It is important to recall that sources of international law include consideration of national laws and practices that may be applicable and adaptable to facilitate addressing and resolving TBIDDs that may arise.

Section 3.3 in the EN provides a summary statement on eight key topics covered in the national reports prepared for each of the NMCs by one or two of their selected national experts under contract with FMMP/MRCS. Material for this section was drawn from the four national reports set out in Annexes 3-24 to 3-27 of the EN.[13] Each of the national reports also contains annexes of relevant national materials.
The following briefly compares the four member countries on the key topics covered in the national reports noted above.

1. Each of the four countries have adopted a constitution that has (Cambodia and Vietnam) or does not have (Lao PDR and Thailand) provisions referring to water matters, but each of the four countries have specific national laws, policies, rules and regulations addressing water development and use.
2. Some countries have adopted specific ADR approaches and applications (Cambodia and Thailand) or provided the agencies governing water matters to exercise administrative jurisdiction over these matters (Lao PDR and Vietnam).
3. All four countries have exhibited a strong interest in addressing and resolving any potential conflict situation that might arise amongst their neighboring riparian countries bi-laterally through special local committees, joint programs and MOUs.

[13] At the regional meeting in Ho Chi Minh City on 10 August 2009, several countries pointed out that national reports prepared by their respective experts are not an endorsement of the contents in the reports by the NMCs or their governments. As such, the summaries of the national reports by the SILA and their inclusion in the annexes must be recognized to be the work of those national expert(s) who authored the reports. Likewise, the SILA did not confirm or verify the accuracy of the reports. These summaries in this sub-section- are intended to be informative reference materials and are not to be regarded as legal or official documents.

# Chapter 4 Pursuing TBIDDs between MRC Member Countries

## 4.1 Options and Applications

The LA-MA95 identifies clear options that MRC member countries have in identifying, addressing and resolving TBIDDs. These options are to pursue the issue under the MA95 framework as set out in Articles 34 and 35, or to purse the issue on a bi- or multi-lateral basis with riparians concerned.

## 4.2 Pursuing TBIDDs under the MA95 Framework

The options and processes for addressing and resolving TBIDDs under the MA95 and other MRC documents are set out in this section, expanding on the Framework described in Chapter 5 of the LA-MA95/WP for a more clear understanding at the national to local levels of the member States. If an incident, action or proposed project gives rise to a contentious issue, difference or dispute between members of the MRC, it must be assumed that other provisions of the MA95 promoting cooperation amongst members to avoid or mitigate causing harm have not been successful, i.e., provisions of Chapter 1 Preamble and Articles 1, 3, 6 and 7. Acknowledging that expressing the rights, interests and responsibilities of member States of the MRC may result in transboundary issues, differences or disputes that need to be addressed in a specific and timely manner, the MA95 contains key provisions on how, who and when the TBIDDs can be systematically and amicably resolved. The key provisions of MA95 are set out in Box 4-1.

**Box 4-1: MA95 Key Provisions for TBIDDs**

**Addressing Differences & Disputes**

- **Article 34. Resolution by Mekong River Commission**

  Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, the Commission shall first make every effort to resolve the issue as provided in Articles 18.C and 24.F.

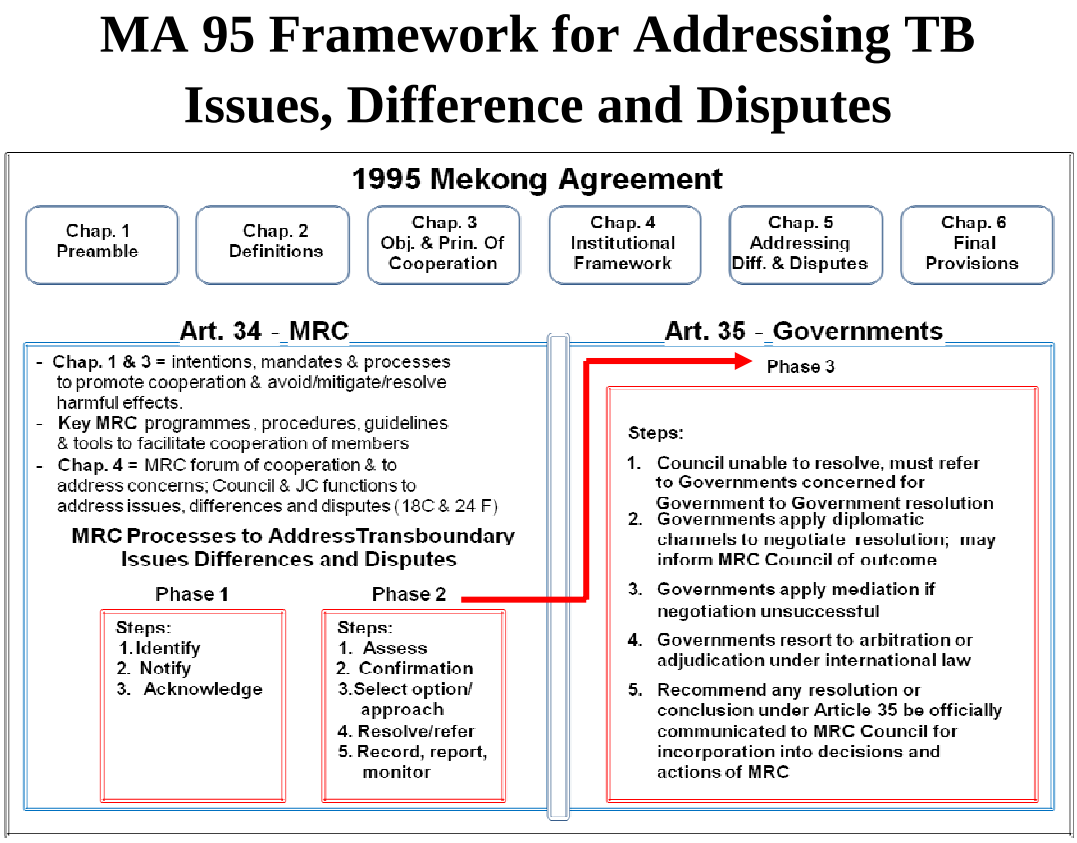
- **Article 35. Resolution by Governments**

  In the event the Commission is unable to resolve the difference or dispute within a timely manner, the issue shall be referred to the Governments to take cognizance of the matter for resolution by negotiation through diplomatic channels within a timely manner, and they may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision. Should the Governments find it necessary or beneficial to facilitate the resolution of the matter, they may, by mutual agreement, request the assistance of mediation through an entity or party mutually agreed upon, and thereafter to proceed according to the principles of international law.

The LA-MA95/WP Chapter 5 elaborated on a general application of the MA95 framework based on Articles 34 and 35 by identifying three specific phases of action with Phases 1 and 2 under the scope of the MRC mandate in Article 34 by the MRC and Phase 3 under Article 35

if the matter cannot be resolved by the Council and is referred to the concerned member states for a government-to-government process. These phases are illustrated in Figure 4-1 along with a number of important steps in each phase.

**Figure 4-1: Framework for Addressing TBIDDs under MA95**



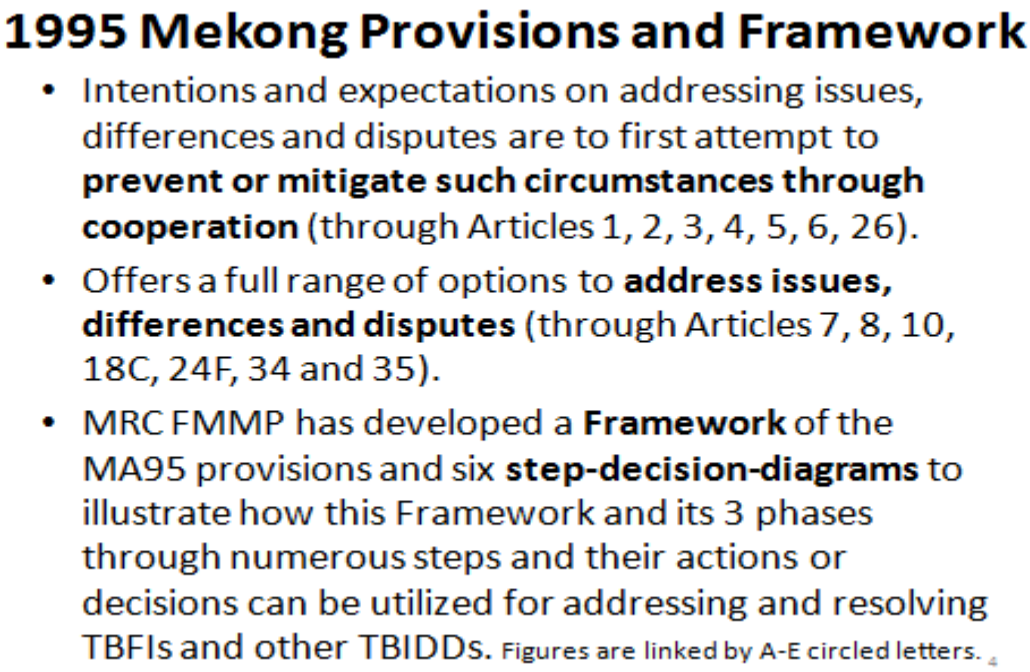

Boxes 4-2 and 4-3 and the text that follows summarize the framework process that is illustrated in the next six figures.

**Box 4-2: Preface to MRC TBIDD Framework**

## Preface to MRC TBIDD Framework

- The **1995 Mekong Agreement (MA95)** sets the **rights, interests and responsibilities (RIR)** of the MRC Member States through **expectations of cooperation** in **good faith for mutual benefit** in developing and managing the **water and related resources and environment of the MRB** and in **avoiding, mitigating or addressing and resolving any contentious issues, differences or disputes** that might arise during implementation of the Agreement.
- The MA95 contains provisions on **how the MRC and Member States** can **raise and resolve any TBIDDs** in the LMB, and for FMMP in particular, those that are flood oriented or related.

**Box 4-3:1995 Mekong Provisions and Framework**




As illustrated in Figure 4-1, the three phases under Articles 34 and 35 consist of Phase 1with 3 steps, Phase 2 with 5 steps, and Phase 3 with 1 step by the MRC Council followed by 4 suggested steps by governments concerned. Within each step of this process are a number of border-colored blocks indicating actions, decisions, or activities. The border color legend is: red-threat/danger/question; orange-MS; yellow-CEO; pink – JC; gray – C; green – MRC/MRCS data, info, tools; & blue – working groups (FAG, EAT, MEG). Sequenced numbers are placed at the bottom left of each block or diagonal as reference guides for the explanatory text that follows each of the figures. The blocks answer key questions of What? Who?, How? When? as illustrated for block No. 1.

Three new groups are introduced that should be constituted immediately and activated as required to facilitate these activities: Flood Assessment Group (FAG), MRC Expert Group (MEG) and External Assessment Team (EAT). The Flood Assessment Group (FAG) consists of a team of at least one member from each country. The FAG should be constituted by the JC with appointments made by the Chairman of each NMC, noting area of specialization, and which team members are listed with the Chairman of the JC and CEO. They are on "standby" until the JC activates the FAG for the purpose of this Framework. The MRC Expert Group (MEG) is selected by the MRCS CEO from experts in the MRCS and appointed by the JC. They are on "standby" until the JC activates for the purpose of this Framework. Their term may be 1 or 2 years as the JC decides. And the External Assessment Team (EAT) consists of external experts recommended by the CEO and approved and appointed by the JC. They are on "standby" until the JC activates for the purpose of this Framework. Their term may be 1 or 2 years as the JC decides. Due to serious and often unexpected nature of floods on mainstream and tributaries, preparedness, rapid decisions and actions facilitated by these groups are required to avoid or mitigate significant adverse effects and substantial harm in a short timeframe.

### 4.2.1 Phase 1 Steps of Identification, Notification and Acknowledgement

In order for any mechanism or process to be initiated to avoid, mitigate or address a real or perceived harm or interference with rights and interests of a riparian MRC member, the harm or interference has to be identified and other parties notified. There are at least three ways (will call them scenarios) in which a real or potential harm or interference (will call the event an "incident") can be identified.

Scenario 1- by the party (riparian member) who is harmed or rights and interests are interfered with through an incident.[14]

Scenario 2 - by the party who has or is likely to cause an incident of harm or interference, to the rights and interests of another riparian, through an on-going or proposed project or other independent action.

Scenario 3- during gathering and analyzing data and information or reviewing project proposal or actions, the Secretariat may come across actual or perceived harm or interference.

Unless, under any of the three ways an actual or potential harm or interference by one or more riparians to another or more riparians is identified and appropriate notice to higher authorities given, the application of the following steps and paths of choice of mechanism to be applied is meaningless.

In this regard, the MRC has already put into place four of five sets of procedures and supporting guidelines for water utilization under Articles 5, 6 and 26 of the MA95 to provide the MRC and member States with adequate and timely data and information on a wide range of topics necessary to implement the Mekong Agreement; intensified hydro-met monitoring on the mainstream, tributaries and inter-basin transfers; a basin-wide modelling system to utilize the data and information, along with other data requested and provided by the member States as a "decision support framework" to facilitate implementation of the other procedures and programmes of the MRC; procedures and processes for proposed uses of water on the mainstream and tributaries during the wet and dry seasons through a three-level gradation of notification, prior consultation and agreement according to the likely impact and severity of flows in the mainstream; adopting acceptable minimum flow levels throughout the LMB during the dry season, sufficient to ensure the reversal of flows in the Tonle Sap at Phnom Penh, and to prevent daily peak flows greater than what would occur naturally during the flood season. The final set of procedures on setting target standards of water quality to be maintained in the mainstream by the member States has yet to be adopted by the Council.

Each of these procedures have described the objectives, process, responsible parties (key stakeholders) at the MRC and NMCs (directly involving the relevant line agencies) and

[14] In both the first and second way to identify harm or interference, it is assumed everyone understands that the actual knowledge and information may come from field personnel, local population, etc. It is not expected that the head of government or high official on its behalf be first to identify the harm or interference. Thus, as a prelude to identification, the national relevant line agencies, NMCs and local officials and populations need to know they should investigate and report potential or actual harm or interference to higher authorities.

annual reporting requirements to inform the Council and JC members of the status of implementation and corrective measures if necessary to improve the outputs. These procedures, and the activities and periodic outputs from other MRC programmes, such as the BDP, EP, NA, etc., if properly carried out, will provide each member State with the initial sources of information for the identification of likely incidents that could lead to a contentious issue, difference and dispute. The steps to addressing and resolving issues, differences and disputes set out below, are to be carried out in a manner so that no conflict or duplication of effort occurs with the implementation of the procedures adopted under the WUP or other programmes. Should there be an overlap in actions, in most conceivable incidents the procedures would take precedence or an adjustment to them recommended insuring the integrity of the Mekong Agreement and mutually acceptable results to the member States.

Articles 7, 8 and 10 along with the Council and JC ROPs are clear about the rights and responsibilities of parties concerned to identify, notify and take remedial action for conditions causing damage, but it also requires those parties to do so in accordance with Article 34, which means that the Joint Committee also needs to be notified. If the Secretariat should identify an actual or potential harm or interference, the CEO should immediately inform the members of the Joint Committee. In any event, most all efforts at avoiding, mitigating or addressing harm, interference or emergency situations will begin or simultaneous with the Joint Committee, which can immediately call a special or emergency session of its members. If the concerned parties wish to address and resolve any harm or interference amongst themselves, Articles 8 and 10 imply that is acceptable, except that the JC shall be notified and kept informed. The outcome should be reported to the JC and the JC should properly inform the Council of the nature, extent and resolution by the parties concerned. In any event, the JC needs to be informed, via the OCEO, and all parties acknowledge the purported incident.

The three steps of Phase 1 in are: 1. Identification of incident, 2. Notification of JC and concerned parties of incident, and 3. Acknowledgement by all parties of incident. Phase 1 is basically a procedural matter of identification of the incident that is or may cause harm; notification by either the party (party alleging harm or party causing alleged incident) to the JC, or it may be the MRC itself that identifies a real or potential harm and raises the issue with the JC and concerned parties notified; and an acknowledgement of the real or potential issue or incident to the JC.

What incidents or issues can be raised and by who to address Phase 1 Step 1? Article 34 of MA95 states: “Whenever any difference or dispute may arise between two or more parties to this Agreement regarding any matters covered by this Agreement and/or actions taken by the implementing organization through its various bodies, particularly as to the interpretations of the Agreement and the legal rights of the parties, …” There should be little doubt as to the comprehensiveness of the Agreement to cover any type of TBIDDs as described in the scope of TBIDDS above from flood, drought, development, water utilization, project planning, environmental harm, pollution, related resources uses/plans for uses, to any other incident that occurs anywhere in the basin in one country resulting in an adverse affect in another riparian country. The rationale for Phase 1 is to provide an opportunity to raise any issue that may

evolve into a difference or dispute if it is relevant to the member States. These three steps and Step 1 of Phase 2 are "exploratory" to determine if there may be a need to take corrective measures.

**Figure 4-2: Framework - Phase 1: Identifying TBFl / TBIDD (P1 S1 & S2)**

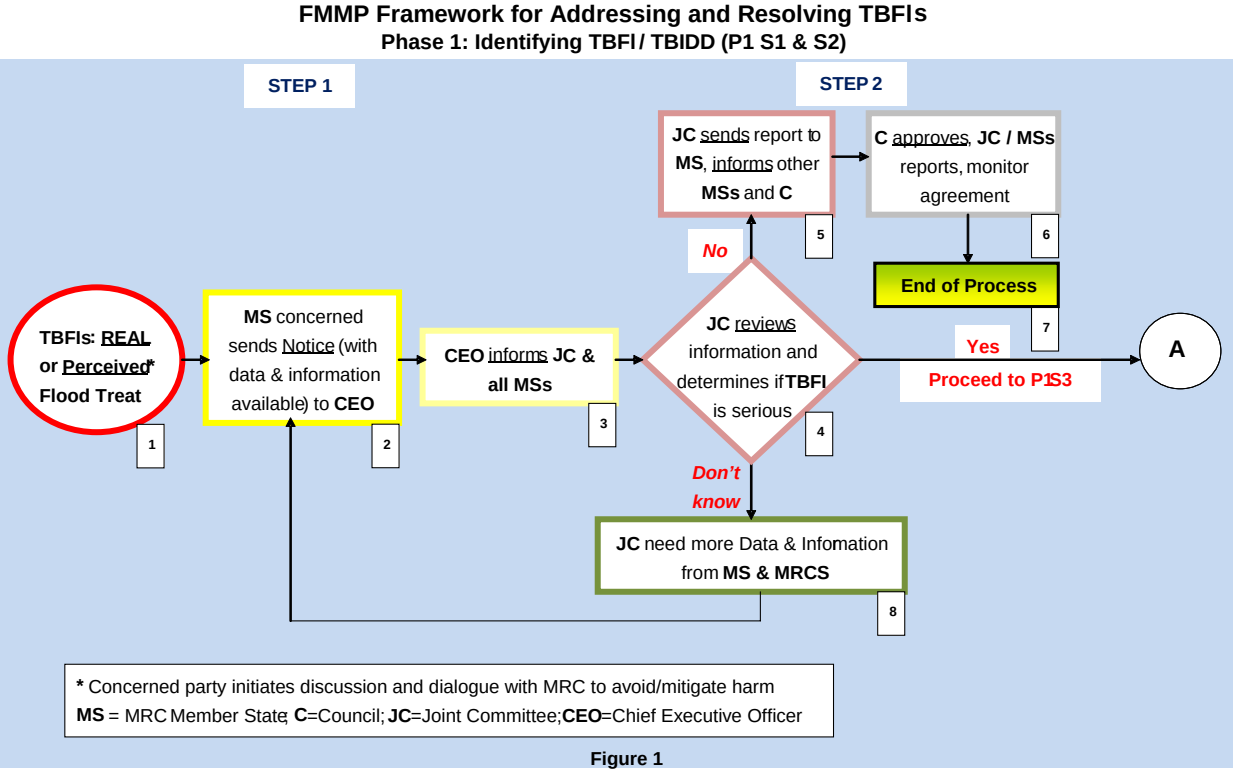



Figure 1

**Explanation of the blocks of Figure 4-2 for Phase 1, Step 1 "Identify" (Block Nos. 1-3):**

1. **What?** An incident of a real or perceived TBFI or other TBIDD has occurred or it is thought that one has or may occur. This is may be at a national field level observation or at various levels resulting from an analysis of a proposed or active project. Often the incident may not be consider transboundary but rather from a local national cause actually or potentially adversely impacting the rights and interests of the parties, or initially observed or concluded by the party taking the action and considered under its responsibility. **Who?** The person or entity identifying the incident if at the field level or any level below or outside the NMC will report the incident to higher authorities, who will inform the NMC for an immediate determination and identification of transboundary nature. **How? When?**

2. **Who? What? How? When?** The MRC member State identifying the incident would inform the MRCS CEO by written notice as soon as possible and include as complete as possible a description of the incident and any other data and information available.

3. **Who? How? What? When?** The MRCS CEO immediately informs the Joint Committee and other member States, conveying the notice of incident and accompanying description, data and information provided. Unless the JC is convening a "regular meeting of the JC", the JC Chairman must immediately call a "special or

emergency meeting of the JC" (which could be a telephonic or conference audio or video meeting) acknowledging the notice.

**Explanation of the blocks of Figure 4-2 for Phase 1, Step 2 "Notify" (Block Nos. 4-8):**

4. The JC must immediately review the notice and supporting information to determine if a serious TBFI or other TBIDD has or might occur. The JC now has three decision choices: No the incident is not serious, Don't Know if it is serious, or Yes it is serious.

5. If **No**, the JC prepares a report of its findings and sends the report to the notice submitting member State and informs all other member States and Council of it decision. The Council must go into emergency session (conference audio or video call acceptable) to review the report of the JC.

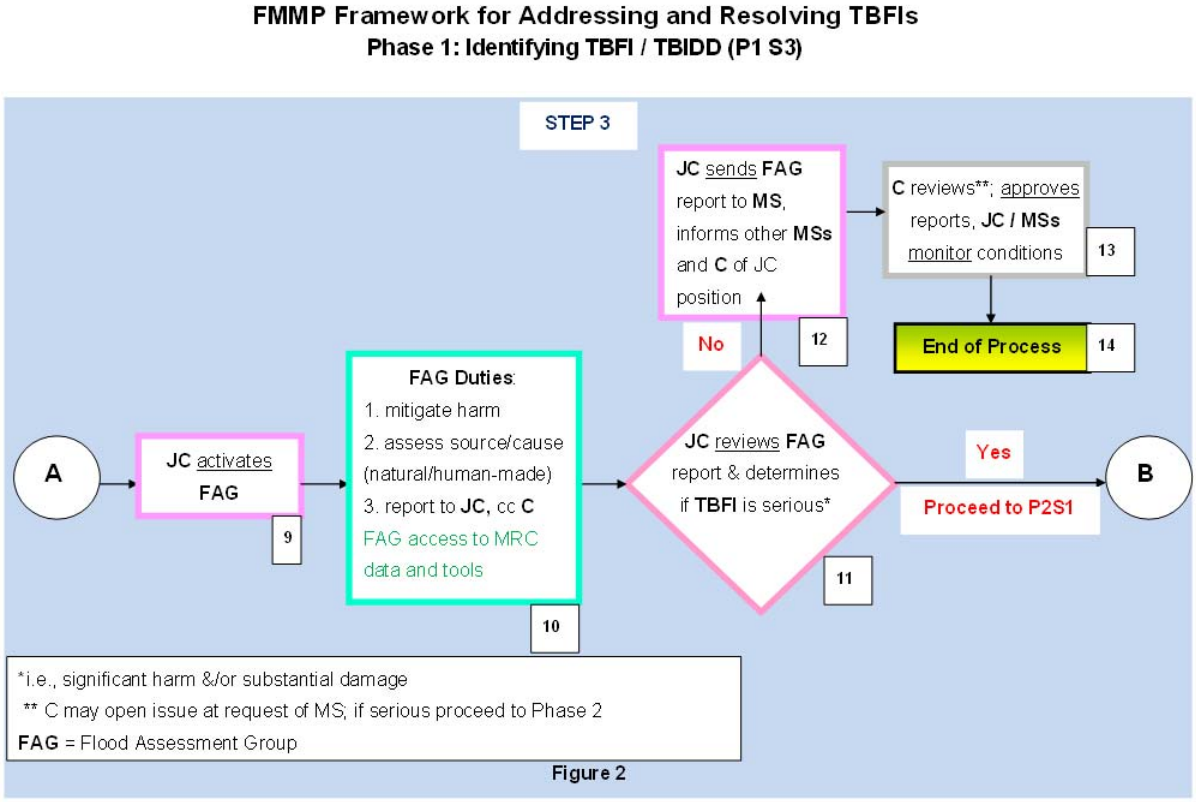
6. If the Council approves the findings of the JC on the matter, it informs the JC and MSs and directs the MRCS to monitor the situation and agreement between the JC and notifying member State.

7. If the Council does not approve the JC findings or considers inadequate information, it informs the JC and directs remedial measures. If the Council approves the JC findings and after informing the JC and MS, that is the **end of the process** on the notified incident.

8. If **Don't Know**, the JC informs the MRCS CEO and MS submitting the notice that it needs immediately more data and information to conclude its findings. The CEO and MS would gather the additional data and information and proceed from block no. 2.

**If Yes, the Framework process would proceed to Phase 1, Step 3 (Figure 4-3).**

**Figure 4-3: Framework- Phase 1: Identifying TBFl / TBIDD (P1 S3)**




**Explanation of Figure 4-3 Phase 1, Step 3: Acknowledge** (Block Nos. 9-14):

9. In finding **Yes** that a serious TBFI or other TBIDD does exist or could occur, the JC would immediately activate the Flood Assessment Group (FAG). See Footnote 1.

10. The duties of the FAG are to immediately review the TBIF/TBIDD notice and information to: 1. provide the JC with options to mitigate any harm to affected member States, 2. to assess the source or cause of the real or perceived harm as natural or human-made, and 3. to inform the JC by written report as soon as possible of its findings and copy the Council (via the MRCS CEO). In carrying out its assessment, the FAG can have access to and should use the data and information and tools of the MRC maintained by the MRCS.

11. The responsibility of the JC is to immediately review the FAG findings and conclusions to determine if the alleged TBFI/TBIDD is serious. The criterion to be applied by the JC is if the real or perceived incident (or accumulations of incidents) has or may cause significant harm and/or substantial damage to one or more of the other member States. The JC has two options: **No** serious incident or **Yes** there is a serious incident.

12. If **No**, the JC sends the FAG report and JC's decision to the notifying member State and informs the other member States and Council.

13. The Council reviews the JC submission and if accepts and approves the JC decision and FAG report, adopts a resolution acknowledging the issue and informs the JC and member States of their decision. The JC, MSs and MRCS monitor the situation to insure no danger of harm or damage. The Council may also open the issue for more detailed discussion at the request of a Member State and proceed in addressing the request according to its ROPs.

14. When Council accepts JC and FAG findings and conclusions that is the **end of the process.**

If **Yes**, the Framework process would proceed to Phase 2, Step 1 (Figure 4-4)

### 4.2.2 Phase 2 Steps of Assessment, Conclusion, Selection of Approach/Mechanism and Resolution

Under any of the three scenarios above in which an incident may be identified, the notification of the parties has to include a notification to the JC via the OCEO, and acknowledgement of the parties of the reported incident. This will either bring the concerned parties together to pursue their obligations under Article 8 to determine if substantial damage has occurred or is likely to occur, or to inform the JC to call the parties together to carry out a similar assessment the incident and situation (in the event it is not a purely Article 8 incident, e.g., it may be an incident arising under other articles of Mekong Agreement or actions taken independent of providing prior notice of such actions). The MRCS should be instructed by the JC to provide necessary data, information, model analyses and outcomes, and other tasks to facilitate the assessment.

Once the incident and situation has been assessed, the courses of action and mechanisms should be reviewed and selected. If the concerned parties choose to attempt resolution amongst them, they will have basically the same approaches/mechanisms available to them as would the JC. If the JC is to take charge as provided under Articles 24F and 34, the approaches/mechanisms available to it are the following:

1. Avoid the incident – assuming that harm or interference of rights or interest have not yet occurred and can be avoided.

2. Mitigate through consultations of the impact of the incident – whether or not the incident has or will cause harm or interference to the rights or interests of another riparian, mitigative or remedial action may be identified, consultations take place and agreed upon.

3. Negotiation and conciliation – if after an assessment of the incident the parties can not readily come to agreement on avoidance or mitigation, the JC (or the concerned parties) can begin an amicable process of negotiation and conciliation for resolution.

4. Fact-finding and mediation - some incidents may be sufficiently complex or controversial as to the nature, cause, intensity of impact and/or solutions that the JC and/or the concerned parties wish to have a fact-finding step in the process of reaching a conclusion as to the incident and to facilitate coming to a resolution of the incident. The MRCS may be directed to assist the JC and concerned parties with data, information, analyses and to facilitate in the negotiations. The JC has the authority to seek outside technical assistance, which it may do, and could even offer such technical assistance to the concerned parties. As part of this technical assistance, the JC could even engage the services of a mediator as a neutral 3rd party to facilitate in the negotiations, fact-finding and resolution of the incident. In this regard, it is not recommended that the MRCS as a body of the MRC, the CEO nor any MRCS staff member serve in the capacity of a mediator. To do so very well may compromise the integrity of the MRCS/CEO/staff as serving the interests and needs of the MRC and member countries.

Once the JC and/or concerned parties have selected and pursued one or more approaches/ mechanisms to address and resolve the incident, and have reached a mutually satisfactory agreement on the resolution, the JC would address at its regular meeting or call a special meeting to prepare a "resolution statement" in the JC minutes of the meeting that would be formally endorsed by the JC and forwarded to the Council for notice of incident and resolution and the terms of resolution. In the event that the concerned parties have come to agreement on their own, they would prepare a joint statement of incident, resolution and terms of resolution and submit it to the JC for endorsement and forwarding to the Council.

In the event the concerned parties and the JC have not been able to resolve the issue of the incident, the JC would prepare a statement of incident, including facts and processes applied to address and resolve it, and refer the matter to the Council in accordance with Article 24F.

The Council will assume jurisdiction over the incident referred to it by the JC or may entertain, address and attempt to resolve any issue, difference or dispute referred to it by any Council member or member State in accordance with Articles 18 C and 34. After assessing the incident of the issue, difference or dispute, the Council can proceed with the same four approaches/mechanisms outlined above for the JC. In the event the Council can conclude a mutually satisfactory resolution of the incident, the Council would issue a resolution in its minutes of the issue, difference or dispute, providing sufficient information and facts on the nature, impact and agreement in its resolution statement.

In the event the Council cannot resolve the incident of the issue, difference or dispute in a timely manner, the incident will be referred to the respective Governments to address and resolve the matter in accordance with Article 35 of the Mekong Agreement.

Up to this point, the MRC is operating under the mandate and authority of the Mekong Agreement particularly with respect to Articles 7, 8, 10, 18C, 24F and 34. The roles and

inputs of the concerned parties, the relevant NMCs and line agencies, the Council and Joint Committee should be easily understood and applied.

In this regard, it is recommended that the role and input of the MRCS be clarified and elaborated on to not only include facilitation of the process of identifying, addressing and resolving incidents of contentious issues, differences or disputes, but also to have a responsible role and function to keep records and issue timely reports (if more than annual reporting to the JC) of the nature and timeline of the incident, analyses of incidents, resolutions and terms, and monitor data and information to facilitate knowledge of the parties that the resolution agreed upon is working satisfactorily and sustainably for the concerned parties and the MRC in general. It is recommended that to effectively carry out this function, it not be a task arbitrarily assigned and added onto an existing post, but rather a position/post be created or expanded upon to serve as the focal point within the MRCS on identification by other MRCS staff , posts or programmes; informing the OCEO of an MRCS anticipated or actual incident, facilitating the JC and concerned parties through coordination within proper units of the MRCS, and recording, reporting and monitoring of incidents and resolutions. An additional function of this post would be to prepare standardized format and forms for notification, acknowledgement, addressing and resolving incidents for use by the MRC, NMCs and member States.

The five steps of Phase 2 are:

1. Assessment of incident
2. Conclusion on veracity of incident
3. Selection of Approach/Mechanism to address the incident
4. Resolution of Incident or next step by JC and/or Council
5. Recording, reporting and monitoring by the MRCS

The five steps of Phase 2 may be cause for concern as to how to proceed. Step 1 call for an assessment of the incident. That can be undertaken jointly by the parties concerned or through a “fact-finding” mission or survey facilitated by the MRCS. For the latter to act, it is advisable that the CEO obtain consent of the JC, and depending upon the funding to be used, it may necessitate obtaining consent from the international donor if the funds used go beyond the activities and expenditures authorized under the project.

If the fact-finding mission or the parties present data and information verifying the veracity of the issue, difference or dispute, it should be presented to the JC for their view and endorsement and informing the Council of the matter. Under Article 24F, the JC should make every effort to address and resolve the issues and differences before turning the matter over to the Council. The concerned parties, the JC or the Council has at their disposal a wide range of approaches and mechanisms from expert panel, facilitation, negotiation, to mediation.

What is often of concern by a riparian is whether their actions or the cause of another’s actions meets the two criteria applied in the MA95, e.g., “significant impact on mainstream flows” and “substantial damage”. With regards to these two criteria, two points are offered:

1. These two criteria should not be applied in the identification of an issue, difference or dispute; what is significant or substantial can only be addressed and resolved through examination of data and information available to the MRC and gathered at the occurrence of the incident; basically the effort carried out under Phase 2 Step 1.

2. These two criteria are not open to general application.
    a. The matter of significant impact on mainstream flows stated in the Chapter 1 definition of proposed use is prefaced by "excluding domestic and minor uses of water not having a" and it is not stated or repeated anywhere else in the Agreement. Therefore, the definition applies to the implementation of Article 5 on reasonable and equitable utilization of water. Since prior uses of water are protected under the Agreement and international law, the only uses to which the definition applies are proposed uses.

    b. The matter of substantial damage is not how others view the impacts from an incident, but on how serious the damage is to the impacted party/ies. This issue of damage is not one for other riparians to set the criteria as to what is or is not substantial; that is up to the damaged party as to what is or is not substantial, which may include adverse impacts on its inhabitants, economy, environment as well as its rights and interests in the waters of the Mekong River system. Once the damaged party has made its position for substantial damage, then other concerned parties can respond as to the reasonableness of the claim. This now takes on another characteristic for the parties to discuss in addressing and resolving a contentious issue, difference or dispute.

The remaining 4 steps under Phase 2 are briefly covered in the LA-MA95, but it is important to discuss them here to insure that a systematic, transparent and mutually fair treatment is afforded all parties. After the data and information has been gathered and observations and analysis made, it is important to maintain harmony amongst the parties to conclude if there is a sound basis to take corrective measures or whether the incident is from natural occurrences, could not be avoided, is really of a minor nature, etc., i.e., to determine the veracity of the incident. The matter is now before the JC, and thus it is incumbent upon the JC to decide or conclude the merits of the issue. The concerned parties themselves may reach a conclusion on this point and so inform the JC Chairman. If the parties can reach a mutually acceptable conclusion, it may provide a resolution to the issue, and the JC can direct the MRCS to record the conclusion and report that the issue is resolved.

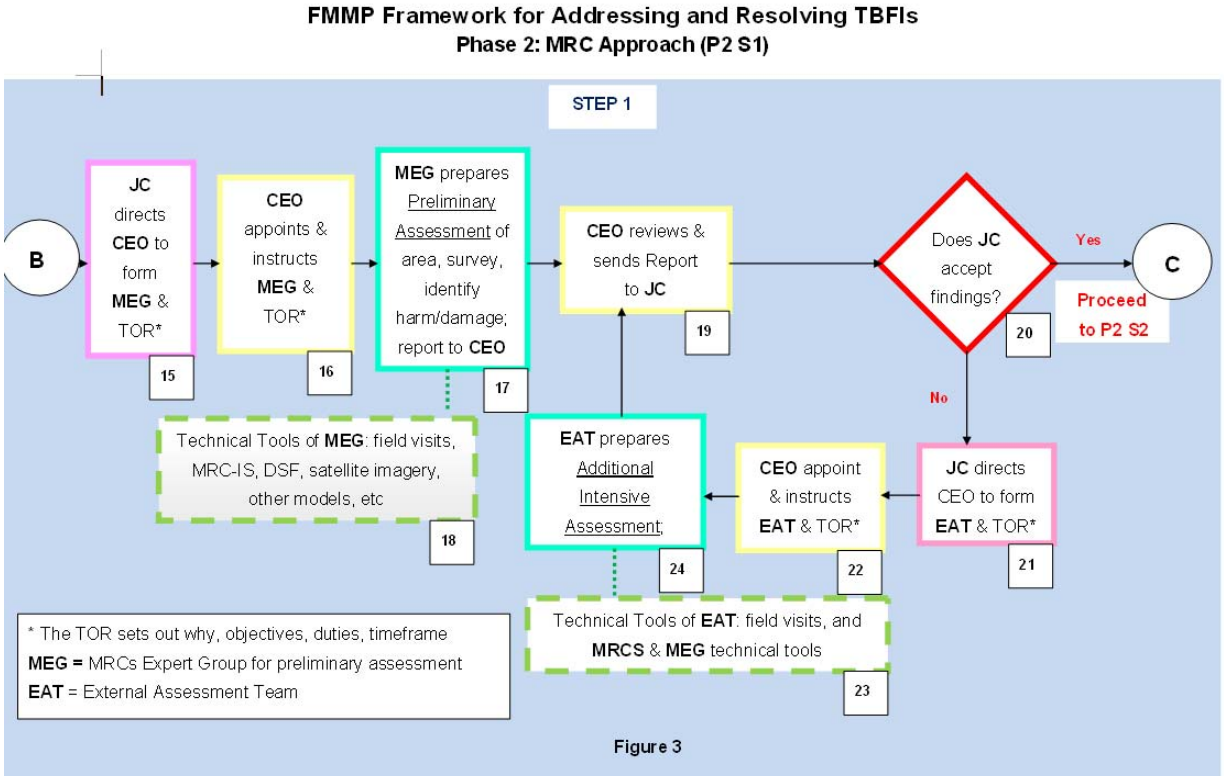
If the issue is determined to have merits and the concerned parties have not been able to reach a consensus on how it can be resolved, the JC would move to step 3 of Phase 2: Selection of Approach/Mechanism to address the incident. Article 24F states that the JC shall "address and make every effort to resolve issues and difference that may arise …" In Article 8, it clearly emphasizes that the "concerned party(ies) have an important role in addressing and resolving issues, differences and disputes, so it would be reasonable for the JC to inquire of those concerned parties which approach or mechanism they mutually favour to address the

incident. They may conclude a preference of bi-/multi-laterally addressing and resolving the matter, or they or the JC may consider a step-wise approach beginning with negotiation assisted/facilitated by the MRCS, bringing in a mutually acceptable third party to mediate the issue with the parties and JC making the conclusion on resolving the matter, or, depending upon the nature of the incident, the JC may propose arbitration or refer the matter to the Council for further deliberations.

This latter point is step 4 of phase 2 and primarily insures addressing and resolving the incident in a timely and satisfactory manner, first by the JC if possible on issues and differences, and second by the Council under Article 18C with regard to addressing and resolving issues, difference and disputes referred to it by the JC, or by another Council member or member State. The Council has all the approaches and mechanisms to address and resolve IDDs available to the JC plus the ability to address the matter at a higher level that includes policy matters. For the Council, a key element is for the Council members of the concerned parties to mutually agree to proceed with a selected or step-wise approach in an effort to resolve the matter. If those Council members do not agree, it is unlikely that the Council can resolve the issue, difference or dispute in a timely manner and therefore, the Council would have to conclude that Step 1 of Phase 3 be adopted to refer the matter over to the respective governments to address and resolve. At this point, the matter is no longer under the jurisdiction and responsibility of the MRC Council, but rather to activate the provisions in Article 35 of the MA95.

Regardless of the outcome at the JC or Council levels, the final step of phase 2 is the recording, reporting and monitoring responsibilities by the MRCS. The Secretariat serves as secretary to the Council and JC meetings for taking minutes and reporting of discussions and outcomes of those meetings. The MRCS has a host of other responsibilities to maintain the MRC-IS, DSF, BDP and other programmes that require monitoring and reporting, and therefore, in order render the technical and administrative services to the Council and JC, it will be incumbent upon the MRCS to monitor the conditions of the incident and resulting impacts. This may be part of its facilitating role, but more importantly, it should also be a direct result and reporting in accordance with the resolution of any IDD.

**Figure 4-4: Framework – Phase 2: MRC Approach (P2 S1)**




**Explanation of Figure 4-4: Phase 2, Step 1 of MRC Approach: Assessment** (Block Nos. 15-24)

15. JC directs the MRCS CEO to form or activate the Mekong Expert Group and prepare a TOR for investigation and assessment of this incident. See Footnote 2 for MEG explanation.

16. The CEO appoints or activates the MEG (if previously appointed and approved by the JC), designates one of the team members as MEG team leader for this assignment, and submits to the MEG team members the TOR for this preliminary assessment.

17. The MEG prepares a preliminary assessment of the alleged TBFI or other TBIDD area, conducts a field visit survey of the area, identifies any harm or damages that might have occurred if a real incident or could occur if a perceived/anticipated incident, and submits a report of its findings and conclusions to the CEO.

18. In carrying out its assessment work, the MEG will have unlimited access to the MRC/MRCS data and information (MRC-IS and other databases), the DSF and other analytical models, satellite imagery and MRCS support for field visits and discussions with concerned parties.

19. Upon receiving the MEG report, the CEO will immediately review the report and submit the MEG report and CEO comments to the JC.

20. The JC needs to quickly review the findings and conclusions of the MEG and CEO, and decide whether to accept (**Yes**) or reject (**No**) the report's findings and conclusions.

21. If **No**, that is that the JC rejects the MEG report, the JC instructs the CEO to form the External Assessment Team (EAT) and prepare its TOR for this assignment.

22. The CEO immediately appoints the EAT from the JC approved and available external experts, designates a team leader, and instructs EAT to review and carry out the TOR. The TOR covers at least the following: why the additional assessment, objectives of the mission, duties of the EAT members and timeframe to complete their assessment and submit their report of findings and conclusions to the CEO.

23. The EAT is provided access to MRC/MRCS and MEG technical and analytical tools in addition to technical tools of EAT members and is to conduct field visits to sites of incident and occurrence.

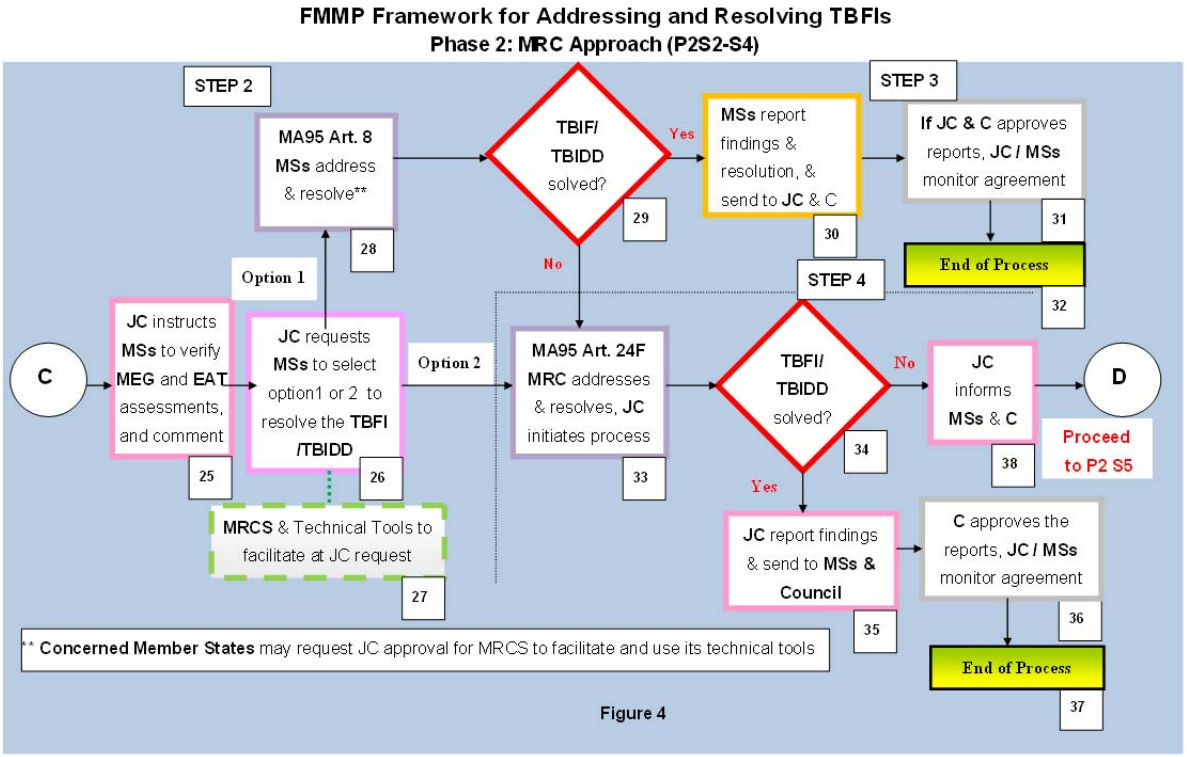
24. The EAT undertakes its assignment in carrying out the additional intensive assessment of the alleged TBFI or TBIDD as directed in the TOR, prepares the EAT report of findings and conclusions and submits it to the CEO.

25. As in block no. 19 above, the CEO reviews the EAT report and submits it with CEO comments to the JC.

26. The JC reviews the EAT findings and conclusions and comments of CEO. If the JC rejects the EAT report and CEO comments, the JC can instruct the CEO to appoint another EAT or can formulate its own findings and conclusions acceptable to all JC members.

If **Yes**, that is the JC accepts the MEG report or the EAT report findings and conclusions, the Framework process would proceed to Phase 2, Steps 2-4 (Figure 4-5).

**Figure 4-5: Framework - Phase 2: MRC Approach (P2S2-S4)**




**Explanation of Figure 4-5, Phase 2, Step 2 of MRC Approach: Confirmation (Block Nos. 25-28):**

25. JC submits the MEG report (and EAT report if constituted) to the Member States and instructs each to confirm the assessment findings and conclusions and to submit their comments back to the JC in a stated time period (e.g., 5 days).

26. The JC requests the concerned parties to mutually agree in selecting one of two options to be employed in resolving the TBFI or TBIDD.

27. The JC may request the assistance of the MRCS and its technical and administrative tools to facilitate in preparing and formulating the options available to the concerned parties.

28. Under Option 1, in accordance with Article 8 of the MA95, the concerned Member States agree to address and resolve the alleged TBFI or TBIDD themselves. A timeframe for Option 1 must be agreed upon by the concerned parties and JC. The concerned parties may request the JC to approve of MRCS facilitating their option 1 process and using the MRC technical tools. If agreeable to the JC, it will instruct the MRCS CEO on extent of facilitation and use of technical tools, including costs involved.

**Explanation of Figure 4-5, Phase 2, Step 3 of MRC Approach: Select Option/Approach (Block Nos. 29-32):**

29. Under Option 1, it is essential to determine if the TBIF/TBIDD has been resolved. If Yes, proceed to block no. 30. If No, proceed to Step 4 block no. 33.
30. If Yes, the incident has been resolved, the concerned Member States prepare a report stating their findings and mutual agreement to resolve the matter. They jointly submit their report to the Council and JC through the MRCS CEO.

31. If the JC accepts and Council approves the report and mutual agreement on resolving the incident, the JC and concerned Member States will monitor compliance with the agreement.

32. With mutual acceptance and compliance, this is the end of the process to address and resolve the incident. The CEO will instruct relevant units of the MRCS to update data and information and monitor compliance to insure no MSs are harmed or damaged.

**Explanation of Figure 4-5, Phase 2, Step 4 of MRC Approach: Resolve or Refer (Block Nos. 33-38):**

33. If No, the incident has not been resolved or if the concerned Member States select Option 2, the process would proceed according to MA95 Article 24F under which the MRC has jurisdiction to address and resolve the incident with the JC initiating the process "*to make every effort to resolve issues and differences … on matters arising under this Agreement.*"

34. Under Option 2, it is essential to determine if the TBIF/TBIDD has been resolved. If Yes, proceed to block no. 35. If No, proceed to block no. 38.

35. If Yes, the JC and the concerned Member States have reached a mutual understanding and agreement to resolve the issues or differences. The JC prepares a report of the finding and agreement and sends/submits it to the Council and Member States.

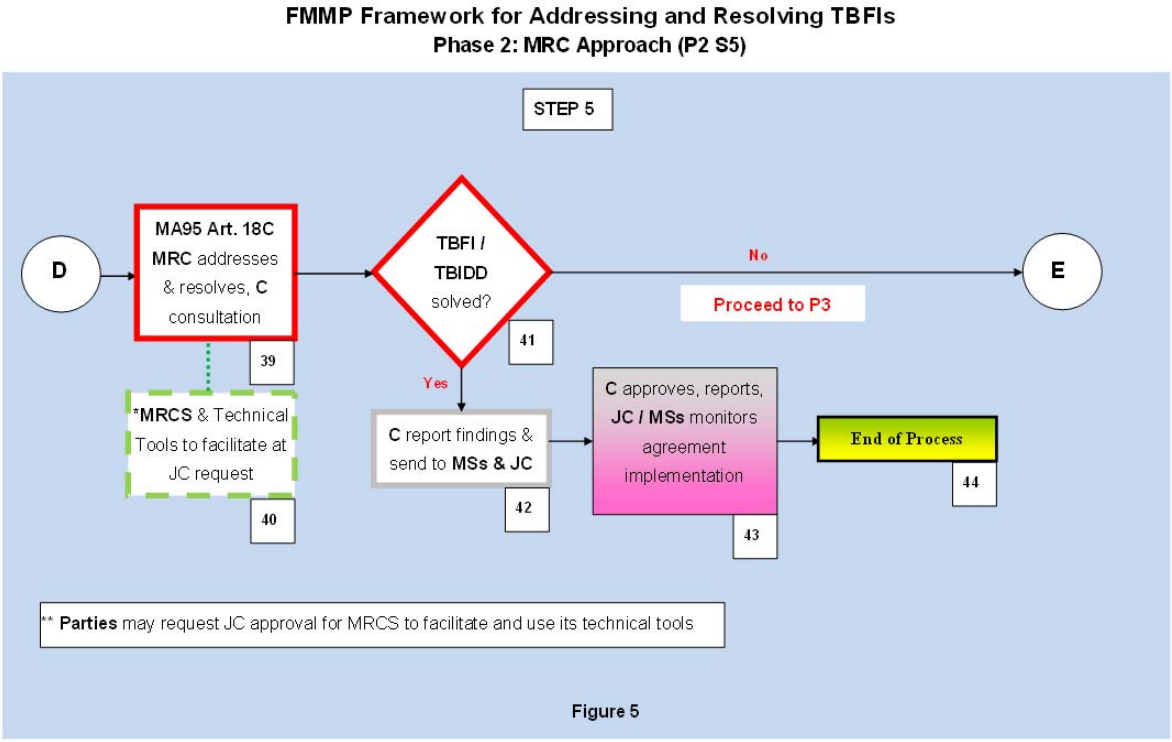
36. If the Council approves the JC report and agreement, it instructs the JC (via the MRCS) and Member States to monitor and periodically report on compliance. If the Council does not accept the findings and/or agreement, it instructs the JC on how to rectify the matter and report back to the Council.

37. Once the Council approves the JC report on resolving the matter, the process is ended.

38. If No, the JC informs the Council and Member States that no resolution was reached and submits the matter to the Council in accordance with MA95 Article 24F.

**If No, the Framework process would proceed to Phase 2, Step 5 (Figure 4-6).**

**Figure 4-6: Framework - Phase 2: MRC Approach (P2 S5)**




**Explanation of Figure 4-6, Phase 2, Step 5 of MRC Approach: Record, Report & Monitor (Block Nos. 39-44):**

39. If **No**, the incident has not been resolved by the JC under MA95 Article 24 and the JC submits the matter to the Council, the process would proceed according to MA95 Article 18C under which the Council has jurisdiction to "entertain, address and resolve issues, differences and disputes referred to it … on matters arising under this Agreement". Then Council would initiate consultations with the Member States and may request the JC to assist in the consultations.

40. The MRCS may be requested to facilitate the efforts of the Council to address and resolve the TBIF/TBIDD and to utilize its technical tools, models and data and information system.

41. It is essential to determine if the TBIF/TBIDD has been resolved to the satisfaction of the MRC and Member States. If **Yes**, proceed to block no. 41. If **No**, proceed to Phase 3.

42. If **Yes**, the Council and concerned Member States have reached a mutual understanding and agreement to resolve the issues, differences or disputes. The Council directs the JC to prepare a report of the finding and agreement and sends/submits it to the Council and Member States.

43. The Council formally accepts the report and agreement by resolution of the Council, and instructs the JC (via MRCS) and Member States to monitor and record implementation of the agreement and periodically report on compliance.

44. With the mutually satisfactory resolution of the matter, the **process is ended**.

**If No, the Framework process would proceed to Phase 3 (Figure 6)**

### 4.3 Pursuing TBIDDs Bi-laterally or Government-to-government: Phase 3 Steps for Referral of Issue to Governments and Governments Options to Resolve

What are the options and processes for avoiding, mitigating, addressing and resolving TBIDDs on a bi- or multi-lateral government-to-government basis by MRB riparians before or under the MA95 and other MRC documents? The LA-MA95 Chapter 5 elaborates on government-to-government informal or formal actions prior to any MRC declaration for the parties to proceed under Article 35 of the MA95, or in the event the MRC cannot resolve the matter and refers it to the respective governments.

Under Articles 7 and 8 of the MA95, the parties concerned are encouraged to identify, consult and resolve any contentious issue that has or may cause harmful effects and substantial damages. This is an option available to the MRC member States under the MA95, as well as being sovereign nations in protecting their rights and interests (territorial integrity) and the corollary of fulfilling their responsibilities. This is a fundamental principle of the sovereignty of nations – RIR - that is a basis of international law, the foundation of the UN Charter, and enshrined in the MA95. In asserting one's rights and interests, it is the responsibility not to violate the rights and interests of another party. Due to the fugitive nature of water resources by force of gravity, water arriving in one state from precipitation in a diffused state, becomes the object of right and interest of another when it accumulates into a "body" and moves to another states or is the common boundary between states, i.e., the water becomes transboundary and is often described as a "shared resource" of the riparians. Nations recognize the benefits and harmful effects of water in its "natural" state by not extending "state responsibility" to the occurrences of flooding or droughts.

The internationally accepted practice of riparians cooperating to avoid, minimize and mitigate the adverse affects of floods and droughts has been a focal activity of the MRC and its predecessors from inception and a fundamental objective and principle of the MA95. These natural occurrences are often referred to as "acts of god" or force majeure to which no riparian can predict or be held accountable. Sharing data, early warning systems, projections and forecasts, and establishing national disaster committees and programs are common and well entrenched in the LMRB countries, especially through the MRC. Due to the near non-predictability of rainfall patterns that accumulate into flood conditions, it is a responsibility of every riparian to inform the river system riparians of conditions that may precipitate flooding at dangerous levels. Why inform an upstream riparian? Because with advanced analytical capabilities and modern technology all riparians can participate in mitigating the adverse

affects of flooding through retention of flows by upper riparians for delayed release in order to “make way” for increased water from flooding. Through cooperation, communication and coordination, an effective basin flood management program can, and in the MRB, may already exist. Each riparian has an expectation that it and other riparians will act responsibly and in good faith to the extent of their capabilities to protect the rights and interests of each other from natural occurrences.

There is generally no “state liability” for responsible and reasonable action as a riparian. There is greater likelihood be state liability for failure to give timely notice in a responsible manner, or for interference or interventions that cause other riparians to experience harm and damage greater that would normally occur.

State responsibility and hence liability, however, may occur from development of the water resources off-stream to include inter-basin diversions, in-stream and on-stream (OIO), if the use or interference of flow unreasonably interferes with the rights and interests of another riparian. The MA95 has put into place many safeguards to avoid causing this kind of adverse affect through the BDP, Procedures for proposed use, environmental standards and use of EIAs, SEEIAs, etc. and a wide range of programs to facilitate development (navigation, irrigation, hydropower, fisheries, etc.) and sustainable use of water as an input and as a medium for development. Through the forum of the MRC, mechanisms are in place to share information, keep all riparians informed of proposed uses of water so that measures can be taken before hand to prevent interference with the rights and interests of other riparians while at the same time, acknowledging the rights and interest of the proposing party. These objectives, principles and procedures have been identified in the MA95 and elaborated on by the actions of the MRC and member countries. In theory, avoidance and mitigation are a part of the cooperation of member states for man-made interventions in a manner similar to natural occurrences. This requires the parties to act in a responsible, timely and amicable manner, as stated in Chapter 1 of the MA95. The MRC has the flexibility to add new actions and mechanisms that would improve its capability to better serve the interests of its members through a wide range of tools, including adding protocols to the MA95, ROPs, Procedures, training programs and capacity building, etc.

Yet, in spite of its best efforts and the good faith of all members, there may occur incidents that exceed the responsibility of one or more riparians and interfere with the rights and interests of other riparians, on the mainstream or shared “international” tributaries. Regardless of the nature of the cause in most cases (that is, the cause is from a man-made activity or intervention regardless of what OIO activity), if the transboundary impact is adverse to the rights and interests of other riparians, it is a least a contentious transboundary issue and can at worst become a transboundary dispute. Fortunately, in the LMB, all four countries have effective MOFAs and maintain good neighborly relations, so many incidents can be mutually discussed informally to ascertain the cause and effect, and ratchet up from informal to formal inquires and efforts to negotiate a solution. This is not only a preferred method in the LMB but almost a global preference of at least initially discussing a contentious issue amongst concerned parties, and then proceeding to more formally address the situation depending upon

data and information available and needed, etc. This willingness to cooperate is evident amongst the MRC member States as seen by the cooperation and on-going efforts of Lao PDR and Thailand on the bank erosion and protection of the Mekong River, by Cambodia and Viet Nam on border tributaries, etc.

The MA95, and to date the practice of non-interference of the MRC with bi-/multi-lateral efforts to mitigate and otherwise resolve causes of harmful effects, encourages this "government-to-government" approach. Section 3.3 above verifies the many efforts and successes of the LMRB riparians in this regard. What is not sufficiently clear is to what extent the MRC can facilitate in these efforts. And the option is always available for the concerned parties (or one of them), to bring the issue before the JC and/or Council to formally request the MRC assistance to address and resolve the issue under the MA95.

There are many questions on the rights and obligations of a riparian in pursuing a TBIDD on a bilateral or government-to-government basis for which a short response is provided:

- If this is a right of a sovereign nation, why include the provisions in the MA95?

  Response: to enable and encourage the member countries to consider all options with the knowledge that the MRC can be requested to participate in facilitating addressing and resolving TBIDDs through its various resources and broad based capabilities.

- What are the benefits and detriments to those provisions and others in the MA95?

  Response: the benefits of the provisions in the MA95 are that they represent a common acceptance and commitment of MRC member countries; the detriments may be that in order to avail itself to those provisions, there is a process that requires greater sharing of information and exposure to seek the best solutions of mutual concern.

- Why was the terminology of Article 7 focusing on the prevention and cessation of harmful effects that cause substantial damage instead of other terms like "significant" or "appreciable" damages?

  Response: For some international river basins and riparian countries, these three terms are used differently and the application and definition must be examined on a treaty by treaty basis. In the case of the MA95, substantial damage refers to the extent of damage that is measurable and must go beyond minor damage; significant is reserved for extent of impact as being significant as opposed to de minimus, used in the definition of a proposed use. What is substantial and what is significant are two different values; in the former, what is or is not substantial has nothing to do with the perspective of the non-injured party, only the injured party. But in the case of what is or is not significant is relative to some other standards and criteria that can be applied and arguably from the perspectives of the concerned parties. The term appreciable is

found in some agreements and arbitral and judicial awards. It implies an accumulative affect from a normal standard and provides the impression that a certain amount of harm or damage should be tolerated, but not if it becomes appreciable to the point of intolerance.

- Who has the burden of identifying the harmful effects and damages, and when is there a determination if the damages are substantial?

  Response: The party with the knowledge of an incident causing harm has the burden or at least the responsibility under international comity to inform the other concerned parties. Of course, often an incident occurs at the source but the adverse impact may not be experienced for some considerable time later and in a place far removed. It is the responsibility of a harmed party to raise the issue so that both parties can carry out their due diligence. In some cases, the incident may be premature to raise. There is a point in time when the incident is "ripe" for being raised, and beyond that point, the injured party may be accused of "sitting on their rights" by not timely raising the issue, and thus may lose the right of assertion. The determination of when the damages are substantial does not occur before the issue of the incident is raised; that determination is done only after the necessary data and information are gathered and analyzed.

- When is it necessary to begin an action with a notice, and how would this be carried out?

  Response: this is not a simple question to answer, as timing is very important to the relationship of the parties and the nature of the incident. If for example, the incident occurred out of the flagrant action of one party in disregard of the rights and interests of others (by some authors describe as hydro-hegemony), the reply may be immediate and forceful. But if it was an incident that occurred due to understandable oversight or even carelessness of one party, then the reply may be very tempered, informal, low keyed and low profile. This may change depending upon the relations of the parties and extent and frequency of harm.

- What law and practices can be applied?

  Response: International law, national law, and any of the other sources of "rule of law" set out in section 3.2.

- If and when can services of the MRC/MRCS be requested?

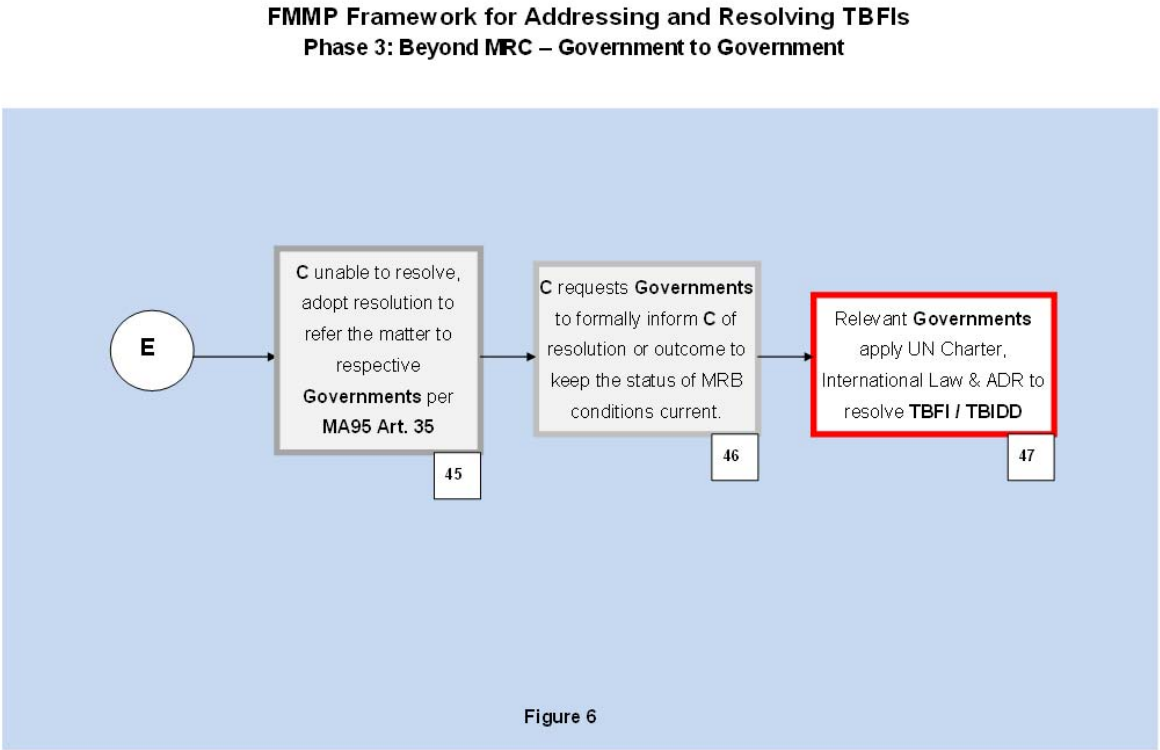
  Response: Anytime. The response to the request will depend upon the nature of the services requested, availability of personnel and funds, and if it is within the duties and functions of the Council, JC and MRCS. Whatever services are rendered must be impartial and knowledge mutually shared.

Based on the information presented in the national reports on the extent of bi- and multi-lateral agreements and arrangements, it is clear the four members of the MRC have an extensive history of working on particular issues and problem areas on a government-to-government basis, and are very capable of negotiating and reaching a consensus on issues of relevance to them. However, there has been limited experience in addressing transboundary water problems were concerns over the nature and extent of damage to one or more riparians resulted from the man-made actions of one or more other riparians.

As noted above, if the Council is unable to resolve the difference or dispute in a timely manner, in accordance with Article 35 of the Mekong Agreement, it shall refer the issue to the Governments of the MRC. The five steps of Phase 3 in summary are:

1. Council referral of incident to Governments
2. Governments concerned initiate resolution of the incident by negotiation through diplomatic channels, and may inform MRC Council of their decision
3. Governments concerned may proceed to mediation if diplomatic channels unsatisfactory or it concluded mediation is necessary or beneficial to issue resolution.
4. If diplomatic channels or mediation unsatisfactory, the parties would then be able to pursue resolution according to international law principles, namely arbitration and/or adjudication/litigation.

**Figure 4-7: Framework - Phase 3: Beyond MRC – Government to Government**




**Explanation of Figure 6: Phase 3, Beyond MRC: MA95 Article 35 - Government to Government, Step 1 by MRC Council: (Block Nos. 45-47):**

45. The MRC Council is unable to satisfactorily resolve the TBFI or other TBIDD incident raised by notice under Phase 1, Step 1, block no. 1 in a timely manner, and adopts a Council Resolution to refer the matter to the relevant/concerned governments under MA95, Article 35 to address and peacefully resolve.

46. The Council requests the relevant governments to inform the Council of their decisions and actions /outcomes in order for the MRC to keep current the status of the MRB. Governments may also communicate their decision to the Council for further proceedings under the MA95 as necessary to carry out their decisions.

47. In addressing and resolving any TBFI or other TBIDD referred to them by the Council, as provided in MA95 Article 35, the governments may apply provisions of the United Nations Charter and other international law as well as the range of alternative dispute resolution options.

Additional Explanation of Phase 3, four steps or courses of action/options are suggested for the Governments to consider based on MA95 Article 35 (beginning with Step 2; Step 1 is set out as block numbers 45-47) :

- Step 2: Governments apply diplomatic channels to negotiation a resolution to the TBIDD and may inform the MRC Council of outcomes.
- Step 3: Governments apply mediation is negotiation is not successful.
- Step 4: Governments resort to arbitration or adjudication under international law.
- Step 5: Recommended any resolution or conclusion under Article 35 be officially communicated to MRC Council for incorporation into decisions and actions of the MRC.

It is recommended that all four governments be informed of the issue or incident as above termed, because any issue, difference or dispute that cannot be resolved by the JC and Council is or should be of great concern to all member States. It is the responsibility of the governments concerned to acknowledge and take cognizance of the issue referred by the Council. At this point, the matter is no longer in the hands of the MRC.

The Governments concerned have a number of approaches/mechanisms that they can discuss and select from. The first is to seek resolution by negotiation through diplomatic channels. This would normally engage their Ministry of Foreign Affairs through procedures and processes well established and understood by them. If the Governments concerned are able to resolve the issue, they "may communicate their decision to the Council for further proceedings as may be necessary to carry out such decision." as provided in Article 35. It would be assumed that the Council would take cognizance of the decision of the Governments and adopt a resolution in their minutes with instructions to the Joint Committee follow-through. The JC would be expected to inform the MRCS as to what tasks they are to perform,

including recording, reporting and monitoring the conditions surrounding the resolved issue for compliance, and routinely inform the JC of its actions and findings.

The next option for the Governments should diplomatic negations fail, as further provided by Article 35, if they conclude it necessary or beneficial to a resolution and by their mutual agreement, seek the assistance of mediation through an entity or party mutually agreed upon. As noted in the preceding chapter, since mediation is a specific approach/mechanism agreed to in the MA95, and is generally considered a more amicable approach to addressing and resolving contentious issues, differences or disputes that arbitration or adjudication/litigation, a number of reports included in Annex 1 and Annex 2 provides detailed information into the nature and process of mediation. The reader is specifically directed to Annex 1 Report 1 Chapter 4 on Mediation, and Annex 1 Report 6 Chapter 3 on Transforming Conflict into Agreement: Means and Mechanisms. These references to the mediation approach would likewise be useful for the Joint Committee and Council, should they wish to utilize this approach during their efforts to resolve the issue.

Should mediation be unsuccessful or not mutually chosen the Governments concerned, Article 35 concludes by encouraging the Governments "to proceed according to the principles of international law." As noted in Chapter 4 of this working paper, this presents the Governments with at least two options for peacefully settling the issue. The first is arbitration and the second is adjudication or litigation before an international tribunal. Again, this working paper will not go into how or why the mechanism is chosen or the process, as this is a matter for the respective Governments and their Ministries of Foreign Affairs. Annex 1 reports contain considerable material on international practices and results utilizing these two mechanisms.

Whatever the outcome of resolution of an incident issue, difference or dispute under Article 35 of the Mekong Agreement, that outcome would most likely impact the interest and necessary actions of the MRC. Therefore, it is recommended the Governments concerned do make a communication with full details of terms in any resolution they may come to through diplomatic negations, mediation, arbitration or adjudication. The MRC, through the Council and Joint Committee will need to assess the impact of the outcome and provide necessary instructions, directions and task for the MRCS and NMCs. The MRCS post proposed above would record the outcomes, and the MRCS may carry out analyses and specifically closely monitor necessary conditions and parameters of data and information. The MRCS would also inform the JC, at least annual in its report to the JC, of the conditions and impacts.

Article 35 resolution of incident would/should be communicated to MRC Council for incorporation into the activities of the MRC in accordance therewith.

### 4.4 Possible Roles and Involvement of MRCS

The involvement of the MRCS in the pursuit of a TBIDD under either the MA95 framework or if concerned parties wish to pursue the matter through bi- or multi-lateral negotiations and solutions, depends upon: the stated mandate of the MRCS, authorizations extended by the JC in overseeing the MRCS on behalf of the MRC and member countries, and the competency of the MRCS. If within the mandate or authorization extended by the JC, the MRCS through the Office of the CEO can provide information and data, carry out analysis of situations, review documents like feasibility studies and damage assessments, discuss options to addressing and resolving contentious TBIDDs and respond to direct requests from member countries.

The MRCS is an impartial body of the MRC and the CEO is obliged to keep all member countries through the JC members informed of its activities and responses to requests from member countries. Requests for services should be submitted in writing to the CEO. The CEO can determine if authority to comply with the request exists or if authority should be sought from the JC. In any event, the JC should be kept informed of the actions of the CEO and MRCS in receiving and responding to requests from member countries.

# Chapter 5 Pursuing TBIDDs between MRC Member Countries and Upper Riparians

## 5.1 Foundations, Legal Obligations, Considerations of RIR

What are the options and processes for avoiding, mitigating, addressing and resolving TBIDDs under international law by the MRC or member countries of the MRC in the event a cause of the TBIDD is due to actions in of the upper riparians (China and/or Myanmar) or in the event either of the two upper riparians raise concern over their rights and interests being adversely affected by actions of downstream riparians? For example, what are the rights and interests exercised by one or lower Mekong River riparians could be exerted to limit the rights and interests of one or both upper riparians.[15] In general, since China and Myanmar are not signatories to the Mekong Agreement, they are not bound by its provisions. But they are dialogue partners, and therefore have an opportunity to raise and discuss any issue of concern to them, and conversely, for any MRC member State through the Chairman of the Council or their Council member at the annual Dialogue Partner meeting.[16]

International customary law would be applicable in any contentious issue, difference or dispute that might arise between the MRC and/or any member State of the MRC and one or both of the upper riparians. The UN Convention on Non-navigations Uses of Water was adopted by the UN General Assembly in 1997 with the four lower Mekong River riparians voting in favor, China voting against, and Myanmar not voting. However, since 1997 there have not been sufficient ratifications of the Convention by UN members for it to come into effect, with none of the Mekong River riparians ratifying the Convention. It can therefore be assumed that all Mekong River riparians have deliberately intended to apply customary international law on all shared freshwaters not covered by a Treaty such as the MA95 with respect to the Lancang-Mekong River.

The discussion on international law in Chapter 4 of the LA-MA95 and Chapter 3 of the EN sets out the framework that would be followed. Since all Mekong riparians are UN members, provisions of the UN Charter for peaceful settlement of disputes are of paramount importance. Because of the good neighborly relations that exist between China and the MRC member

[15] At the regional meeting in Ho Chi Minh City in August 2009, several countries expressed concern that this chapter may be seen by the one or both upper riparians as implying fault or liability upon them or the course of action that may be taken by the MRC or a member State. This is not the case as this is not a legal opinion on a course of action to be taken by any riparian, and it does not advocate that any riparian has or will violate the rights and interests of any other riparian nor are any riparians bound by the limits of this explanation of international water law. As no doubt every riparian will have access to this EN, Chapter 5 is informative of the foreseen RIR of all riparians, but responds to the specific issues raised during meetings on contents of the EN to cover in general the legal standing of MRC member riparians and non-member riparians of the MRB.

[16] The Dialogue Partner meetings previously were held every year immediately after the annual Council meeting, but now they are held the day prior to the Council meeting. This change in timing undoubtedly enables the annual Council meeting to take into account the discussions held during the Dialogue Partner meeting and take any action deemed necessary to address issues and proposals raised.

States, it is very likely that an amicable solution would be pursued applying one of the forms of ADR listed in Chapter 3, beginning with consultations and negotiations.

## 5.2 Range of Options

Basically there are two options for MRC member countries in addressing TBIDDs with the one or both upper non-MRC member riparians. Neither option should be carried out in or by the media; but the level of informality or formality would depend upon the nature of a real or perceived incident.

The two options are:

1. Proceed collectively through the MRC as it is an international river basin organization with status as a legal body fully subscribed to and supported by the four member countries; or
2. As sovereign nations riparian to the Mekong River Basin, each or a combination of the four countries can pursue a TBIDD on a government-to-government manner through their respective MOFAs.

These options are discussed in greater detail in the WP and EN. The level of informality or formality would depend upon the nature of a real or perceived incident and the posture of the countries involved. But it is recommended that neither option should be carried out by any country involved in or by the media as a tactic to gain leverage or advantage.

# Chapter 6 MRC Resources and Useful Tools

The MRC is mandated to implement the provisions of the 1995 Mekong Agreement in a cooperative, timely and amicable manner through its three organizational bodies: the Council at Minster level for policy and decision making; the Joint Committee at department head level for technical direction of the MRC and recommendations to the Council for adoption; and the Secretariat to provide technical and administrative service to the MRC. The MA95 identifies specific functions of each body and directs internal rules of procedures (ROPs) to be adopted by the Council and JC; ROPs have been adopted for all three bodies of the MRC. The Secretariat is directed and managed by a CEO and is under the direct supervision of the JC.

In addition to having representation of one member each on the Council and JC and an effort of equal representation of national staff in the Secretariat for each Member State, each country has established a National Mekong Committee with line-agency representation. The NMCs are not part of the MRC but rather are the communication and project/program implementation link between the MRC Secretariat and the Member State. The role of each body of the MRC and NMCs is fairly well established with elaboration of specific duties and functions in programmes and the procedures.

A number of procedures have been adopted as required by the MA95 or for specific programs that are internal documents of the MRC; most relevant to TBIDDs are the five sets of procedures developed under the WUP project that ended in mid-2008 to address Articles 5, 6 and 26 of the MA95. The MRCS has also adopted specific internal procedures to process submissions, comments and results from the Procedures and Guidelines for Notification, Prior Consultation and Agreement. The MRC has a strong capacity building platform with specific capacity building training in most of the programmes and a new Integrated Capacity Building Programme (ICBP) created in 2008. Capacity building activities strive to increase the capabilities and competencies of personnel of each Member State and units of the MRCS to most effectively implement the MA95.

However, most activities and programs of the MRC and NMCs are directed toward assessment and development efforts; in the past there have not been many occasions or needs for strengthening capabilities to address and resolve TBIDDs. The FMMP initiated the effort to more clearly identify potential areas of conflict related to flood impacts, but it was soon realized that such skills and training needs existed for a wide range of possible TBIs, not just flood related TBIs. It was concluded that legal and technical skills in identifying, avoiding, mitigating, addressing and resolving TBIDDs for adverse flood impacts are very similar to the needs in other programs and activities of the MRC where transboundary adverse impacts may occur, especially since many such TBIs are linked to other development activities or cumulative impacts.

The LA-MA95 and this EN encompass this broader application of conflict management in line with the provisions of the MA95. A brief review of the history of the Mekong agreements

and implementing bodies from 1957 to the present indicates the need for a dynamic interpretation of the current agreement and MRC organization to adapt to rapid physical, technological, economic and social changes taking place. The demands on water and related resources of the MRB are exponential and these demands place a greater challenge on maintaining acceptable environmental and eco-system conditions. What resources and tools does the MRC have available to meet these demands and challenges?

## 6.1 Assessment of MRC, Its Expertise and Resources

It is important to assess of the roles, capacities and resources of the MRC to carry out or facilitate identifying, addressing and resolving TBIDDs such as harmful flood conditions as provided in the mandate of the MA95. Being knowledgeable about these aspects of the MRC will facilitate understanding the perspective of a resource assessment and help identify areas of needs in a dynamic sense as real or potential transboundary incidents arise. A quick resource assessment goes one step beyond just looking at the available resources, expertise and tools and begins with who may be involved and their roles (the MRC and NMCs mainly); it attempts to acknowledge the separation of the decision-making expertise and resources from the technical and process expertise, resources, and tools. The SWOT analysis described below can be used to identify what expertise, resources and tools are available to manage, mitigate and address TBIDDs in general by category, and for any specific TBIDD. A SWOT analysis should address not only the technical and procedural requirements and availabilities, but also the financial requirements and sources of funds.

## 6.2 MRC Tools

The MRC has a wide range of tools at its disposal that can greatly facilitate identifying, addressing and resolving TBIDDs, many whose origin is described in Section 6.1.2. Most notably is the MRC-Information System (MRC-IS) that contains a wide range of data sets covering the most significant data and information needed to monitor, evaluate, plan and implement development projects, to assist the MRC and member States in carrying out IWRM at the levels of basin, region and nation, and to monitor the status or health of the MRB. The data is gathered by the MRCS IKMP from and shared with member States through national and MRC-shared gauging stations and other sources. The PDIES and PWUM required the establishment and maintenance of the MRC-IS; their respective technical guidelines and the permanent sub-committee of the JC insure these procedures are adequate and applied. This data and information is intended to be kept current, uniform and relevant for use by the MRC and member States.

The second important tool is the DSF with its suite of computer based simulation and analytical models and knowledge base created under the WUP as the analytical tool for improved water resources assessment, planning and management; the DSF and other decision support systems and tools, such as GIS and Remote Sensing are the delegated responsibility of the IKMP. The DSF can be applied at the basin and national levels and is particularly applicable to running scenarios for the BDP. It could be applied to identify and assess

TBIDDs. GIS is one of many tools frequently used to analyze spatial data and information. The MRC has established GIS capabilities for particular topics and areas of the MRB.[17]

The premier integrated basin planning tool of the MRC is the BDP established under Article 2 of the MA95. It is intended as a dynamic and evolving blueprint of basin resources, and existing and planned uses. The MRC BDP is to provide master planning and assessments of proposed developments in accordance with the measures, standards and criteria adopted under the sets of procedures and the directions of the Strategic Plan. The BDP should be beneficial to avoiding and minimizing TBIDDs from floods, flood control and management structures, operation of dams, and other causes and activities.

### 6.3 Transboundary Diagnostic Analyses (TDA)

The TDA is a different type of analysis that can be used in conjunction and support of SWOT analysis to identify and diagnose the nature of conditions and real or potential TBIDDs in the LMB and those that may occur in the UMB. TDA training and application was initially tried by WUP but apparently did not meet with success in confidence and usefulness by member States. Annex 2-3 is an MRC Working Paper on TDA effort, but it must be opened as “read only” as it is password protected. In other river basins TDA has been applied with a high level of success, so it might be concluded that either the scope or inputs were not appropriate for the WUP TDA. In any event, DA is commonly used in water resources assessments and planning. It is suggested that a simpler (less complicate and comprehensive) TDA could be of relevance to assist the MRC and concerned parties in identifying, avoiding, mitigating, addressing and resolving TBIDDs.

[17] Arc Info by ERSI and MapWindow are two GIS tools with complex to more simplified user friendliness.

## Conclusions

- **This Framework has been prepared by the FMMP Component 3 to provide a MRC systematic step-by-step process to facilitate addressing and resolving TBFIs and other TBIDDs from local to Council levels. It is not a requirement of the MA95 and applicable only upon acknowledgement by the JC and Council.**
- **This Framework applies only to the option of utilizing the provisions of the 1995 Mekong Agreement, Articles 34 and 35 to TBFIs and other TBIDDs.**
- **This Framework does not replace, supersede nor address other bi-or multi-lateral options available to MRC Member States within the LMB or MRB.**

**Box 6.1: Summing up Resources, Expertise and Tools**

**Any adverse impacts to the legitimate in-stream, on-stream and off-stream flows and uses on the MRB mainstream and tributaries (especially transboundary tributaries), including maintaining expectations and benefits from beneficial floods and preventing or mitigating damage from harmful levels of floods, are within the intentions and objectives of the MA95 to be carried out by the MRC with full cooperation from the member States, regardless of program or project designation. It is only through the sum of the whole of the resources, expertise and tools that MRC can attain sustainable achievements greater than the sum of its parts as envisioned in the MA95.**