



Transboundary freshwater security governance train

Interactive Online Session:
IWL & Infrastructure Projects

18 May 2021



Event Moderator



Dr. Yumiko Yasuda

Senior Network and Transboundary Water Cooperation Specialist, GWP

- Yumiko leads GWP's thematic work on transboundary water, and is the lead faculty of the MOOC on Transboundary Freshwater Security, designed and directed the production of the course.
- Her area of expertise lies in the analysis of water and environmental governance, water diplomacy, political economy analysis surrounding natural resources management, with a focus on transboundary rivers and non-state actors' engagements in natural resources management.
- Dr. Yasuda obtained her PhD degree from the Centre for Water Law, Policy and Science at the University of Dundee, MA in environmental policy from the Tufts University, and MSc in environmental science from Tsukuba University. Her research on the Mekong has culminated in the publication of a book entitled "Rules, Norms and NGO Advocacy Strategies: Hydropower Development on the Mekong River" by Routledge in 2015.

Fun fact! Yumiko performed stand-up comedy in Scotland.



**The biggest achievement in life:
Still working on it!**



Event Chairs



Professor Patricia Wouters
Founding Director, International
Water Law Academy, Wuhan
University



Dr. David Devlaeminck
Lecturer, School of Law,
Chongqing University



Founding Director, Wuhan International Water Law Academy (CIBOS) University of Wuhan

- Professor Wouters has close to 30 years experience in the field of international law that governs transboundary waters. Her legal education includes BA and LLB at the University of Ottawa, Canada; LLM, University of Berkeley, California; DES, PhD, Graduate Institute of International Studies/University of Geneva, Switzerland.
- Professor Wouters has published and consulted broadly on international water law, including for the UN, World Bank, regional bodies and national governments, across most regions of the world. She was founding director of the University Dundee UNESCO Centre for Water Law and Policy (Scotland), and established the China International Water Law group at Xiamen Law School, where she was appointed under the Chinese Thousand Talent programme (2012).

“ Fun fact! Patricia has a dual nationality - Canadian and Belgian, and lives mostly in Scotland (commuting to Wuhan).

**The biggest achievement in life:
My healthy family!**



Professor Patricia Wouters

Lecturer, School of Law, Chongqing University



David J Devlaeminck

- Dr. Devlaeminck is an emerging young scholar in the law of international watercourses. He completed a BA in Philosophy at the University of Guelph, Canada; an MA in Philosophy at McMaster University, Canada; the Water Without Borders Graduate Certificate Programme at the United Nations University – Institute of Water, Environment and Health, Canada; and a PhD in International Law from Xiamen University, China.
- He conducts teaching and research on international environmental law with a focus on the law of international watercourses. He has published in various international journals and his monograph, *Reciprocity and China's Transboundary Waters: The Law of International Watercourses*, was recently published with Routledge.

Fun fact! David is a bit of an adventurous eater, willing to try anything (from sandworms to cicada) at least once.



**The biggest achievement in life:
After moving to China in 2014, he now speaks
Mandarin (although it's a work in progress)!**

International Water Law & Infrastructure

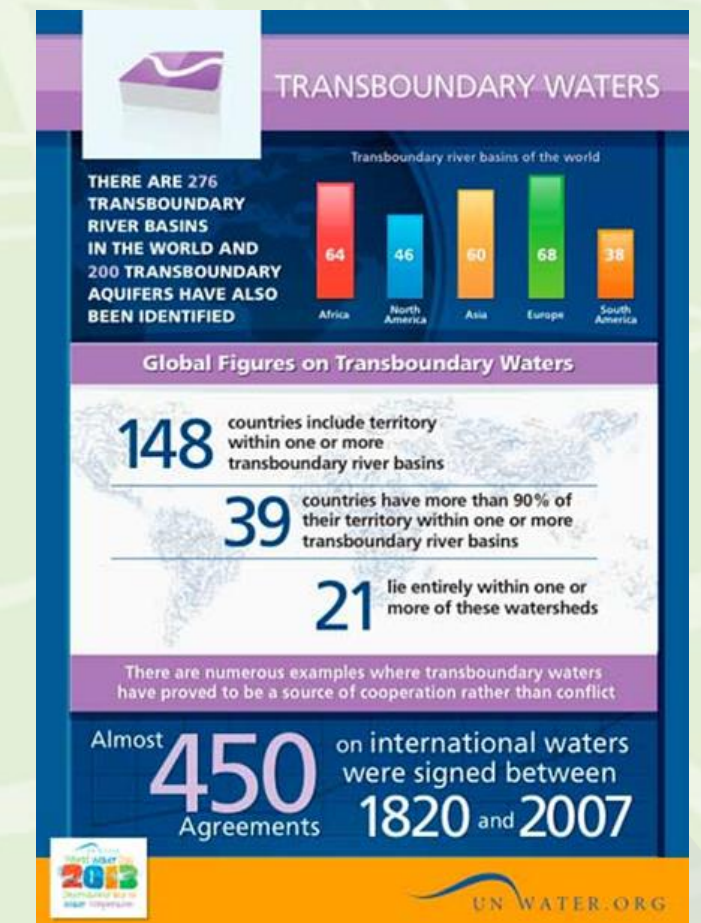
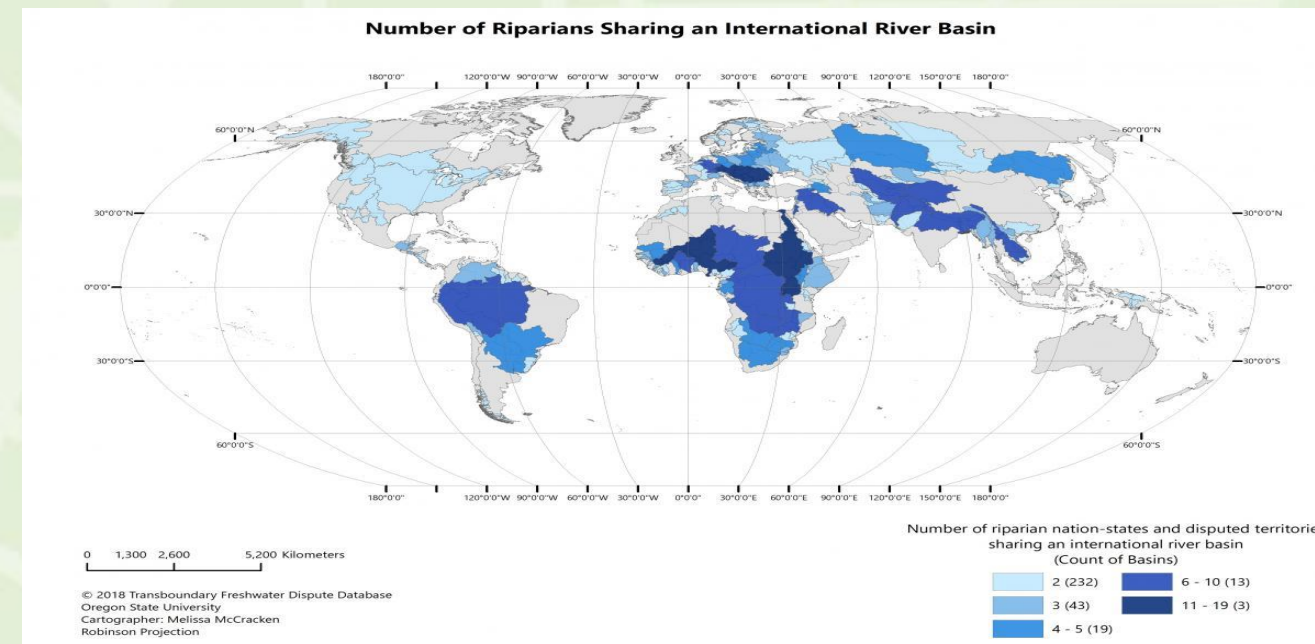
- What are the **rules** of international law that govern **infrastructure**?
- **IWL** – International Water Law
- **IRF** – Investment regulatory framework (IIL)
- **Other** - MEAs



International Water Law & Infrastructure



- International water law?
- Infrastructure?



International Water Law & Infrastructure

IWL Rules (custom & treaty)

- **Duty to cooperate**
 - Equitable and reasonable use
- Due diligence to prevent causing significant harm
 - Duty of notification of planned measures

Infrastructure - IRF

- Investment regulatory framework (**IRF**)
- Transnational / national requirements
 - Investor type/duties/protection



Speakers

- 1. Dr. Ana María Daza-Clark**, Lecturer in International Law, Law School, University of Edinburgh
- 2. Mr. Phera S. Ramoeli**, Executive Secretary, Okavango River Commission
- 3. Dr. Sokhem Pech**, Affiliate Member of International Water Law Academy, Senior Water and Climate Change Consultant, Canada



Lecturer in International Law, Law School, University of Edinburgh

- Ana María Daza-Clark is a Lecturer in International Law at the Law School, University of Edinburgh, since 2013. Her teaching and research focus on international investment law and arbitration, international trade law, international water law and natural resources management. Ana María has written extensively on the intersection between international investment law and other areas of law, such as environmental law, domestic law, water law and policy, and the law of armed conflict.
- Ana María acts as of counsel, expert and consultant in international investment and commercial arbitration disputes, and for several years she worked as Legal Officer and Legal Director at the Public Utility Regulatory System (SIRESE) in Bolivia, advising on administrative appeals brought by foreign and national investors against the decisions of utility regulators.
- She holds a PhD from the Centre for Water Law, Policy and Science at the University of Dundee, an LLM in Law and Economics from Utrecht University, and an LLM 'Magister Iuris Communis' from Maastricht University.
- She is a member of the Academic Forum for the reform of investor state dispute settlement - UNCITRAL Group III, an affiliate to the Wuhan International Water Law Academy and a member of the Edinburgh Centre of International and Global Law.

“**Fun fact! Her first strike (hunger strike) at the age of 9, was to pressure her parents to get a water storage tank, so that she didn't have to get up at 5.30am to have shower (this was in Cochabamba – Bolivia and they did get the tank).**

Biggest achievement in life: Probably the tank.



Dr. Ana María Daza-Clark



Executive Secretary, Okavango River Basin Commission



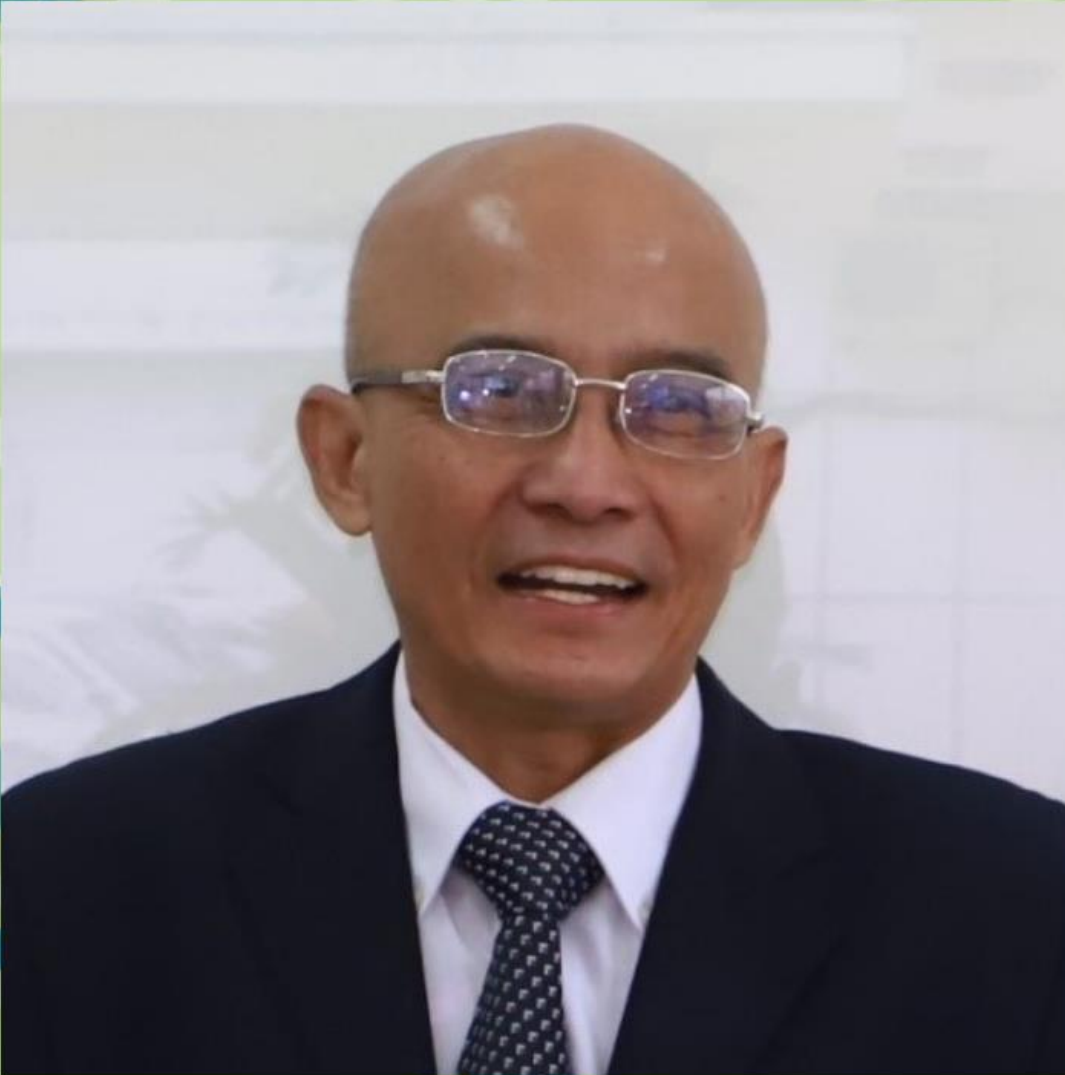
Phera S. Ramoeli

- Mr. Phera S. Ramoeli is currently the Executive Secretary of the Okavango River Basin Commission since October 2018, based in Gaborone, Botswana, after serving as Senior Program Officer in Directorate of Infrastructure and Services – Water Division, Southern African Development Community (SADC) Secretariat for over 21 years. He was responsible for the coordination and facilitation of the implementation of the SADC Program of Action in the Water Sector.
- Out of his tremendous 30 years experience in the water sector, over 24 years were devoted to transboundary issues at SADC level. Mr. Ramoeli led the process of negotiations for the review and revision of the SADC Protocol on Shared Watercourses (2003). He has also led the coordination and implementation of the SADC Water Programme, e.g. establishment of River Basin Organizations such as the Zambezi Watercourse Commission, Limpopo Watercourse Commission, ORASECOM and CUVECOM.
- Mr. Ramoeli has a Masters Degree in Aquatic Resources Management from the Kings College, University of London, a Post Graduate Diploma in Operational Hydrology from Institute of Meteorological Training and research in Nairobi, and BSc in Biology and Chemistry from the National University of Lesotho.

Fun fact! He hails from a country with the highest lowest point in the world, Lesotho, also referred to as “the Kingdom in the Sky””

Biggest achievement in life: Being part of and contributing to promotion of Water Cooperation in the SADC with its multiple shared watercourses including groundwater aquifers.





Dr. Pech Sokhem

Affiliate Member of the International Water Academy (IWLA), Senior Water and Climate Change Consultant (Canada)

- Sokhem holds a PhD degree in a multi-disciplinary and sustainability science (transboundary rivers), Tohoku University, Japan, Master of Law (international water law) (LLM), University of Calgary, Canada; and, Master of Arts from the Moscow State Institute of International Relations (MGIMO) – public international law and diplomacy.
- Sokhem was formerly a senior official (Director General) in Cambodia's Ministry of Foreign Affairs.
- He joined the Mekong River Commission (MRC) in 2000 as an international water lawyer before being appointed as the Director of the MRC's Technical Support Division and Deputy CEO.
- 2004 to 2007, he joined the academic research program of the Japan Science and Technology Agency on the Mekong River Basin and other Asian rivers; and he served as a Co-Chair of the Regional Research network, implementing the Mekong Program on Environment Water and Resilience (MPOWER).
- 2007 to the present, he has served as the international development director and governance specialist in the Canadian environmental companies based out of North Vancouver, BC, Canada.

Fun fact! As a world traveler and global citizen, Sokhem has been delegated to the virtual travel, tele-working and on-line rendez vous by the invisible pandemic, since early 2020. ”

The biggest achievement in life: Sokhem is glad that his ecological footprint has been remarkably reduced, thanks to the fun fact above.



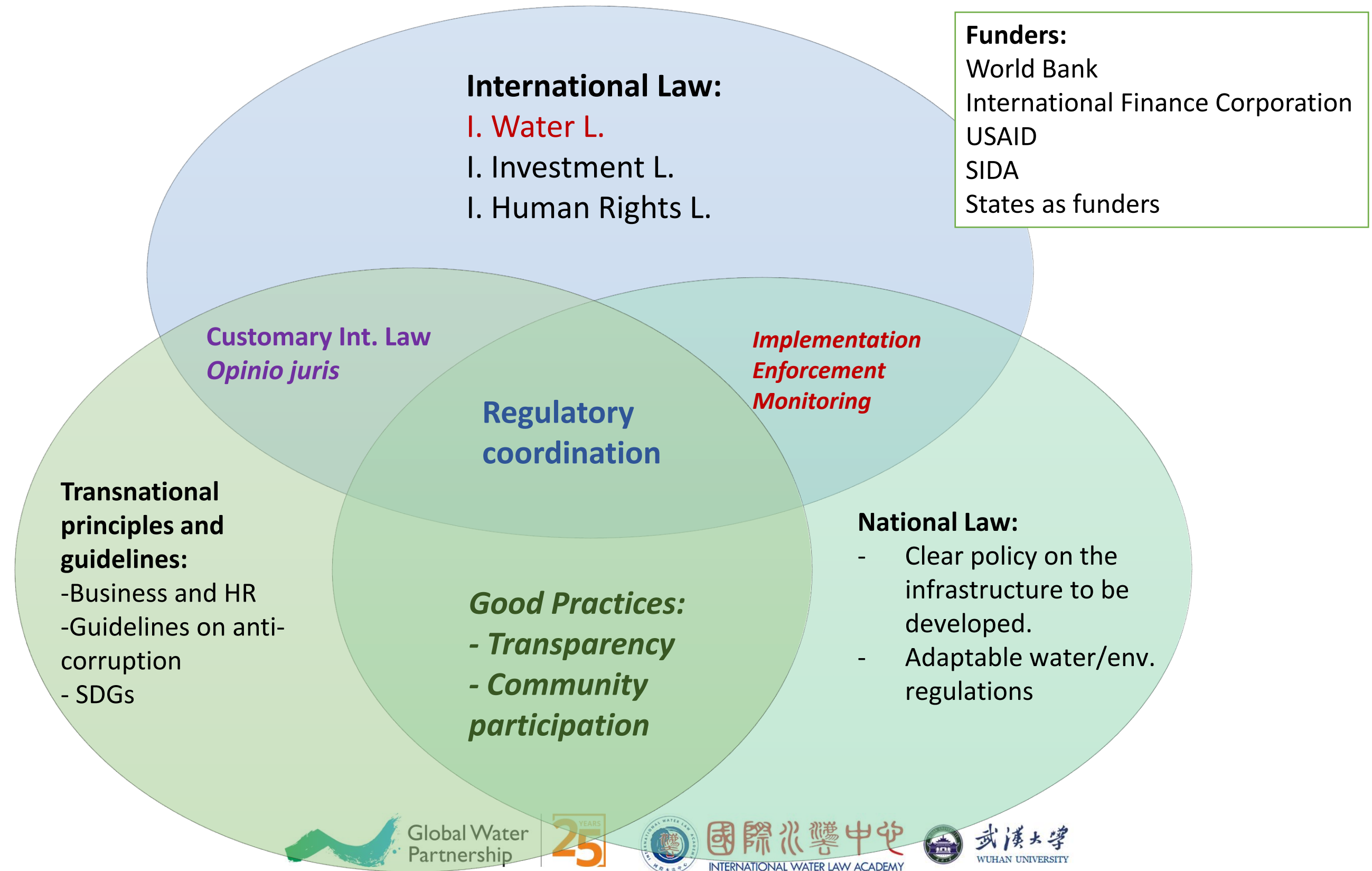
Investment in transboundary water infrastructure under international water law

Outline

- International Water Law/Infrastructure and other legal frameworks
- Pulp Mills case (investor's perspective)
- Protection of foreign investment in infrastructure projects and countries' regulatory adaptability



Infrastructure and investment

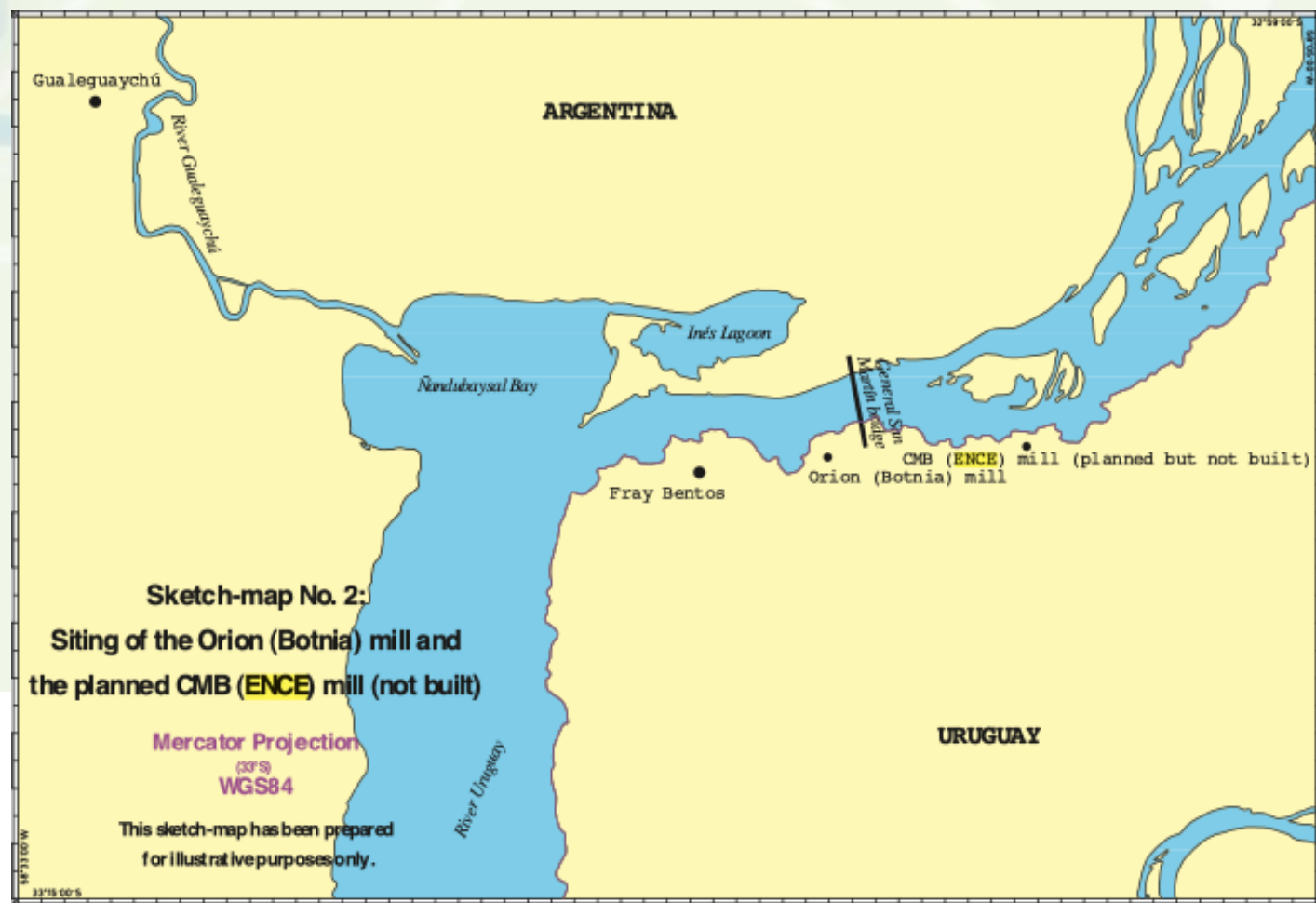


Pulp Mills case from investor's perspective

- **Celulosas de M'Bopicuá S.A. (CMB) (Spanish investor ENCE)**

EIA submitted to CARU/initial permit approved. But on 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

- **Botnia S.A and Botnia Fray Bentos S.A. (Finish investor, Oy Metsä-Botnia AB) –** Parallel procedures for approval, they built the Orion Pulp Mill, functional since 2007.



- The dispute concerned the interpretation and application of the 1975 Statute of the River Uruguay:

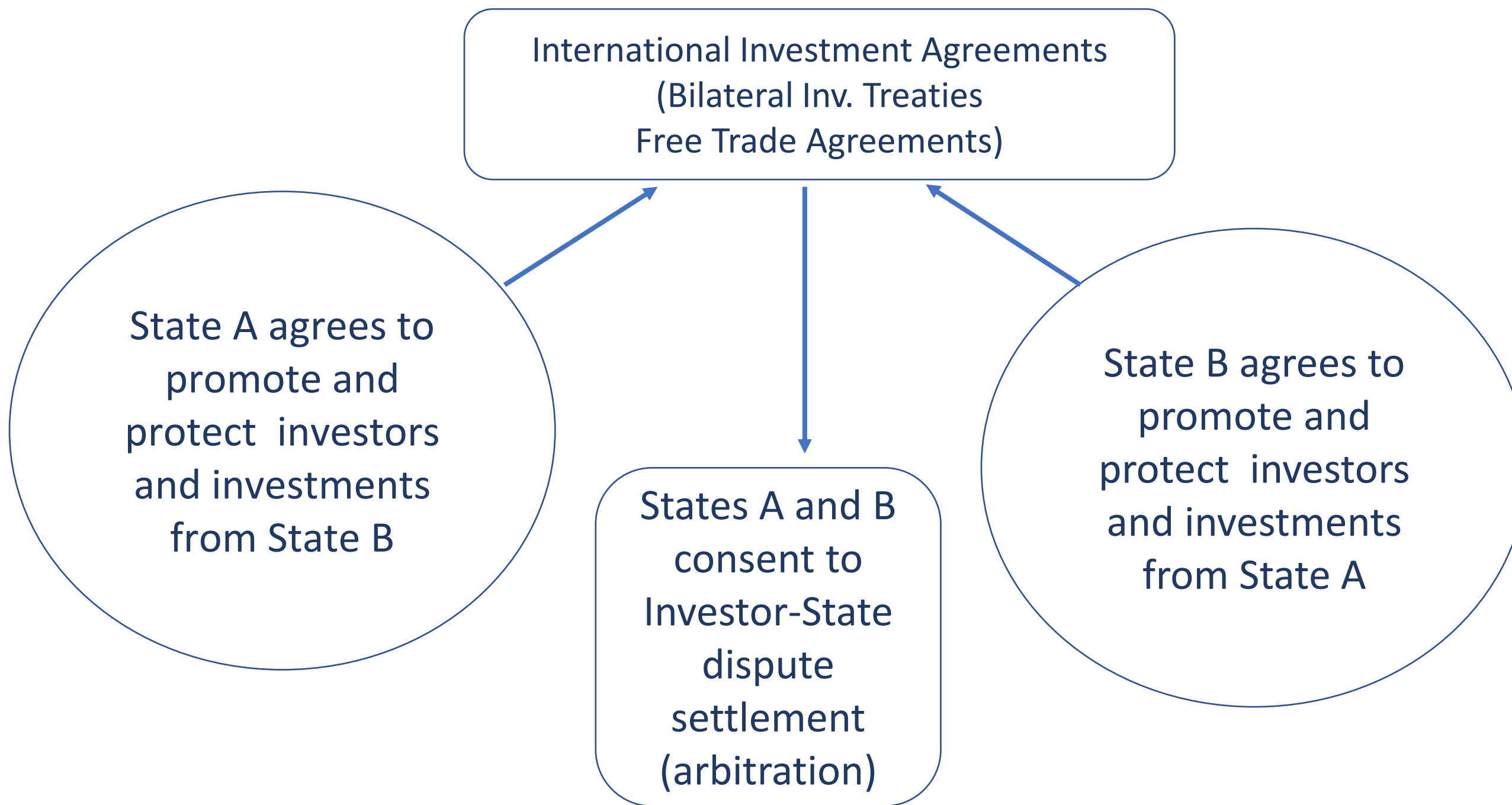
- Did Uruguay comply with its procedural obligations in issuing authorizations for the construction of the CMB (ENCE) mill and the Orion (Botnia) mill?
- Did Uruguay comply with its substantive obligations since the commissioning of the Orion (Botnia) mill in November 2007?

Findings:

- Uruguay has breached its procedural obligations under Articles 7 (oblig. to notify, inform and negotiate) to 12 of the 1975 Statute of the River Uruguay.



What are international investment agreements (IIAs)?



A typical IIA

Preamble

Definitions: Investment – investor

Treatment:

- National and most favoured nation treatment
- *Fair and Equitable Treatment and Full protection*
- Expropriation and compensation
- Free transfers
- Investment and environment / labour/ HR
- Investor State Dispute Settlement



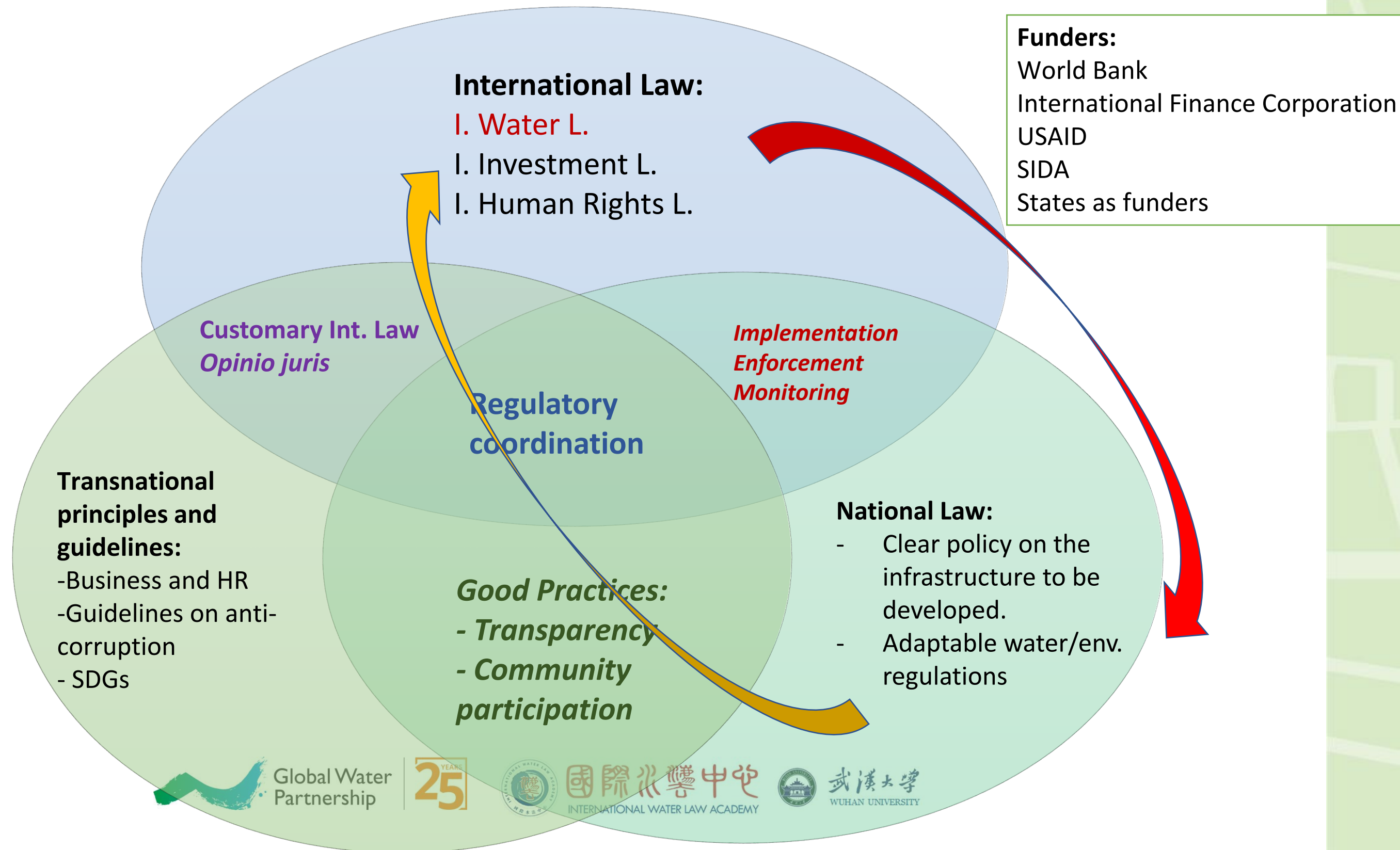
Fair and Equitable Treatment

- Fair and equitable treatment (FET) clauses in IIAs touch directly on interaction between the government and foreign investor (e.g. PPPs, JV, indiv.). Most claims in ISDS are based on FET.
- Infrastructure projects often have a great deal of interactions between the (foreign) investor and government agencies at all phases of the project. (e.g. bidding and tendering; application or renewal of licenses or concessions; termination of the contract by the authorities, etc.).
- In these interactions, the investor may feel it was treated in an unfair or inequitable manner by the government authority, e.g. because it had legitimate expectations that it would get awarded the contract or that a license would be renewed, or that the termination of the contract was in breach of the contractual terms.

Source: <https://investmentpolicy.unctad.org/pages/1031/mapping-of-iaa-clauses>



Concluding remarks





Transboundary freshwater security governance train:

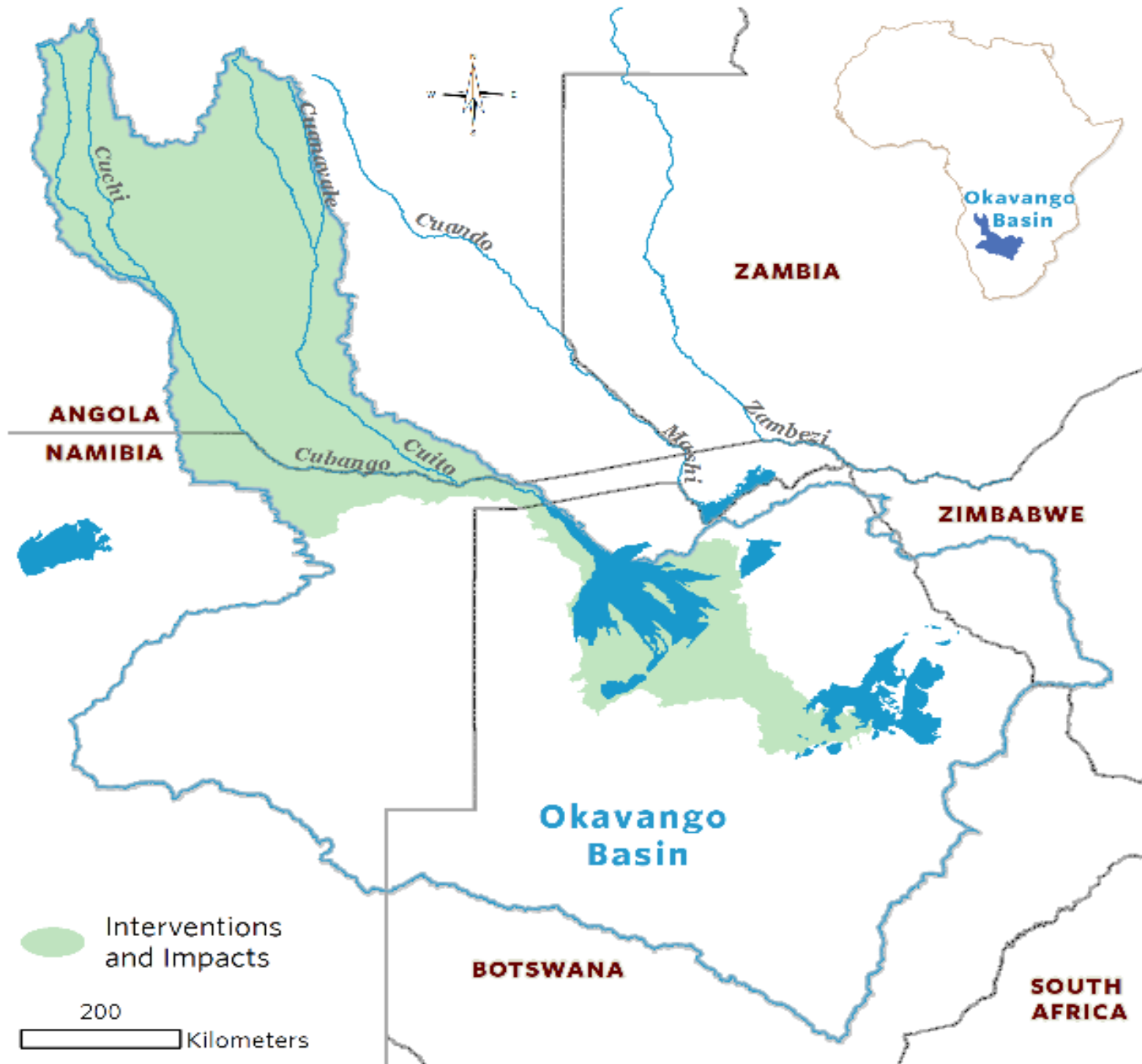
Interactive Online Session: International Water Law and
Infrastructure, OKACOM Experience Case Study

18 May 2021

Phera Ramoeli – OKACOM Executive Secretary



The Cubango-Okavango River Basin (CORB)



- The CORB is one of the world's most unique, near pristine free-flowing rivers and central to sustainable economic development within the arid landscapes of the basin
- Transboundary Basin share by 3 riparian states Angola, Botswana, and Namibia;
- 95% flow originates from the highlands in Angola and most utilized in Botswana supporting Okavango Delta ecosystem;
- Transboundary Infrastructure is guided by the **SADC Protocol on shared Watercourses** (2000) and The **OKACOM Notification Consultations and Negotiation Guidelines** (2019);
- The SADC Protocol's Article 4(1) addresses mandatory notification of planned measures undertaken in any riparian state in cases where such measures hold the potential to cause "significant adverse effects".

OKACOM Notification, Consultation and Negotiations PROCESS

- The OKACOM NCN Provide broad definitions of specific terms relating to the process of notification including: Planned Measures, Significant Adverse Impacts, Available information & Data, EIA, SEA, Prenotification and Notification Stages, etc;
- It defines **the scope of application** of the NCN Guidelines including **different levels and scales** for NCN implementation, **clear allocation of roles and responsibilities** within the OKACOM cooperation framework, and describes categories of projects that can potentially impacting upon transboundary watercourses;
- The overarching purpose of these Guidelines is that of ensuring a common understanding among the OKACOM Member States on the steps necessary for cooperative implementation of Article 4 of the SADC Protocol;
- The NCN finally defines and gives guidance on notification, consultation and negotiations including conflict resolutions in case of disputes and defines the tools.

OKACOM MULTI-SECTOR INVESTMENT OPPORTUNITY ASSESSMENT

- The Multi-Sector Investment Opportunities Analysis (MSIOA) is part of a systematic strategy by OKACOM to assist the Member States to achieve their joint Vision of a socially just, economically prosperous, and environmentally healthy development of the CORB;
- Pursued through the formulation of a **Sustainable and Equitable Climate Resilient Investment Program**;
- Developed through a **collaborative cooperation** that included scientific analysis; economic, hydrological, and environmental modeling; coupled with stakeholder consultations;
- For the success of the Programme it calls **for concerted joint actions at the basin level**;
- 10 Basin Development Scenarios (BDS) were developed to assess potential future water abstraction to 2040 and 2050.
- significant economic benefits are possible from **productive and conjunctive use of water** for hydropower, irrigation, and urban growth, and associated sectors such as tourism, while also securing improved livelihoods for the basin;
- the higher levels of abstractions associated with such developments must be balanced against the scale and costs of the resulting environmental impacts in the basin and the Delta;
- a set of recommended joint actions that include the following:
 - **A Livelihood Enhancement Program** that could build on existing initiatives to provide short-term interventions and deliver relatively quick returns;
 - **A Tourism Investment Framework** that could mobilize private sector resources by creating an appropriate enabling environment and models of engagement;
 - **Cooperative Infrastructure Development** that addresses needs within the basin through a sustainable framework and that consolidates the cooperative venture among the Member States.



Sustainable Financing of the CORB Programme: The CORB Fund

Legal Structure

The Fund is established as a **Company Limited by Guarantee** in Botswana (legally registered December 11, 2019).

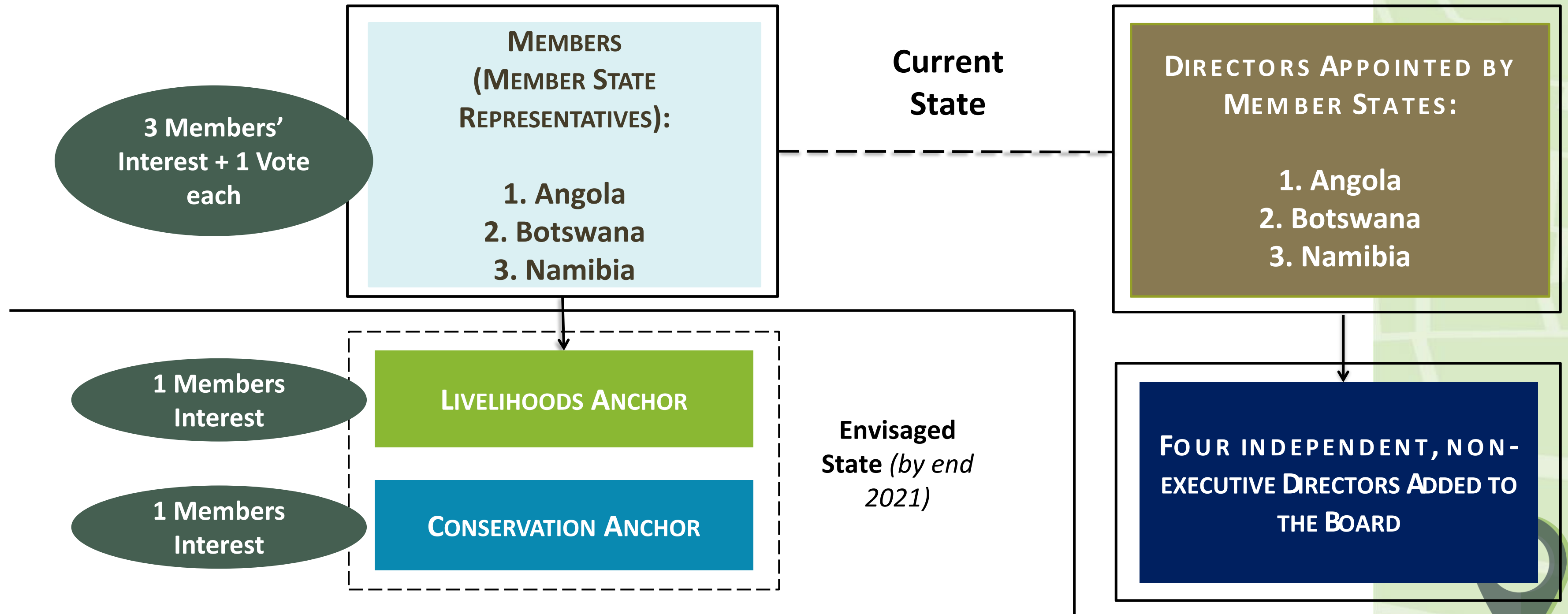
- The CORB Fund will distribute resources from an independent fund in order to support interventions designed to conserve and restore biodiversity and ecosystem functions, enhance livelihoods equitably;

The objectives are to:

- Be the primary focus of the long-term marketing strategy for the CORB;
- Create a coordinated response to threats in the CORB
- Provide sustainable financial resources to fund threat mitigation activities
- Create a platform for an optimized benefit sharing across the basin

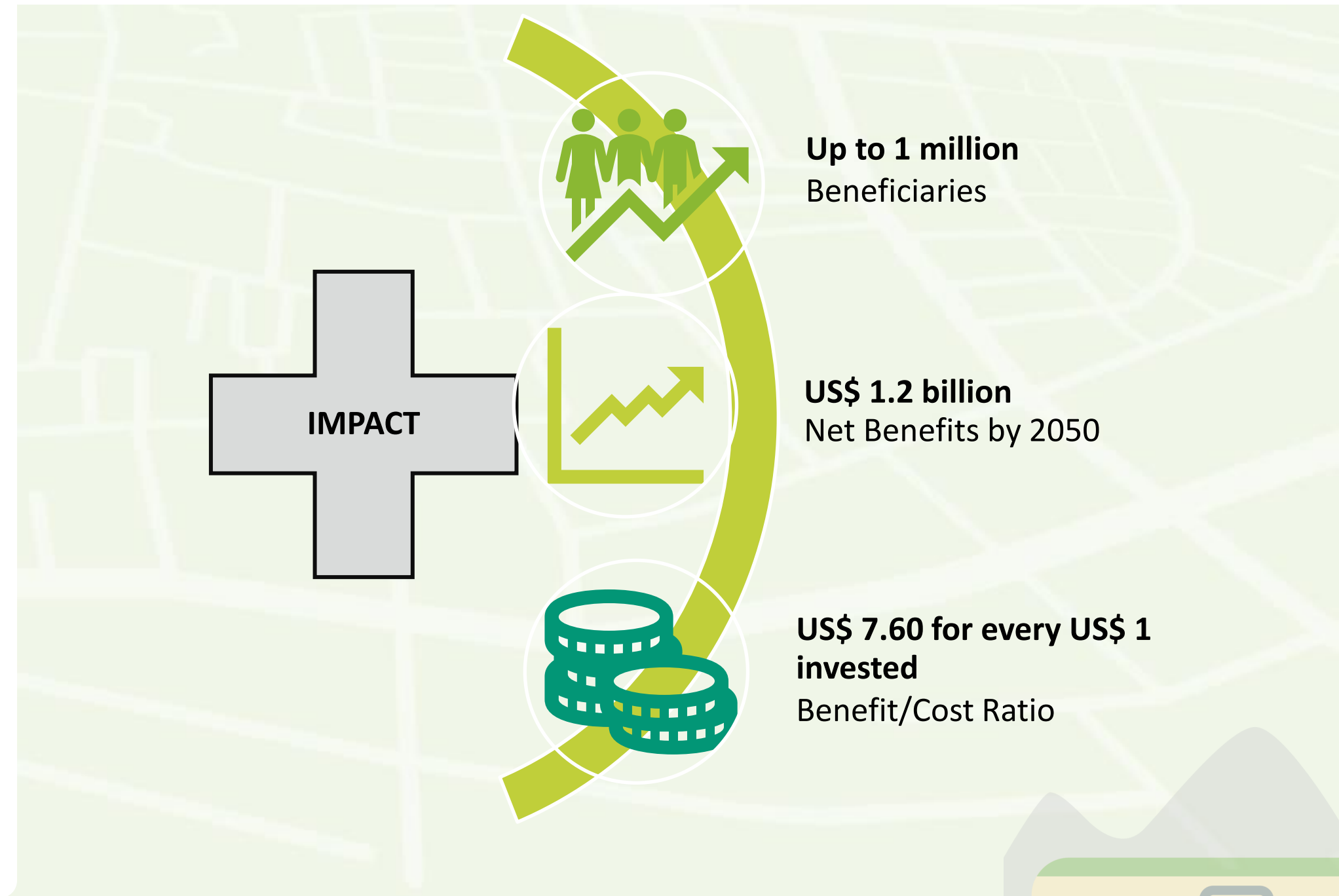
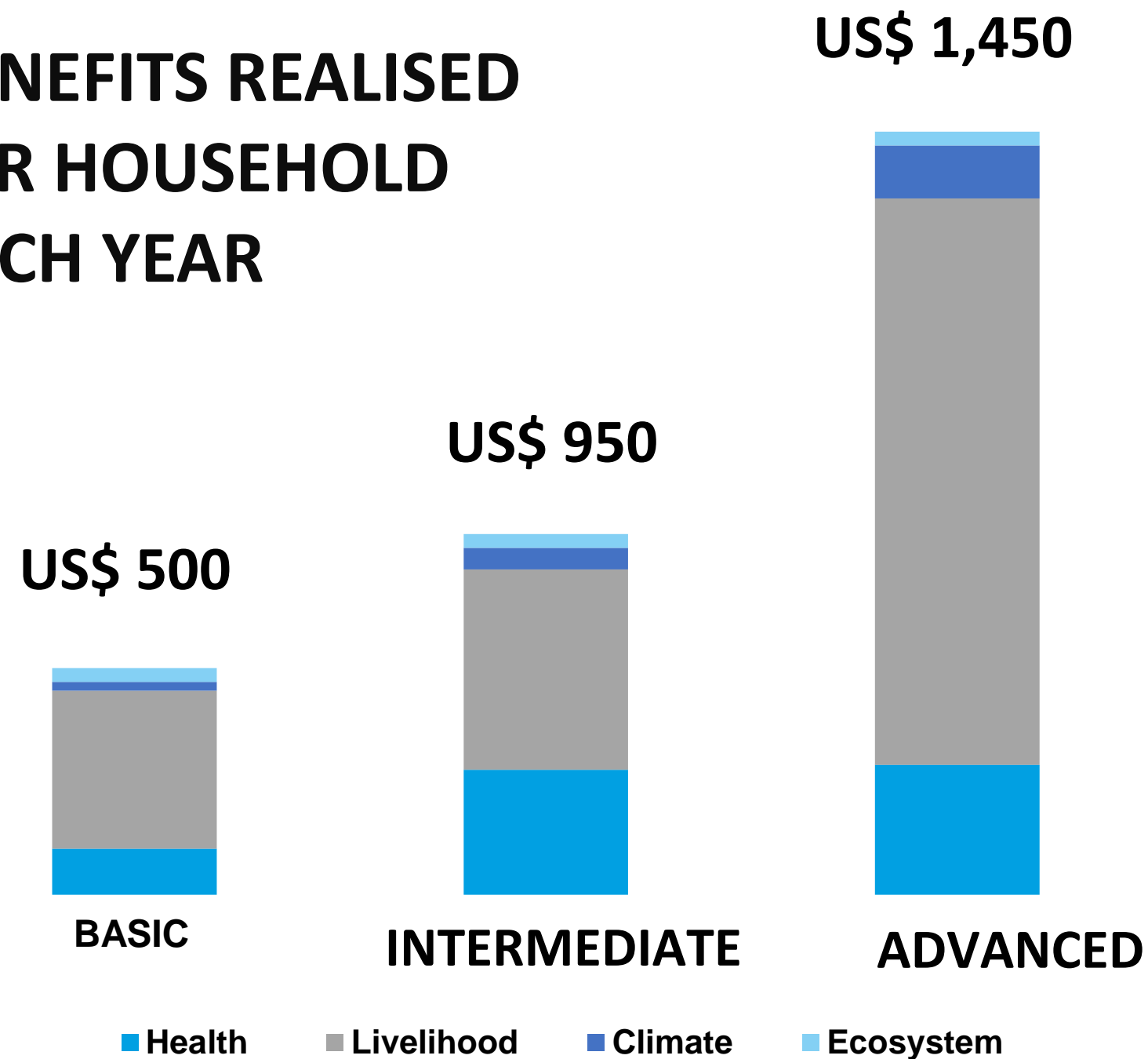


Governance Structure - Members and Directors [3/3]



Real Impact and Return On Investment

BENEFITS REALISED PER HOUSEHOLD EACH YEAR



THANK YOU FOR YOUR ATTENTION
OBRIGADO





Prior Consultation: the Case of Xayabury Mainstream Dam in the Lower Mekong Basin

Dr. Pech Sokhem

Interactive Online Session:

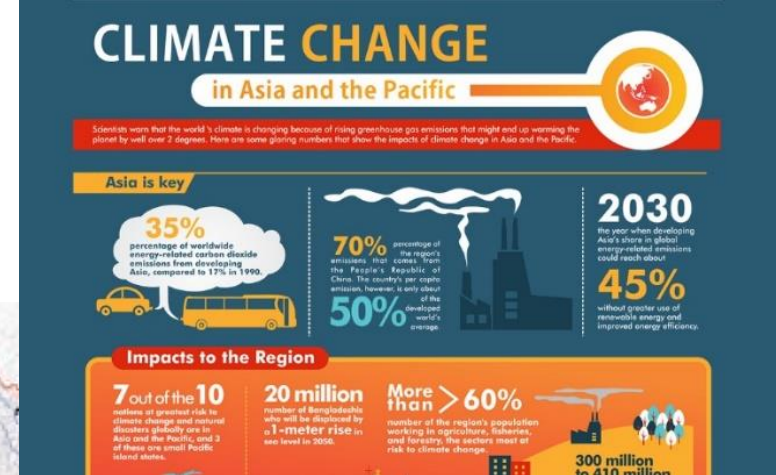
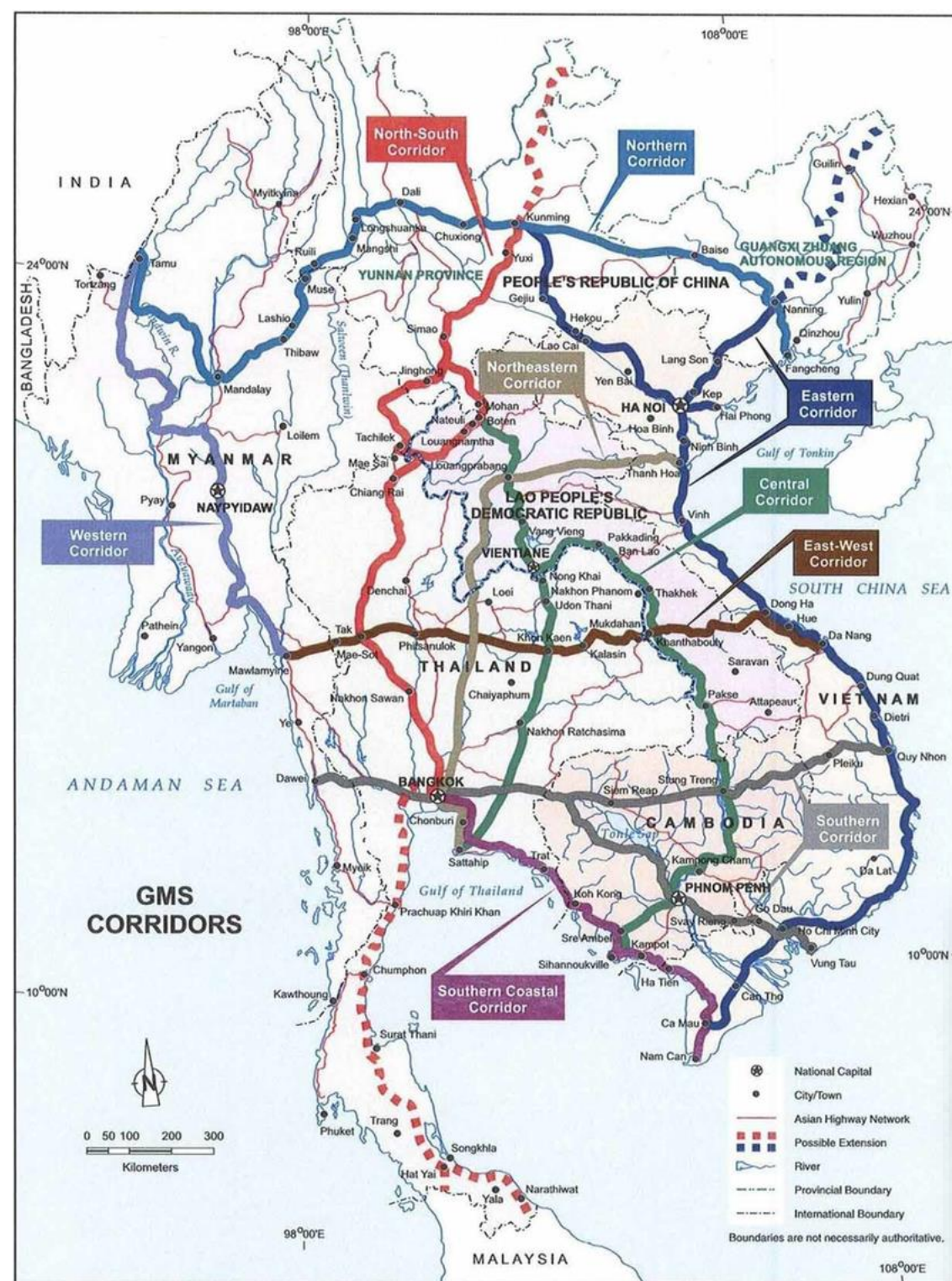
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1995 Mekong Agreement during Rapid Infrastructure Development

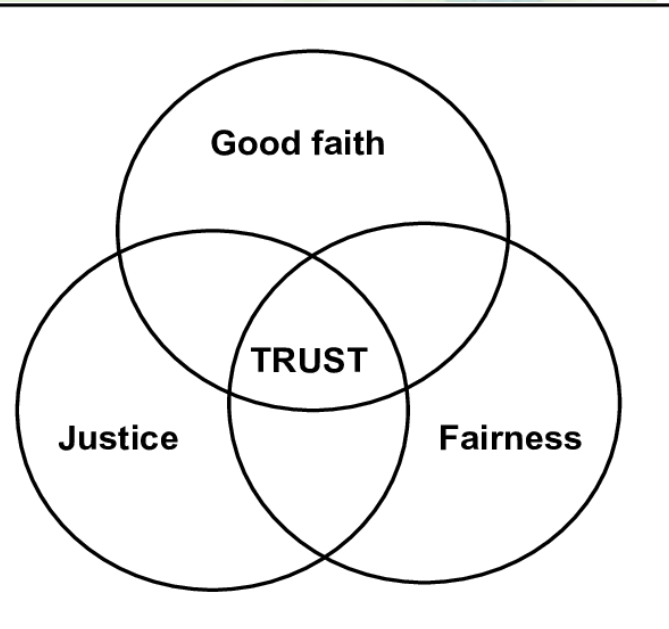
- Lower Mekong Cooperation since 1957.
- April 5, 1995 after 21 months of complicated negotiation.
- **A framework agreement** that contains 42 articles, in six chapters + Protocol to establish MRC - Council, Joint Committee and Secretariat.
- China and Myanmar are dialogue partners (Article 39).



Duty To Cooperate in Good Faith

Equitable and Reasonable Use:
Assist each other to realise their
development goals

**Due Care/ No Significant Harm
Obligation:** Take all measures to
avoid, minimise & mitigate
Significant Harms/impacts



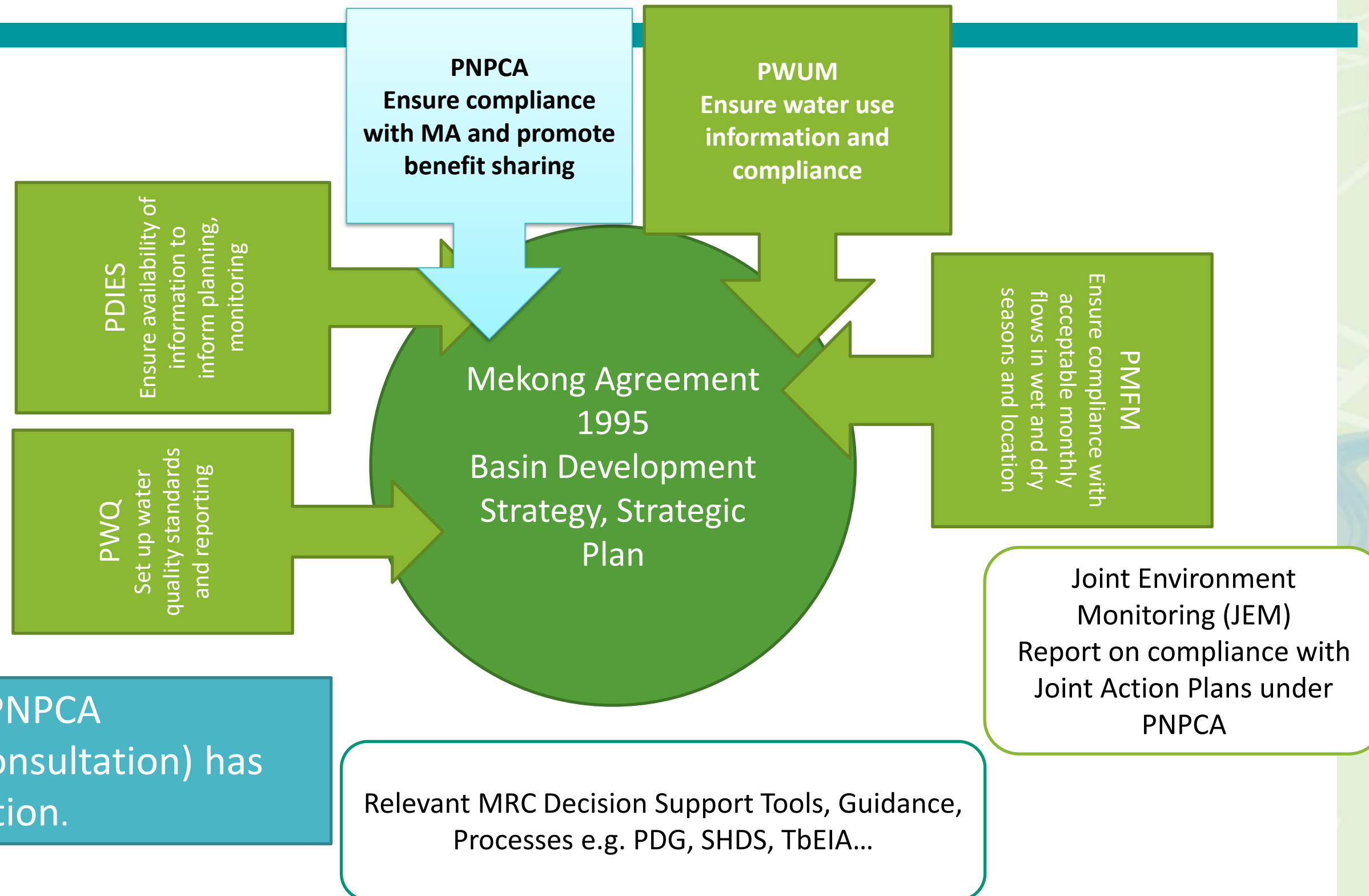
95 MA

Pacta sunt servanda – obligation arising from international agreements must be fulfilled in good faith.

Sovereign Equality and Territorial Integrity: Cooperation in good faith, Due Diligence, equitable & reasonable use, and no-harm, and other relevant substantive and procedural norms/rules including notification, consultation, assessments, and peaceful dispute management etc.

Operationalizing Treaty through Water Use Rules and Institutions

- 1995-2021:
Treaty **among sovereign States**
➔ Traditional legal certainty and technical adaptability.



It does not deal specifically with water allocation
➔ but a framework.

❑ Implementation of PNPCA (particularly Prior Consultation) has drawn a lot of attention.



PNPCA

NOTIFICATION

- 1) Intra-basin use and Inter-basin diversion from tributaries; and
- 2) Intra-basin use on mainstream.

PRIOR CONSULTATION

1. Inter-basin diversion from mainstream;
2. Intra-basin use on mainstream; and
3. Inter-basin diversion of surplus water

SPECIFIC AGREEMENT
Any inter-basin diversion from mainstream

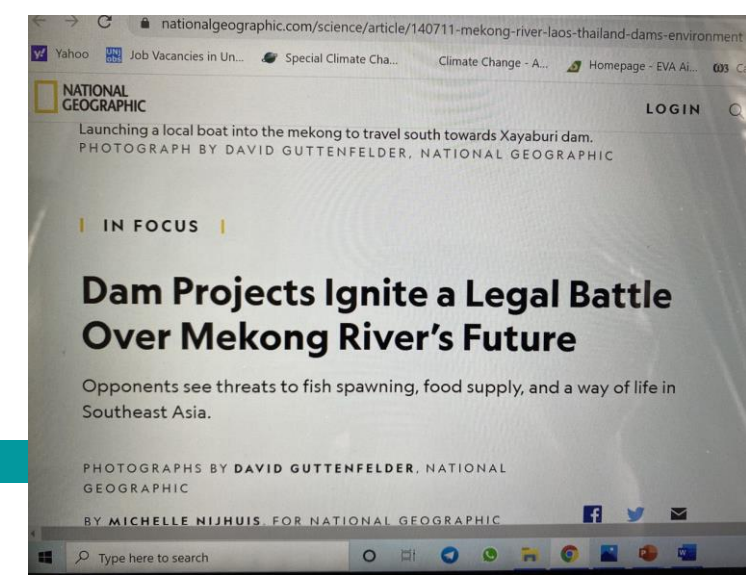
1st Prior Consultation

- Xayaburi Hydropower Dam project was the first real test-case (2010-2011).
- As “run-of-river 1,285-megawatt dam project.
- Funded by Thai banks and 98% of electricity is sold to Thailand.
- Highly time consuming and contested. Stalemate !!
- But the project went ahead and now commercially operational in October 2019



CONCLUSION: What have we learned?

- It represent a leading-edge practice.
- PNPCA process promote water governance and peaceful relation.
- A lot of rooms for improvement.
- It did force several improvements:
 - dam design for fish passage, sediment, seismic safety and navigation locks.
 - Council Study – impacts of infrastructures....
 - Joint Action Plans, Joint Environmental Monitoring → More Active Regional Planning for improved benefit and risk sharing etc..
- International cooperation is important and can be moving as fast as the least willing sovereign States want.





Thanks to all the speakers & participants!

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