



WATER GOVERNANCE DYNAMICS in the **MEKONG REGION**

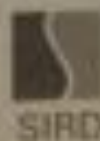


Edited by **David J.H. Blake** and **Lisa Robins**

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USER

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Arenas of Water Justice on Transboundary Rivers: A Case Study of the Xayaburi Dam, Laos

Carl Middleton and Ashley Pritchard

In Southeast Asia, major transboundary rivers such as the Mekong River are central to the food security, livelihood and culture of millions of people. An increasingly extensive program of large hydropower dam construction is under way in Laos, Cambodia and Myanmar to meet domestic electricity demand and for power export to neighboring Thailand, Vietnam and China. The concept of justice in water governance and its applications to transboundary rivers has increasingly come under critical analysis (Neal et al. 2014), including with regard to human rights-based approaches (HRBA) (Sultana and Loftus 2012). Yet, even as the *Convention on the Law of the Non-navigational Uses of International Watercourses* (the International Watercourses Law) entered into force in August 2014, how it relates to international human rights law remains poorly understood (Rieu-Clarke 2015a) despite a growing recognition of the relationship between the environment and human rights (Knox 2014).

This chapter seeks to examine how decision-making processes on transboundary rivers around large hydropower dams have been challenged within "arenas of water justice" in Southeast Asia, in particular adopting an HRBA. In the following section, an HRBA to large hydropower dams is discussed from the perspective of international human rights law, recognizing that rights are also fundamentally a social relationship and therefore bound up within power relations. The next section proposes "arenas of water justice" as a heuristic approach to analyze the politicized spaces of transboundary water governance in which a process for claiming and/or defending the Right to Water and the environment or seeking redress for human rights violations takes place. The following section extends the discussion to recent developments in

international regimes, namely the International Watercourses Law, human rights, and corporate accountability. In the second half of the chapter, the arenas of water justice approach is applied to a case study of the Xayabour Dam, which is a heavily contested project presently under construction (April 2016) on the Mekong River's mainstream in northern Laos. The chapter concludes by arguing that transboundary arenas of water justice and their implicit associated extraterritorial obligations will become increasingly significant, not only in the context of large hydropower dams on transboundary rivers in Southeast Asia, but more widely as the region proceeds to economically integrate under the ASEAN Economic Community.

HRBA to large hydropower dams

The planning, construction, operation and decommissioning of large hydropower dams have implications for a wide range of human rights as recognized in international law, as mapped out by Hurwitz (2014) (table 3.1). Assessing large dams through the lens of an HRBA provides a normative framework by which the actions of government and private sector actors can be evaluated even where gaps or deficits in national law and transboundary regimes may exist. Other approaches to planning hydropower projects and evaluating their role in development have also drawn on the HRBA, including the World Commission on Dams' proposal of a "rights and risks" approach (WCD 2000).

In formal international law, the Right to Water has emerged in the context of the demand for safe drinking water and sanitation. International conventions that have referenced the Right to Water include the *Convention on the Rights of the Child* (1989) and the *Convention on the Elimination of Discrimination Against Women* (1979). Meanwhile, the Right to Water is implicit throughout the *International Covenant on Economic, Social and Cultural Rights*. In July 2010, 122 countries formally acknowledged the Right to Water in the General Assembly resolution (A/64/292). More broadly, there has been growing momentum around the right to a safe, clean and healthy environment. In his statement to the Human Rights Council in March 2014, the UN Special Rapporteur on Human Rights and the Environment, Professor John Knox, concluded that: "I believe that it is now beyond argument that human rights law includes obligations relating to the environment."¹

Table 3.1: Substantive and procedural human rights obligations relevant to large hydropower dams

Human rights obligations	
Substantive obligations <ul style="list-style-type: none"> • Right to life • Right to water and sanitation • Right to freedom from torture and degrading treatment • Right to health • Right to housing • Right to food • Right to culture • Rights of disabled people • Rights of the child • Gender and women's rights • Right to self-determination • Indigenous peoples' land rights and permanent sovereignty over natural resources 	Procedural obligations <ul style="list-style-type: none"> • Right to equality before the law and equal protection of the law • Rights of non-discrimination • Right of freedom of movement • Rights to freedom of opinion and expression • Right to freedom of speech • Right to freedom of assembly • Right to transparency and access to information • Right to participation in decision-making • Right to access to justice • Free prior and informed consent

Source: Adapted from Hurwitz (2014)

The Right to Water and related resources should not be simply understood as defining the access to water of an individual. Implicitly, it also relates to decision-making over who can access water, and is thus also fundamentally a social relationship and therefore necessarily also an expression of power (Boelens 2008). As Boelens and Zwartveen (2005: 735) highlight, "Water rights are best understood as politically contested and culturally embedded relationships among different social actors." Thus, beyond rights as defined in international human rights law, local rules and rights of any particular community to utilize water resources emerge from place-based processes of negotiation and/or contestation that are socially, culturally, historically and politically specific. Multiple water access and use rules commonly coexist or are in tension, usually between national law and local customary arrangements (i.e. legal pluralism) (Boer et al. 2016). The legitimacy and application of rules are often contested between actors of divergent interests and power.

In this chapter, emphasis is placed on the HRBA as communities and supporting actors seek to legitimize a community's claims to the use of and control over water resources in language that is recognized by the state and its legal systems. This is not to deny the importance of local

rules- and norms-based claims, which typically coexist with human rights-based claims, and that are reflective of the legal pluralisms that define many natural resource uses in Southeast Asia. On the one hand, as Boelefs (2006: 56) observes, "laws cannot act by themselves and require social forces to materialise them." Entitlements under the law, whether national or international, are not passively bestowed, but need to be actively claimed, and can be a strategic means by which to challenge powerful actors. On the other hand, while laws and the justice system are supposed to protect the marginalized, this presupposes that the laws themselves are just or are used to just ends; yet, laws can – and often do (but not always; see Boer et al. 2016) – consolidate the position of powerful actors in society rather than redress social injustices.

Arenas of water justice

In this chapter, a heuristic framework is proposed centered around the concept of legal "arenas of water justice." These arenas are conceptualized as politicized spaces of water governance in which a process for claiming and/or defending the Right to Water or seeking redress for violations take place. Arenas of water justice exist at – and interact across – the local, national, regional and international scale, and involve contestation and/or cooperation between state, private sector, civil society, and community actors. Each arena can be understood as consisting of:

- formal institutions and legal processes in which decisions are taken that may be either legally binding or voluntary in nature; and
- a wider public (or extra-legal) space that surrounds formal institutions and legal processes, which accommodates a greater diversity of voices and actions on a particular formal decision. These may engage directly with the formal legal process or they may convey their resistance in other ways.

Four scales of legal arenas of water justice in Southeast Asia are mapped in table 3.2.

Table 3.2: Typology of legal "arenas of water justice" for human rights protection in Southeast Asia

Legal arenas of water justice in Southeast Asia	
Scale	Arena
National	<ul style="list-style-type: none"> • National justice system • National human rights institutions
Regional inter-governmental	<ul style="list-style-type: none"> • ASEAN Intergovernmental Committee on Human Rights (AICHR) • ASEAN Commission on the Protection of the Rights of Women and Children (ACWC)
International inter-governmental	<ul style="list-style-type: none"> • United Nations Human Rights Council • United Nations Special Rapporteurs • Universal Periodic Review • UN Core treaties (Optional Protocol mechanisms: Convention on the Elimination of all Forms of Discrimination Against Women [CEDAW], the Convention on the Rights of the Child [CRC], etc.)
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> • Corporate policies of project developers/financiers • Multilateral guidelines (e.g. OECD Guidelines on Multi-National Corporations) • Multi-stakeholder voluntary processes (e.g. Hydropower Sustainability Assessment Protocol)

A range of state, non-state, and private actors pursue their interests—publically and behind closed doors—within arenas of water justice (fig. 3.1) (Vernon et al. 2010 in Dore et al. 2012). As cross-scale contestation unfolds, actors both in favor of and opposed to a particular hydropower project will strategically build allied coalitions where shared values and interests exist (McCarthy and Zald 2006). These coalitions may span the legal and extra-legal spaces of the arena; occur between various state, private, and non-state actors; and operate across scales.

Figure 3.1: Actors involved in water governance in mainland Southeast Asia (reproduced from Dore et al. 2012)



While an HRBA provides an international legal framework by which to evaluate substantive, procedural and recognitional obligations of state and private sector actors, the challenge remains to ensure that human rights as stated on paper can in practice be accessed (Ribot and Peluso 2003). As arenas of water justice are spaces within which politicized processes unfold, recognizing power in its various forms and the power asymmetries that exist are a key consideration (Zwartveen and Boelen 2014). Elites seek to – and often do – capture formal institutions and their processes (Baird 2014). Yet, formal institutions and legal processes also hold the potential to redress power imbalances and address injustices (Boer et al. 2016). In Southeast Asia, while individual government recognition of human rights is patchy, there has been some promotion of an HRBA to development (Ciorcian 2012), including the Right to the Environment (Boer and Boyle 2013).

Given the transnational nature of some human rights cases in Southeast Asia, and the uneven access to justice across the region, extraterritorial obligations (ETOs) could be a significant transboundary justice mechanism (Middleton and Pritchard 2013). ETOs can be defined as “[o]bligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory” (ETO Consortium 2013), and are a recent evolution in international human rights law. While until now

most governments in Southeast Asia have interpreted their human rights obligations as applicable only within their own borders, the concept of ETOs is of growing interest. For example, in October 2014, five National Human Rights Institutions in Southeast Asia together with eleven civil society groups signed the "Bangkok Declaration on Extraterritorial Human Rights Obligations" (APWLD 2014). The implications of ETOs for the Right to Water on transboundary rivers has only recently begun to be explored (Bulto 2014).

International regimes and transboundary water governance

This section briefly summarizes recent developments in international regimes related to transboundary water governance. The International Watercourses Law is first introduced, and then its relationship with other international regimes – namely human rights and corporate accountability – is discussed.

Since its ratification in August 2014, only Vietnam has ratified the International Watercourses Law; however, the Mekong Agreement (MRC 1995) that binds the four countries of the Lower Mekong Basin (Cambodia, Laos, Thailand and Vietnam) within the Mekong River Commission (MRC) is drawn from a draft version of the law.

As the principal customary international law on transboundary rivers, the International Watercourses Law addresses the rights and obligations of states sharing transboundary rivers, in particular between those that have acceded to the convention. It is neither a veto right against other riparian states, nor an entitlement to unilateral use. Based on the principle of limited territorial sovereignty, core to the convention's notion of fairness between states is the concept of "equitable and reasonable utilization." Other important principles are: the obligation not to cause significant harm (Article 7); and the general obligation to cooperate (Article 8). Procedural norms are detailed in the International Watercourses Convention, which include norms on data sharing, available data, notification for planned measures, and time frames for consultation (UN 1997; Rieu-Clarke 2015a).

These principles are often elusive in practice, however. Each state will be inclined to utilize interpretations that most benefit their interests, as Neal et al. (2014: 14) argue: "generally upstream riparians favor the principle of equitable use while downstream riparians favor the obligation

of no significant harm to be written into water agreements and treaties.” Zeitoun et al. (2014: 175) point out that hegemonic states within a river basin “sometimes use power to deny or curtail the claims by non-hegemonic actors of past injustices, or of current inequitable arrangements of water use, treaties, or institutions,” where there may be “equality on paper and inequality in practice” (ibid.: 178).

Recently, in addition to the International Watercourses Law and related international environmental laws and norms, a wider array of international legal regimes have shaped transboundary water governance in relation to large dams, including: international human rights law; and international investment law (Rieu-Clarke 2015a; Boer et al. 2016). Rieu-Clarke (2015a), in an initial mapping paper, explores how environmental, human rights, and international investment regimes currently interact on transboundary rivers. Beyond the International Watercourses Law regarding international investment he details the implications of regional investment agreements, which in Southeast Asia is principally the ASEAN Economic Community launched in December 2015. He also discusses the role of third party dispute settlement procedures, for example, those facilitated by the International Centre on the Settlement of Investment Disputes, which generally have acted to defend the interests of foreign investors. In his paper, Rieu-Clarke emphasizes the Right to Water and the role of regional human rights institutions (which, in Southeast Asia, is the ASEAN Intergovernmental Commission on Human Rights, AICHR). When these regimes intersect around the “obligation to prevent transboundary harm (to another riparian state),” which is common to all three, it places states under a due diligence obligation, meaning:

States will be responsible for activities of ‘others in its territory’, including actions of foreign investors involved in hydropower projects. Such an obligation would require States to adopt certain legal, administrative, economic, financial and technical measures by which to regulate the conduct of non State actors in order to prevent significant harm. (ibid., 36)

Key regulatory measures that the state might be required to undertake are stakeholder consultation, and transboundary environmental impact assessments. Various private sector codes-of-conduct also determine required care by the state, including the OECD Guidelines on Multinational Enterprises and the International Hydropower Association’s Hydropower Sustainability Assessment Protocol (ibid.).

With an emphasis on the role of the state, Rieu-Clarke (*ibid.*) documents, principally from the perspective of international relations and international law, how these regimes interact. As highlighted by Hirsch and Merck Jensen (2006), however, states in their pursuit of the "national interest" through intergovernmental negotiations on transboundary rivers do not always represent the interests of all citizens equally, especially those citizens who are economically, socially or politically marginalized (as riparian communities often are). Thus, introducing a critical political economy and critical hydropolitics analysis could deepen understanding of the interaction of these regimes and their outcome in terms of access to justice (e.g. Zeitoun et al. 2014).

Arenas of water justice on the Mekong River: Xayaburi Dam

Since 2006, plans for a cascade of up to eleven dams on the Lower Mekong River's mainstream have been revived (Grumbine et al. 2012). While the full proposed Lower Mekong mainstream dam cascade holds the potential to generate up to 14,697 MW of electricity and thus to contribute to economic growth, by changing the river's hydrology and ecology and blocking major fish migrations and the movement of sediment, the mainstream dams could also put at risk the livelihoods, local economies and food security of millions of people (ICEM 2010; Grumbine et al. 2012).

The 1,285 MW Xayaburi Dam in northern Laos, the project at the most advanced stage of preparation, would export 95 percent of its electricity to Thailand, and is now under construction by a predominantly Thai private-sector consortium (Matthews 2012). Project proponents, including the Government of Lao PDR (GoL), the project consortium, and some of Thailand's relevant ministries and its electricity utility, the Electricity Generating Authority of Thailand (EGAT), argue that the Xayaburi Dam will generate cheap electricity and contribute to Thailand's energy security, and that the cross-border foreign direct investment and project revenues would bring "development" to Laos. Those opposing the project, including a number of local and international NGOs and some riverside communities from Thailand, Cambodia and Vietnam under the banner "Save the Mekong Coalition,"² emphasize that the Xayaburi Dam would require the resettlement of approximately 2,100 people from ten villages in Laos and that more than 200,000 people located near the dam would experience impacts to their livelihoods and food security, both within

Laos and in neighboring countries, due to impacts on migratory capture fisheries, loss of sediment flows and other ecological changes. They also highlight how the project's original Environmental Impact Assessment (EIA) report, published in August 2010, was of poor quality and did not consider transborder impacts (International Rivers 2011a). In response, the project developers claim they intend to spend an additional US\$400 million over the originally planned costs to address substantial and legitimate concerns, including threats to fisheries and sediment passage. Whether the project redesign will mitigate its negative impacts remains uncertain.

Decision-making and arenas of justice

The Xayaburi Dam has been surrounded by intense local, national, regional and even global politics (Matthews 2012). Key moments in decision-making around the project's construction include:

- The GoL and the project developer signed a Memorandum of Understanding on the Xayaburi Dam in May 2007, a Project Development Agreement in November 2008, and the concession agreement in November 2010.
- An MoU for a Power Purchase Agreement (PPA) was signed between EGAT and the GoL in July 2010, and the PPA between EGAT and the project developer was signed in October 2011.
- In May 2009, the MRC commissioned a Strategic Environmental Assessment (SEA) report for the Mekong mainstream dam cascade, which was launched in October 2010 (ICEM 2010).
- On 22 September 2010, one month before the launch of the SEA, the GoL initiated a regional decision-making process through the MRC called the Procedures for Notification, Prior Consultation and Agreement (PNPCA). The GoL concluded that the process was complete in April 2011, while Cambodia, Thailand and Vietnam requested further studies.
- Subsequently, in December 2011, the MRC Council agreed to conduct a further study on the Mekong mainstream dam cascade, which had not been completed at the time of writing.
- The GoL announced in July 2012 that the project had been redesigned to address neighboring countries' concerns,³ and a "ground breaking"

ceremony was held in November 2012 attended by the Cambodian and Vietnamese governments.⁴

- A court case was submitted in August 2012 by Thai villagers to Thailand's Administrative Court challenging their government's role in the project. In February 2013, the court announced that it did not accept jurisdiction on the case. However, in April 2014, the Supreme Administrative Court of Thailand reversed the lower court decision and accepted the case, but ruled against the Thai villagers in December 2015. The case is now subject to appeal.
- In early 2016, the project was about 60 percent complete.⁵

As the project decision-making process has played out, multiple arenas of water justice have been utilized by impacted and potentially impacted communities and their civil society allies (table 3.3). Each arena has its own story of coalition building, strategic activities and politics.

Table 3.3: Typology of legal "arenas of water justice" for human rights protection for Kayaburi Dam

Legal "arenas of water justice" for Kayaburi Dam	
Scale	Arena
National	<ul style="list-style-type: none"> • Thailand's Power Development Plan (since 2010) • Laos' Environmental Impact Assessment (February 2010) • Thailand National Human Rights Commission (February 2012)* • Thailand Administrative Court (since August 2012) and Thailand Supreme Administrative Court (since June 2014) • Thai Senate Committee on Good Governance Promotion and Corruption Investigation (November 2012)
Regional inter-governmental	<ul style="list-style-type: none"> • Mekong River Commission <ul style="list-style-type: none"> ◦ Strategic Environmental Assessment (May 2009–Oct 2010) ◦ Procedures for Notification, Prior Consultation and Agreement (PPNCA) (Sept. 2010–April 2011) ◦ Basin Development Plan 2 (2011) ◦ MRC Council Study (Dec. 2011) • AICHR (April 2011)*
International inter-governmental	<ul style="list-style-type: none"> • Not applicable (potentially UN Special Rapporteur on Rights to Food)
International voluntary/non-binding mechanisms	<ul style="list-style-type: none"> • OECD Guidelines for Multinational Enterprises <ul style="list-style-type: none"> ◦ Policy (August, 2012–June 2013) ◦ Audit AC (April 2014)

Note: *For details on case, in particular regarding the Power Purchase Agreement, see <http://www.internationaldetours.org/blogs/2011-01>. * Although AICHR could not formally investigate the case, Thailand's representative suggested it could be considered in AICHR's CSR study: http://www.an.mahidol.ac.th/eng/press/newsroom/news_full_p.php?id=1463.

Within each arena, actors' narratives have drawn upon various studies and also made claims about the project's impacts on substantive and procedural rights, including:

- *Substantive Rights:* The Right to Life; The Right to Food (e.g. Harris 2013); The Right to Health; and The Right to Housing
- *Procedural Rights:* The Right to Transparency and Access to Information; The Right to Participation in Decision-making; The Right to Access to Justice.

In the following sections, three of these arenas of water justice are briefly discussed, guided by identifying and analyzing:

- formal institutions and legal processes, the wider public space that surrounds them, and the actors included or excluded from each;
- how decision-making processes have unfolded as shaped by, *inter alia*, the politics of knowledge, uncertainty and complexity, and scale.

The selected arenas of water justice are:

- *a regional intergovernmental arena*: the PNPCA facilitated by the MRC, which in essence are an application of the International Watercourses Law to the project;
- *an international voluntary/non-binding mechanism arena, which draws on international human rights law obligations*: the complaint filed against the Finnish company Pöyry with the OECD Guidelines for Multinational Enterprises resulting from its role in supporting the GoL to proceed with the project; and
- *a national arena with implications for Thailand's extraterritorial obligations*: the court case submitted to the Supreme Administrative Court in Thailand.

"PNPCA process/ international watercourses" arena

On September 22, 2010, the GoL initiated the MRC's PNPCA, which has been a key arena of water justice in the case of the Xayaburi Dam. The PNPCA process is required under Article 5 of the Mekong Agreement, which states that for projects proposed for the Mekong River's mainstream that will have impacts on water flows in the dry season "Intra-basin use shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee." Procedural requirements cover notification, prior consultation, and agreement for planned measures. Further details on the process for intergovernmental consultation and agreement are provided in various documents, including the "PNPCA Procedures," "Guidelines on the implementation of the PNPCA," and the "Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin" report. Despite these documents, there has been considerable disagreement over how to interpret the rules and procedures

of the PNPCA process (Rieu-Clarke 2015b), which has resulted in a "politics of uncertainty" around the legal norms in play (Middleton 2014).

The PNPCA process officially commenced on October 22, 2010, initiating the creation of a MRC PNPCA Joint Committee Working Group that reported to the MRC Joint Committee (Rieu-Clarke 2015b).⁶ In terms of public meetings, the PNPCA process held eight "information sharing" meetings in Cambodia, Vietnam and Thailand and received online submissions, although civil society groups complained that their opinions were not seriously taken into consideration from these meetings. No consultation process was held in Laos under the PNPCA, as the government claimed that they had previously consulted communities. Given the limited space for public debate in Laos on contested topics such as hydropower dams, however, the quality of this consultation is doubtful. Furthermore, the Xayaburi Dam's EIA was only released after the meetings were held and therefore was not subject to discussion, and was criticized for its quality (International Rivers 2011b).

Following a series of meetings of the experts who formed the MRC PNPCA Joint Committee Working Group, the MRC Joint Committee convened on April 19, 2011 to discuss the PNPCA (see Rieu-Clarke 2015b). The official press release of the meeting stated:

Lao PDR insisted there was no need to extend the process since this option would not be practical, while trans-boundary environmental impacts on other riparian countries are unlikely ... Cambodia, Thailand and Viet Nam, however raised their concerns on gaps in technical knowledge and studies about the project, predicted impact on the environment and livelihoods of people in the Mekong Basin and the need for more public consultation ... Vietnam indicates it would like to see a 10 year moratorium.

The issue was delegated to the next ministerial-level MRC Council Meeting, which takes place annually.⁷ The meeting, however, was not held until December 2011, some eight months later; while an agreement to delay the Xayaburi Dam was announced afterward (International Rivers 2011c), preparatory work continued at the site.

Diverse interpretations of the PNPCA procedures and guidelines led to different conclusions on whether the PNPCA process was actually concluded or not. The GoL claimed that according to the PNPCA guidelines, the process ended on April 22, 2011, six months after it

formally commenced because no government had officially objected to the project. To further its argument, the GoL commissioned a report by the consultancy group Pöyry assessing the compliance of the Xayaburi Dam with the MRC requirements (Pöyry Energy AG 2011). While the report itself was not published until August 2011, Pöyry issued a letter in June 2011 concluding "that the Prior Consultation Process had been ended" and that "the decision whether or not to proceed with the project rests solely with the Government of Lao." At the time, the MRC's official position on the PNPCA process was that "there is still a difference in views from each country on whether the prior consultation process should come to an end," and "that a decision on the prior consultation process for the proposed Xayaburi hydropower project be tabled for consideration at the ministerial level, as they could not come to a common conclusion on how to proceed with the project" (MRC 2011c).

Pöyry's letter was used by the GoL to inform the lead developer of the project consortium, Thailand's Ch. Karnchang, and Thailand's Ministry of Energy in June and October 2011 respectively that the PNPCA process was complete. These letters paved the way for the project developer to proceed to sign a PPA with EGAT on October 29, 2011. This reveals how actors in positions of power use their influence to define justice, in this case regarding the interpretation of the PNPCA process and its closure.

Meanwhile, the Cambodian Government and some civil society groups disagreed with the Pöyry assessment (International Rivers 2011a). A commissioned legal opinion by the firm Perkins Coie differed from that of Pöyry and concluded that:

Lao PDR's unilateral action to prematurely terminate the PNPCA process, without allowing its neighbor countries to properly conclude that process, violates the Mekong Agreement, and therefore international law. (International Rivers 2011d)

The NGO International Rivers argued that the GoL was required to seek agreement with its neighbors before beginning the project, but had not "negotiated in good faith," partly because it was constructing the project even as public and intergovernmental consultations were still under way (Herbertson 2013).

The MRC Secretariat, which had been asked by the Vietnamese government to review the Pöyry report in the context of the MRC's dam

design guidelines, concluded that the measures proposed by Pöyry would not result in the Xayaburi Dam's compliance with the MRC standards. It stated that:

due to the major challenges involved it is the MRC Review Team's observation that even if the recommendations in the Pöyry Report are followed, the Xayaburi Project would be considered only partly compliant in the area of fish bypass facilities and fisheries ecology as well as in terms of dam safety. (MRC 2011a)

The GoL commissioned a second consultancy firm, *Compagnie Nationale du Rhône (CNR)*, to review the Pöyry assessment. The GoL claimed that CNR's report, which was published in March 2012 (CNR 2012), supported the Pöyry assessment. But this was also subsequently challenged by civil society groups, and according to *International Rivers* (2012) the CNR report's findings appeared to be misrepresented by the GoL itself.

Uncertainty around how to interpret the rules of the PNPCA has been compounded by scientific uncertainty within studies. A wide range of actors have generated primary research and analyses of the Xayaburi Dam, reaching divergent conclusions on whether the project should proceed or not, including: the project developers (e.g. *TEAM Consulting 2010a, 2010b*) and government-commissioned consultants (e.g. *Pöyry Energy AG 2011*); the intergovernmental MRC (*MRC 2011a, 2011b*); academics (e.g. *Matthews 2012; Grumbine et al. 2012*); and NGOs (e.g. *Save the Mekong Coalition 2010; International Rivers 2011a, 2012*). Thus, the predicted impacts of the project, the effectiveness of technologies proposed to mitigate them, and the project's implications for human rights are heavily contested between the project's supporters and opponents.

At the 19th MRC Council meeting in January 2013, it was reported that the Government of Cambodia claimed that the GoL had misinterpreted the 1995 Mekong Agreement in deciding to proceed with the project (*Lefevre and Carsten 2013*). According to *International Rivers*:

On January 17 [2013], government ministers gathered in Laos for the annual meeting of the Mekong River Commission's governing body. Although the Xayaburi Dam was not on the agenda, the governments finally spoke out. Discussions became tense. Cambodia said that Laos had misinterpreted the 1995 Mekong treaty by proceeding with the Xayaburi

Dam before the "prior consultation" was finished. Vietnam said that the recent launching of the dam "is causing concerns ... about its adverse impacts on downstream areas." Even Thailand acknowledged that concerns still exist.

... At the end of the meeting, Laos announced "with deep regret" that it could not sign the meeting's official minutes, signaling that it did not acknowledge the criticisms. (Herbertson 2013)

Rieu-Clarke (2015b: 145), commenting on the same meeting, notes that "Cambodia called for 'a more effective framework,' Thailand recognized the need to 'strengthen the MRC,' and the MRC development partners asked the Basin States to strengthen the procedures for prior notification and consultation." Almost two years later, in a media interview in November 2014, Te Navuth, secretary-general of Cambodia's National Mekong Committee (CNMC) stated: "We don't talk about Xayaburi anymore (Worrell 2014)."

As demonstrated above, the MRC struggled to facilitate the PNPCA process and in the end it did not produce a consensual agreement even among the four member governments. Commenting on the role of the Mekong Agreement and its significance to the International Watercourses Law, Rieu-Clarke (2015b: 145) argues that:

Unfortunately, the Xayaburi prior consultation process failed in its main objective, namely to reconcile the competing interests of the states concerned ... while the political factors must be taken into account, this failure to reconcile competing interests can partly be blamed on the ambiguity within the text of the 1995 Mekong Agreement and related procedures.

Ultimately, the ability of affected communities and civil society to influence the core decision of this arena was weak. At the same time, the PNPCA process represented an unprecedented public (albeit imperfect) decision-making process in a region where transparent and accountable government is limited.

"OECD Guidelines" arena

In June 2012, 15 civil society groups from seven countries filed a complaint with the OECD Guidelines for Multinational Enterprises with the National Contact Point (NCP) in Finland regarding the Finnish company Pöyry's role in assessing the Gol's compliance with the PNPCA process.

This is an international arena of water justice where a set of voluntary guidelines evaluate and can make recommendations towards the role of private sector actors (from the OECD), with the process facilitated by an NCP, which in the case of Finland is the Ministry of Employment and the Economy (MEE) (see OECD Watch 2012; Herbertson 2012a). The arguments put forward in the complaint were as follows (Siemsenpuu Foundation Mekong Group 2012):

- *Conflict of interest:* Pöyry produced a report in support of the GoL's position that the PNPCA process had been concluded satisfactorily, while also negotiating other rules in the project's development.⁸
- *Report's conclusions questionable:* Pöyry concluded that "The Xayaburi HPP has principally been designed in accordance with the applicable MRC Design Guidelines" (Pöyry Energy AG 2011). However, its report identifies that a further 40 studies were required. Furthermore, the report did not clearly state where the GoL was not in compliance with the PNPCA, for example, on the effectiveness of the fish passage structure. The Pöyry report concludes that the project's impacts could be mitigated, and that outstanding concerns about the project could be addressed as construction proceeded. This conclusion was questioned by the MRC Secretariat in a subsequent report (MRC 2011b; see also Herbertson 2012b).
- *Undermining regional cooperation:* The report was commissioned against the backdrop of a diplomatic dispute within the MRC regarding whether the GoL could proceed with the Xayaburi project. The complainants argued that the report – and therefore Pöyry – was "party to an attempt to circumvent a not-concluded, still on-going, regional consultation process that aims at guaranteeing balanced and peaceful co-operation between the countries in the region" (Siemsenpuu Foundation Mekong Group 2012: 6).
- *Regarding human rights, the OECD guidelines⁹ has a chapter that requires of companies: "within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur" (paragraph 2); and "seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts" (paragraph 3).*
- The complainants therefore argued that:

Pöyry does not address any but a few of the human and social impacts of the dam. ... [and therefore] Pöyry is contributing to the adverse human and social impacts. Through the report, Pöyry has encouraged the Lao government to go ahead with untested and inadequate mitigating measures that would require further study in the context of Lower Mekong mainstream.

It should also be noted, ... that inadequate in-country laws or government's unwillingness to respect human rights are not excuses for companies not to comply with international standards ... This is highly relevant with regards to impacted people both in Cambodia and Lao PDR." (Siemepuu Foundation Mekong Group 2012: 34)

Pöyry's initial response to the complaint, published in a letter to the Business and Human Rights Resource Center, was that it "finds this complaint completely unfounded and without any basis in the OECD Guidelines for Multinational Enterprises."¹⁰ They argued that the complainants base their assessment of the potential effectiveness of mitigation measures on scientific uncertainty surrounding the measures. According to Middleton (2014), such a response itself engages in a "politics of uncertainty," whereby uncertainty itself is deployed as a discursive strategy.

The case was accepted by Finland's NCP in October 2012. In response to the complaint, Pöyry argued that: it was not the leading developer of the project; as consultants they were not responsible for how their services were used; and that ultimately their work had improved the project causing it to become more environmentally friendly. Following an attempt at mediation between Pöyry and the complainants in December 2012, as required under the OECD Guidelines process, Pöyry stated it was not interested in further dialogue with the complainants. Thus, following the release of statements prepared by the Finnish ministries of Environment and of Foreign Affairs, both Pöyry and the complainants issued their final responses.

The case ended in June 2013 with Finland's NCP concluding that:

Pöyry Oyj did not violate OECD Corporate Social Responsibility Guidelines in its dam project in Laos. However, companies should assess the risks of similar projects more carefully and act more transparently in the future.¹¹

It goes on to state:

Pöyry should have addressed the ambiguities related to environmental issues and human rights more clearly in its report to the government of Laos. However, the company made an effort to mitigate the environmental risks and negative impacts of the project by means of several detailed recommendations, even if the various parties disagree upon whether or not these actions were adequate.

In a press release by the complainants the process of the complaint itself was criticized because:

The response to the complaint that Pöyry submitted to the MEE has been treated as strictly confidential, and [thus] the complainant has not been allowed to access central information regarding the handling of the case.¹²

The NGO OECD Watch argued that this is against the principles by which a complaint should proceed, citing a United Kingdom case where the NCP's conclusion was revoked due to information not shared among all parties:

The case, which was the first ever handled by the Finnish NCP, raises serious concerns about the NCP's equitability. The NCP gave in to Pöyry's [sic] demands for an excessive degree of confidentiality and did not allow the complainants to see or rebut the company's [sic] response to the allegations. (OECD Watch 2012)

The complainants added:

During the procedures [of this specific instance], the implementation of the OECD Guidelines in Finland has turned out to be inadequate and discriminatory towards the NGOs (ibid.).

In other words, while the arena was activated to challenge the role of a powerful actor, from the perspective of the civil society complainants the official process proceeded without equity. Despite this outcome, with which the complainants clearly disagreed (in particular in terms of procedural justice of the OECD complaint process itself), one organization—the Siemenpuu Foundation—noted that the case was “An important precedent for the Finnish NCP” because it made clear that Finnish consulting companies are subject to the OECD Guidelines.¹³ More recently, a Finnish journalist has been developing a challenge to the flaws in the procedural dimensions of the case.

"Thai National court" arena

Following the outcome of the PNPFA, which civil society groups and riparian communities in Thailand felt had marginalized their concerns, in August 2012 they submitted a case to Thailand's Administrative Court to challenge the role of Thai government agencies in the project, on the basis of the 2007 Constitution. The case was submitted by 37 Thai villagers from eight Thai provinces along the Mekong River who claimed that they would be affected by the project. The villagers were supported by the Thai public interest legal NGO Community Resource Center. The case was against five Thai government agencies involved in the Xayaburi Dam project in various ways, including: EGAT; the Thai Cabinet; and the National Energy Planning Council.²⁴ According to the NGO EarthRights International, the basis of the case was to:

challenge the decision of the National Energy Policy Council and Thai Cabinet to approve the Power Purchase Agreement between the Electricity Generating Authority of Thailand (EGAT) and the Xayaburi Power Company Limited, the project's operator. The villagers argue that this approval was given without conducting an environmental and health impact assessment of the dam in Thailand along with public consultation, both of which are required under the Thai Constitution for activities that will significantly affect a community's natural environment. (Suriyasothachyankul 2012)

The case related to the fact that consultations undertaken under the PNPFA in Thailand were inadequate with regards to the standards expected under Thailand's 2007 Constitution, and that the project developers and the Gov. had not undertaken a transboundary EIA for the project and thereby not assessed the impacts on Thai communities. Given that the Thai government had a role in the decision taken to proceed with the project and that there would be transboundary impacts on Thai communities, the plaintiffs argued that Thailand's Constitution should apply in this case, even though the project itself is located in neighboring Laos. Niwat Roykaew, one of the leaders of the Network of Thai People in Eight Mekong Provinces, which is a grassroots group supporting the case, is quoted as stating:

We have done everything to make the parties concerned aware of the issues but so far none of the departments or organizations we have appealed to has addressed the issue by suspending the project in order to avoid its impact. For this reason we ... are seeking justice from the court. (Suriyashetchiyangkul 2012)

In February 2013, the court announced that it did not accept jurisdiction on the case on the basis of three grounds:

- the plaintiffs are not considered injured persons as conditions and compliances set by the Cabinet before concluding the power purchase agreement are considered part of the internal administrative process;
- the power purchase agreement is binding for contractual parties, such as EGAT and the Xayaburi Power Company, therefore third parties like the plaintiffs are not considered injured persons; and
- although the defendants did not comply with PNPCA, such process is not considered an administrative act and therefore the court is not able to hear the case. (Deetes 2012)

In March 2013, however, the plaintiffs appealed to the Supreme Administrative Court of Thailand, and in June 2014, the Court reversed the Lower Court decision (Deetes 2012, 2014; Sta. Maria 2012). The Court accepted that the MRC's PNPCA process as conducted in Thailand had not complied with the standards expected under the Constitution, in particular regarding information disclosure and public participation (Efevre 2014). In accepting the case, the Court stated that communities in Thailand

are entitled to participate in the management, maintenance, preservation and exploitation of the natural resources and the environment, in a balanced and sustainable manner, in order to enable themselves to live a normal life consistently in an environment that is not harmful to their health, sanitation, welfare and quality of life. (Deetes 2015)

Yet on December 25, 2015, the Court rejected the case, stating:

the PPA signing was legal and passed the MRC Procedure for Notification Prior Consultation and Agreement (PNPCA). Hosted by the Department of Water Resources (DWR), four public hearings were arranged in Thailand's provinces along the Mekong River in 2011 as part of the PNPCA. (Wangkiat and Banggrapha 2015)

At the time of writing, representatives of the plaintiffs said that they would file an appeal, while the representative of the NGO Community Resource Center pointed out that the court did not take into account the transboundary impacts of the Xayaburi Dam.

This case is unprecedented for Thailand, as it investigates the consequences of Thai investment in a neighboring country. In other words, the case partially represents Thailand's consideration of its extraterritorial obligations, even though it only considers the extent to which the project creates impacts on Thai communities. The Thai communities, however, consider themselves as acting in solidarity with communities in neighboring countries who are also being impacted by the project, but, reflecting the uneven access to justice across the region, cannot act on their own behalf directly to raise concerns about the project. The case does not challenge directly the GoL's decision to proceed with the Xayaburi Dam, but it does have implications for the PPA between EGAT and the project developer. Given that EGAT plans to buy 95 percent of the project's power (and that the project's construction is more than half complete), the implications for the construction itself would be significant should the PPA be cancelled as a result of the court case.

Conclusion: Water justice and sustainability

Across rural mainland Southeast Asia, direct access to and sustainable use of natural resources are inextricably tied to people's well-being. Loss of access to natural resources—including due to hydropower dam construction—is a threat to livelihoods, and also to human rights. The construction of a large hydropower dam significantly redistributes access to and control over river-related resources from riparian communities to the operator of the dam and to the consumers of electricity. Benefit-sharing mechanisms, where they exist, have significant shortcomings in practice (Suhardiman et al. 2014).

Internationally, there is a growing recognition of the relationship between the environment and human rights, including the Right to Water, although in Southeast Asia the recognition of these rights often seems distant. This chapter has proposed the heuristic framework of "arenas of water justice" as a tool to analyze the various legal processes of water governance that exist around large hydropower projects on transboundary rivers, while at the same time recognizing that legal processes are only

one of a number of arenas within which such contestations take place. These arenas are conceptualized as politicized spaces of water governance in which a process for claiming and/or defending the Right to Water (and related resources) takes place. The chapter has problematized the implications for power and politics within arenas of water justice on transboundary rivers. It has contextualized these arenas within recent developments in international law, including the International Watercourses Law and its relationship with international human rights law, and also the role that extraterritorial obligations might play in protecting these rights.

The Xayaburi Dam case study reveals how legal claims for rights have been pursued through extraterritorial arenas of water justice by affected communities and civil society seeking to challenge the environmental and social impacts associated with the project. These legal strategies are also embedded in a wider array of strategies deployed by the dam's opponents that also involve cultural claims over the value of water and how justice should look. Given the transboundary character of the Xayaburi Dam case—in terms of foreign direct investment, planned electricity trade, actors involved, and its location on a transboundary river—there is not a single arena of water justice that exists whose jurisdiction and authority may offer a "silver bullet" for redressing claims of injustices. Instead, impacted communities and civil society allies have pursued multiple arenas of water justice, hoping that a critical momentum may be achieved.

Transboundary arenas of justice and the associated extraterritorial obligations implicit to them will become increasingly significant as Southeast Asia continues to economically integrate, including under the ASEAN Economic Community. These arenas could be a key avenue offering access to justice when contestation emerges over shared resources within and across borders, which takes place in the context of uneven access to justice across the region. Through the pursuit of justice in these arenas, there can be hope for more equitable and sustainable development, especially for those most economically and politically marginalized. These arenas are created, affirmed and reinforced, however, only through the innovative actions of affected communities, civil society groups, and allied individuals bravely challenging powerful actors often at personal risk.

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Notes

- ¹ Knox (2014) also notes that not all states have accepted the norms that could govern the relationship between human rights and environmental protection.
- ² In Laos, non-profit associations work within an extremely constrained political space.
- ³ See Ministry of Energy and Mines, "Frequently asked questions about Xayabury hydropower project," http://www.laenergy.la/pageSubMenu.php?id_submenu=34 (last accessed July 19, 2016).
- ⁴ Construction for the project on the riverbanks had actually proceeded since late 2010 and in the river itself since at least mid-2012.
- ⁵ See also, International Rivers 2014 and Rieu-Clarke 2015b.
- ⁶ The MRC Joint Committee is formed of senior officials from the four member countries at no less than departmental head level.
- ⁷ The MRC Council is formed of environment and water ministers from the four member countries, and meets annually.
- ⁸ In November 2012, Pöyry signed a contract to supervise the project's construction (Worrell 2012).
- ⁹ OECD Guidelines, 24, Commentary 20 on paragraph A.12.
- ¹⁰ See Pöyry Group, "Pöyry's Statement to Business & Human Resource Centre," Business and Human Rights Resource Centre, August 2012: <https://business-humanrights.org/en/p%C3%B6yry-plc%E2%80%99s-statement-to-business-human-rights-resource-centre>.
- ¹¹ See "Pöyry Found Not to have Broken OECD Guidelines for Laos Dam Project," *Environment Analyst*, July 2, 2013: <https://environment-analyst.com/29044/poyry-found-not-to-have-broken-oecd-guidelines-for-laos-dam-project>.
- ¹² See Siemenspuu's Facebook post, "Unofficial English Translation of the Complainants' Press Release on Pöyry Case on June 18, 2013," https://www.facebook.com/permalink.php?id=164447100248670&story_fbid=677894275570614 (last accessed July 27, 2016).
- ¹³ Liisa Uimonen, Siemenspuu Foundation Mekong Group, "Complaint against Pöyry for its Role in Xayabury: Corporate Responsibility and Finnish Development Cooperation at Odds in the Mekong," undated presentation.
- ¹⁴ Within the Administrative Court it is not possible to sue the private sector members of the consortium or its financiers.

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