



**Arenas of water justice on Transboundary Rivers:
A rights-based approach to the food-water-energy nexus in Southeast Asia**

Carl Middleton^{1,2}

Center for Social Development Studies (CSDS), Faculty of Political Science,
Chulalongkorn University, Bangkok, Thailand

Conference Paper

Resource Politics 2015

Institute of Development Studies

7 – 9 September 2015

resourcepolitics2015.com

¹ Author's email: carl.chulalongkorn@gmail.com; www.csd-chula.org and www.maids-chula.org

² The author would like to thank the project “*Dams, securitization, risks and the global water-energy nexus under climate change scenarios (KN/11015)*,” of the Social, Technological and Environmental Pathways to Sustainability (STEPS) Centre, Institute of Development Studies, University of Sussex for its support in preparing this paper and participating in the Resource Politics 2015 conference. The author also thanks Ashley Pritchard for early discussions on the concept of “Arenas of Injustice.”

In Mainland Southeast Asia, major transboundary rivers such as the Mekong River and the Salween River are central to the food security, livelihoods and culture of millions of people. Increasingly fulfilled plans for hydropower dams place environmental and social costs onto communities whose human rights are often violated. In 2014, the International Watercourse Law entered into force, whilst globally there is also growing recognition of the relationship between the environment and human rights, including the Right to Water, as well as the role that extra territorial obligations (ETOs) might play in protecting these rights. Meanwhile, the “food-water-energy nexus” has also emerged as a potentially useful research and policy agenda, but remains contested including over how it addresses issues of justice. All are relevant to cross-border investments in hydropower projects in Southeast Asia.

This paper examines how processes of transboundary river resource dispossession by large hydropower dams have been challenged within “arenas of water justice” in Southeast Asia, conceptualized as politicized spaces of water governance in which *a process* for claiming and/or defending the Right to Water takes place. The paper problematizes how justice has been understood in relation to water and its governance, and the implications for power and politics within arenas of water justice on transboundary rivers. It explores how arenas of water justice have played out through a case study of the Xayaburi Dam, which is a heavily contested project now under construction on the Mekong River’s mainstream in Laos that will export the majority of its electricity to Thailand. The paper suggests that given that human rights are interdependent and indivisible, a rights-based approach to the food-water-energy nexus could anchor “the nexus” in a clear normative framework. Meanwhile, recent political economy research on the nexus in practice (for example Foran, 2015) could provide a clear analytical framework by which to materially express these human rights’ indivisibility. Such rights are claimed and defended within arenas of water justice.

Introduction

In Mainland Southeast Asia, major transboundary rivers such as the Mekong River and the Salween River are central to the food security, livelihoods and culture of millions of people. An increasingly extensive program of large hydropower dam construction is in progress on these rivers in Laos, Cambodia and Myanmar to meet domestic electricity demand and for power export to neighboring Thailand and Vietnam (Middleton and Dore, 2015). These projects are mostly joint endeavors between state agencies and transnational private sector developers and financiers (Middleton et al., 2015b). Whilst producing apparently cheap electricity, these projects' are resulting in the degradation of the region's river systems with the costs borne by tens of thousands of villagers who are being resettled, and a far larger number who depend upon increasingly degraded riverine resources that are in essence being partially-enclosed (Middleton et al., 2013). Many studies have recently assessed the costs and benefits of hydropower projects in the region, and the politics enshrouding them that determines who benefits and who pays the costs (e.g. Öjendal et al, 2012; Molle et al, 2009).

Recent academic literature has begun to address how the concept of justice in water governance should be understood and applied (Lazarus et al., 2011), including on transboundary rivers (Neal et al., 2014) and with regard to rights-based approaches (Sultana and Loftus, 2012, Bulto, 2014). Furthermore, in August 2014, the "Convention on the Law of the Non-navigational Uses of International Watercourses" (*the International Watercourse Law*) entered into force. How the International Watercourse Law relates to other international regimes, in particular international human rights law, remains poorly understood (Rieu-Clarke, 2015b) despite a growing recognition of the relationship between the environment and human rights (Knox, 2014).

Since 2008, the concept of the "food-water-energy nexus" (*the nexus*) has also emerged as a research, policy and project agenda globally and in mainland Southeast Asia towards natural resource management (Allouche et al., 2015, Smajgl and Ward, 2013). In essence, the nexus approach acknowledges the importance of co-considering food, water and energy systems for sustainable development and poverty reduction (Hoff, 2011). Middleton et al (2015a) have argued that whilst the nexus approach offers potential analytical insights, if it is to become a empowering development agenda it needs to more explicitly identify winners and losers in decision-making, the politics involved, and ultimately address the issue of human rights and justice.

The purpose of this paper is to examine how processes of transboundary river resource dispossession by large hydropower dams have been challenged within "arenas of water justice" in Southeast Asia. The paper focuses in particular on a rights-based approach to large hydropower dams and water governance on transboundary rivers in Southeast Asia in light of the International Watercourse Law, the Right to the Environment, and the food-water-energy nexus. In the following section, a rights-based approach to large hydropower dams is discussed from the perspective of international human rights law, whilst recognizing that rights – including the right to water – are fundamentally a social relationship. This is followed by a section outlining and critically evaluating the Right to the Environment and related extra-territorial obligations in Southeast Asia. The next section defines "arenas of water justice" as politicized spaces of water governance in which *a process* for claiming and/or defending rights to water or

seeking redress for water rights violations take place. The following two sections seek to problematize how justice has been understood in relation to water and its governance, and the implications for power and politics within arenas of water justice. The next section then extends this discussion to a rights-based approach to water governance and the nexus on transboundary rivers. The following section briefly applies the arenas of water justice approach to a case study of the Xayaburi Dam, which is a heavily contested project now under construction on the Mekong River's mainstream in Laos that will export the majority of its electricity to Thailand and is built by a predominantly Thai private sector consortium (Matthews, 2012). The paper concludes by considering how the Right to Water and related resources, claimed or defended within arenas of water justice, could be furthered through linking normative rights-based claims to political economy research on the food-water-energy nexus.

A Rights Based Approach to Large Hydropower Dams

Many studies have examined the political ecology of water resource conflict and dispossession resulting from large hydropower dams, how powerful actors are largely privileged, and how environmental injustices thus result (Mehta et al., 2012, McCully, 2001, Molle et al., 2009). 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 urban and industrial consumers of electricity. Benefit sharing mechanisms, where they exist, have significant shortcomings in practice (Suhardiman et al., 2014).

In formal international law, the Right to Water has emerged in the context of 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)³, which was followed by a Declaration by the Human Rights Council in September 2010 (WaterLex and WASH United, 2014).

The Right to Water is a “positive human right”, meaning that it obliges action by duty holders, in particular governments, to ensure the right. Based on the recognition of the interrelated, interdependent and indivisible nature of rights, there is an effort to link the Right to Water to the full range of economic, social, and cultural values of water (e.g. see WaterLex and WASH United, 2014), yet substantial work remains to be done.

Relatedly, there has been growing momentum around the right to a safe, clean and healthy environment.⁴ In his statement to the Human Rights Council in March 2014, the current UN

³ The UN General Assembly states: “The Assembly recognized the right of every human being to have access to sufficient water for personal and domestic uses (between 50 and 100 liters of water per person per day), which must be safe, acceptable and affordable (water costs should not exceed 3 per cent of household income), and physically accessible (the water source has to be within 1,000 meters of the home and collection time should not exceed 30 minutes).”

⁴ In April 2011, the UN Human Rights Council adopted resolution 16/11 on human rights and environment, which determined that: sustainable development and the protection of the environment can contribute to human well-

Special Rapporteur on Human Rights and the Environment, Professor John Knox, concluded that⁵: “I believe that it is now beyond argument that human rights law includes obligations relating to the environment” (Knox, 2014). He had previously identified three types of environmental human rights obligations of States (Knox, 2012):

- *Procedural obligations*, including to assess environmental impacts, share information, facilitate public participation, and provide access to effective remedies for environmental harm
- *Substantive obligations* to protect against environmental harm that interferes with the enjoyment of human rights, including adopting and implementing an appropriate legal framework that strikes a reasonable balance between environmental protection and other priorities. Substantive rights include life, health, food and water. It also includes the right to self-determination, for example when indigenous groups are threatened by hydropower projects.
- *An obligation to take account of groups who may have particular vulnerabilities to environmental harm.* This may include the impacts of environmental pollution to children’s health, situations that may have a disproportionate effects on women, and impacts on indigenous people who have a particularly close relationship with natural resources.

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 1).⁶ Assessing large dams through the lens of a rights-based approach 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 rights-based approach, in particular the World Commission on Dams that proposes a “rights and risks” approach (WCD, 2000, Moore et al., 2010).

Table 1: Substantive and Procedural Human Rights Obligations Relevant to Large Hydropower Dams	
<i>Substantive obligations</i>	<i>Procedural obligations</i>
<ul style="list-style-type: none"> • The Right to life • The Right to water and Sanitation • The Right to freedom from torture and Degrading treatment • The Right to health • The Right to housing 	<ul style="list-style-type: none"> • The Right to equality before the law and equal protection of the law • Rights of non-discrimination • The Right of freedom of movement • Rights to freedom of opinion and expression

being and the enjoyment of human rights; and conversely environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights.

⁵ Professor Knox notes that not all States have accepted the norms that could govern the relationship between human rights and environmental protection.

⁶ These rights are derived from: The International Bill of Human Rights, which includes the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights; The Core UN Human Rights Treaties and the optional protocols to these treaties; and the International Labor Organization Conventions, Protocols, and Recommendations.

<ul style="list-style-type: none"> • The Right to food • The Right to Culture • Rights of Disabled People • Rights of the Child • Gender and Women’s Rights • The Right to Self-determination • Indigenous Peoples’ land Rights and Permanent Sovereignty over natural Resources 	<ul style="list-style-type: none"> • The Right to freedom of Speech • The Right to freedom of Assembly • The Right to transparency and Access to information • The Right to Participation in Decision-making • Right to Access to Justice • Free Prior and Informed Consent
---	---

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 Zwarteveen (2005:735) highlight in their study on Andean collective irrigation management institutions “*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 negotiation/ contestation processes that are socially-, culturally-, historically- and politically specific. These local rules and rights in turn reflect “*power relations, local identities and contextualized constructions of legitimacy*” (Boelens and Zwarteveen, 2005:735). Multiple water access and use rules commonly co-exist or are in tension (i.e. legal pluralism), usually between national law and local customary arrangements (Boelens et al, 2005; for the Mekong region see Johns et al, 2010). Which rules are legitimate and to be applied is often contested between actors of divergent interests and power, including when a large hydropower project is proposed.

Badenoch and Leepreecha (2011), taking the case of the Hmong ethnic group in Northern Thailand, show how local water resource management regimes may be framed as either “Rights” or “Rites” by communities as they seek to secure access to and control of their resources. Regarding “Rights-based” claims, communities detail their resources as “*a system of interlinked common property resources that require the right institutions to regulate users...*” (2011:67) and the associated rights-based framing of claims to resource tenure facilitates their engagement with the state in a formalized and legalistic language that the state understands – if not always agrees with. Meanwhile, a “Rites-based” approach is derived from when “*watersheds have been understood as a place where local people struggle against the state in a clash of cultural symbols and knowledge systems*” (2011:67). Here, claims to control over resources emerge from the legitimacy that is derived from the cultural norms, local knowledge, history of use including investment of labor, local customs that have developed for its management, and sense of identity of the community derived from the use of resource. For Boelens and Zwarteveen (2005:753), such struggles of the Andean community irrigators are “*over water, over the right to sustenance and livelihood, over the right to healthy and socially just forms of living are also struggles for specificity and contextuality, for own ways to define the language and rules of play, for the right to ‘otherness’*” [Emphasis added]

In this paper, emphasis is placed on the rights-based approach as communities and supporting actors seek to legitimize community's claims to use of and control of water resources in language that is recognized by the state and its legal systems. This is not to deny the importance of "Rites-based" claims, which typically co-exist with "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 Boelens (2008:56) 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 elite actors. On the other hand, whilst laws and the justice system are supposed to protect the weak, this presupposes that the laws themselves are just or are used to just ends; yet, laws can also consolidate the position of powerful actors in society rather than acting to redress social injustices.

The Right to the Environment and related Extra-Territorial Obligations in Southeast Asia

Across rural mainland Southeast Asia, loss of access to natural resources – including due to hydropower dam construction – is a threat to livelihoods, and also to human rights. On transboundary rivers, projects built in one country can create impacts across borders in another. At the same time, cross-border flows of finance as well as electricity trade also imply that sovereignty is partially shared (Merme et al., 2014), that there are linkages (and disconnects) between water and electricity planning (Middleton and Dore, 2015), and that the associated cause-and-effect of impacts to river resources are connected across borders (Baird and Quastel, 2015).

In Southeast Asia, there has been some promotion of rights-based approaches to development (Ciorcian, 2012), including the right to the environment (Boer and Boyle, 2013).⁷ While individual government recognition of human rights is patchy and some governments actively limit the diffusion of rights-based approaches, a significant regional step forward was taken in October 2009 with the creation of the ASEAN Intergovernmental Commission on Human Rights (AICHR). Since AICHR's creation, governments have emphasized the promotion mandate of AICHR, whilst civil society – cautiously supporting AICHR - have at the same time criticized its lack of a protection role that means it is currently unable to receive and investigate cases (Gomez and Ramcharan, 2014).⁸

In November 2012, the Association of Southeast Asian Nations (ASEAN) adopted its declaration of human rights, in which Article 28 states "*Every person has the right to an adequate standard of living... including: ... The right to a safe, clean and sustainable environment.*"⁹ Signaling its intent

⁷ For example, in May 2014, the Embassy of Sweden organized a two day regional workshop in Bangkok titled "*The Interaction between Environmental Sustainability and a Human Rights-Based Approach*"

⁸ AICHR, as in ASEAN more generally, is also challenged by the divergent commitments amongst governments to the complete body of international human rights law, which some countries view as an imposition of Western liberal values, or as impeding economic growth.

⁹ The ASEAN Declaration on Human rights, Article 28 in full states: "*Every person has the right to an adequate standard of living for himself or herself and his or her family including: a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food; b. The right to clothing; c. The right to adequate and affordable housing; d. The right to medical care and necessary social services; e. The right to safe drinking water and sanitation; f. The right to a safe, clean and sustainable environment*"

to pick up the right to the environment as a thematic focus, in September 2014 AICHR organized a two day workshop titled “*AICHR Workshop on Human Rights Environment and Climate Change*”, with a follow-up workshop scheduled for September 2015. Meanwhile, AICHR has also published a thematic study titled *Baseline Thematic Study on CSR and Human Rights* that frequently refers to the environment and sustainability (Thomas and Chandra, 2014).

Given the transnational nature of some human rights-environment cases in Southeast Asia, alongside the uneven access to justice across the region, the role of extraterritorial obligations (ETOs) could be a significant transboundary justice process (Middleton and Pritchard, 2013). ETOs are a recent development in international human rights law, and can be defined as “*Obligations 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).¹⁰ Implications for the Right to Water on transboundary rivers has only recently begun to be explored (Bulto, 2014, Bulto, 2011). ETOs are of particular importance when trans-national corporations operate in countries where “*the accountability to human rights is low, the legal and institutional frameworks are too weak and much more favorable to (private) investors than victims/ local communities who are rarely consulted and heard.*”¹¹

Most States in Southeast Asia presently interpret their human rights obligations as applicable only within their own borders. Notwithstanding the deficits in existing national human rights systems and justice systems, this has further exacerbated the gap in human rights and environmental protection in terms of responsibilities on sharing transboundary rivers. Despite this, the concept of ETOs is of growing interest in the region¹². For example, the Thai National Human Commission (TNMC) and Malaysian National Human Commission (Suhakam) are currently considering cases submitted by affected riparian communities on the Xayaburi and Don Sahong dams respectively on the Mekong River in Laos. The TNMC is also investigating the Hat Gyi Dam on the Salween River, Myanmar. These are potentially important cases for affirming the right to the environment and furthering the principle of ETOs in mainland Southeast Asia.

Arenas of Water Justice

Whilst a human rights-based approach to large hydropower dams on transboundary 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

¹⁰ The implications of this rapidly evolving international human rights law, in particular as it relates to Economic, Social and Cultural Rights (ESCRs) is mapped out in the Maastricht Principles (ETO Consortium, 2013)

¹¹ <http://www.etoconsortium.org/en/thematic-focal-groups/extractive-industries-landgrab-transnational-corporations/> [Last accessed 26.8.15]; The ETO Consortium also notes “*States are obliged to refrain from any action that would impair or nullify the enjoyment of ESCRs of those also living extraterritorially (Principle 19- 22). Furthermore, States have the obligation to protect individuals ESCRs by regulating non-state actors (Principles 23-27). States are obliged to regulate and/ or influence the business sector in order to protect those affected by them outside their territory.*” <http://www.etoconsortium.org/en/thematic-focal-groups/the-rights-to-food-health/> [Last accessed 26.8.15]

¹² For example: “*Rights-based governance beyond borders: The role of extraterritorial obligations (ETOs).*” Chulalongkorn University, Bangkok, Thailand. September 2nd 2014; and “*ETOs in cross-border investment : the role of human rights institutions.*” ASEAN Peoples Forum, Kuala Lumpur, Malaysia. 24 April 2015.

that are stated on paper can in practice be accessed (Ribot and Peluso, 2003).¹³ As planning and decisions-making processes proceed under conditions of weak accountability and vast power asymmetries, communities and civil society – to the extent that political space permits – seek to influence or challenge projects with large hydropower projects with environmental and social impacts within formal and informal spaces.

In this paper, a heuristic framework is proposed centered around the concept of “arenas of water justice.” These arenas are conceptualized as politicized spaces of water governance in which *a process* for claiming and/or defending rights to water or seeking redress for water rights violations take place. Arenas of water justice exist at – and interact across – the local, national, regional and international scale¹⁴, and involve contestation and/or cooperation between state, private sector, civil society, and community actors. Within each arena exist:

- formal institutions and legal processes in which decisions are taken that may be either legally binding or voluntary in nature;
- a wider extra-legal (or public) space that surrounds formal institutions and legal processes, which accommodates a greater diversity of voices and actions on a particular decision

Elites seek to – and often do – capture formal institutions and their processes (for example, see Baird, 2014). Yet, formal institutions and legal processes do require a degree of legitimacy from the public, whose opinion is formed within the public sphere surrounding them. Thus formal institutions and processes are embedded within the wider extra-legal space, where actors try to influence the formal decisions without necessarily being officially involved in formal legal processes, for example grassroots protest movements or opinion formers such as the media.

Based upon an initial typology by Middleton and Pritchard (2014) four potential arenas of water justice in Southeast Asia are mapped in Table 2.¹⁵

<i>Scale</i>	<i>Arena</i>
National	<ul style="list-style-type: none"> • National justice system • National Human Rights Institution
Regional inter-governmental	<ul style="list-style-type: none"> • ASEAN Intergovernmental Committee on Human Rights • ASEAN Children and Women Commission

¹³ Boelens and Zwarteveen (2005: 742) propose three manifestations of water rights, which reflect both the materiality and temporality of water as a resource, and its socio-political characteristics: Reference rights; Activated rights; and Materialized rights

¹⁴ Similarly, taking the case of the Andeans, Boelens (2008) identifies that arenas within which water conflicts unfold exist at the national level (such as those related to Bolivia’s “water wars” in the late 1990s and early 2000s), and (more commonly) at the local level around low profile, localized water conflicts.

¹⁵ Hurwitz (2014) proposes the following systems in which to promote standards: national legal systems; the UN system; multilateral covenant bodies; financial institutions; and corporate level policies.

International inter-governmental	<ul style="list-style-type: none"> • UN - Human Rights Council • UN - Special Rapporteurs • Universal Periodic Review • Core treaties (Optional Protocol mechanisms - CEDAW, CRC etc).
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> • Corporate policies of project developers / financiers • Multi-lateral guidelines (OECD Standards on MNCs) • Multi-stakeholder voluntary processes (e.g. Hydropower Sustainability Assessment Protocol)

Water and Justice

Water is a resource crucial to human and other life, but is also increasingly commoditized, privatized and claimed as an economic good (Bakker, 2005, Sneddon, 2007). This transformation reconfigures access to and use of water resources through the reconfiguration of rules and authority, the restructuring of institutions, and the deployment of new discourses that legitimize these processes. Neal et al (2014:1, 5-10), synthesizing papers from a special issue journal titled “*Why justice matters in water governance*”, propose four characteristics of water that hold implications for environmental and social justice:

- *The physical properties of water:* It’s distribution is uneven both spatially and temporally, therefore some places (before the intervention of social structures or technology) will hold a form of natural advantage in terms of access to or control over water resources
- *Water essential for all life:* Both humans and the environment have a minimum (or basic) need for water for their survival. For humans at least, the Right to Water addresses the ability of humans to meet this basic need, whilst the concept of environmental flows is increasingly emerging as an approach to define and operationalize meeting the needs of nature.
- *Water’s benefits to human well-being:* Beyond meeting basic needs, water provides added benefits to human well-being through the goods and services it provides. These include material benefits, health benefits, and human security benefits. There are a range of theories of justice (prior right theory, intergenerational justice ...) that might guide how distribution of water might be “justly” prioritized beyond meeting basic needs, although which principle applies may likely be contested (thus relating in turn to procedural justice) (Neal et al, 2014: 8)
- *Power asymmetries and water governance:* Decision-making over access to and control over water resources are inherently political, and entail interaction between actors of asymmetrical power relations. Power shapes who defines (or who is heard to define) what is just, for example through the contestation of dominant versus marginalized discourses and worldviews.

Neal et al (2014) highlight the importance of rendering principles of justice visible and explicit in analysis of water governance. Zeitoun et al (2014) furthermore emphasize that researchers and practitioners themselves should reflexively declare their values towards justice in undertaking water governance research. Indeed, teasing out and articulating how justice is understood may be

a crucial missing analytical category in the analysis of water governance. As Neal et al (2014:13) state:

“In much of the political science literature ‘power’ is often espoused as the explanatory variable of negotiated outcomes. There is, however, a recent (re-)emergence in the literature of the view that justice is a parameter that can explain not only how and why trade-offs in resource allocation proceed but also why they fail.”

Philosophers, academics, activists and governments have conceived of, framed and theorized justice from plural normative and analytical perspectives. In a liberal understanding of justice: *equality* refers to the extent to which actors have parity of capacities and rights, which in turn shapes their ability to pursue justice (see Zeitoun et al, 2014:180-185); *equity* can be understood as a dimension of distributive justice (i.e. whether distribution is considered to be just according to some principle); whilst *fairness* is more a concern of procedural justice (Neal et al., 2014). Regarding distributive justice, it is commonly considered from three perspectives: distribution according to a person’s contribution (i.e. a rule of proportionality); distribution according to a person’s needs; and distribution according to a principle of equality (i.e. egalitarianism; regardless of needs or contribution). Meanwhile, considerations of procedural justice, meaning fair representation and due process, concerns participation, access to information, and access to redress, as for example advocated within concepts of deliberative democracy (Dore, 2014, Sneddon and Fox, 2008). Yet, processes that may appear procedurally fair but that are undertaken in asymmetrical power relations may result in highly inequitable outcomes, for example as a result of elite capture, tokenism, and the exclusion of alternatives (Zeitoun et al., 2014). Finally, justice as recognition considers who is and isn’t valued, and incorporates social and cultural (lack of) recognition (Walker, 2012:10; see also Zwarteven and Boelens, 2014). Distributional, procedural and recognitional justice are inter-relational and serve to reinforce or undermine each other (Schlosberg, 2004): *“the effects of what you do depend on how you do it”* (Brockner & Wiesenfeld, 1996:206, cited in Neal et al 2014:4).¹⁶

Zwarteven and Boelens (2014) emphasize the limits to the expansion of libertarian and entitlement theories of justice¹⁷ that are the foundations nowadays of many country’s legal systems. They suggest libertarian world views play down distributional inequalities, instead emphasizing freedoms and opportunities to fulfill ones potential, together with the importance of fair procedures. Highlighting the limits of liberal justice, Zwarteven and Boelens (2014: 146) state *“Although these definitions and ideas presuppose the equality of all, they work to justify distributive planning and decision making in arenas where people are not at all equal but divided along lines of class, gender, education and ethnicity.”* In other words, as put by Zeitoun et al (2014:182) *“Law isn’t ‘just’, simply because she is (meant to be) blind. Assumptions of equal capacity and opportunity between actors are likely to mislead analysis away from equitable arrangements between them.”* Drawing on the work of Schlosberg (2004:516), Zwarteven and Boelens write (2014:147): *“theories that focus only on (universal) distributive models and procedures are poorly equipped to “examine the social, cultural, symbolic and institutional conditions*

¹⁶ In a fourth strand, Rawlsian Justice proposes that resources should be distributed as if under a veil of ignorance as to the recipients of this justice.

¹⁷ Such theories *“stress the connection between individual freedom (vis-à-vis state control) and private property rights, and posit these as key universal principles of humanity and human society”* (Zwarteven and Boelens 2014:146)

underlying poor distributions in the first place”’. Thus, they argue for a relational and grounded approach to justice that also articulates how injustices are experienced, and how justice is defined from the local perspective (including in relation to the formal justice system) (see also Harvey, 1996).

Power and Politics in Arenas of Water Justice

Arenas of water justice are embedded within economic, political, cultural and socio-nature structures that shape and constrain actor’s agency. As arenas of water justice are politicized processes, recognizing power in its various forms and the power asymmetries that exist should be a key consideration, including in terms of defining justice. Even limited to the different strands of conceptualizing justice within liberalism, actors¹⁸ with divergent worldviews will not necessarily agree on a convergent notion of justice; simply put, those in positions of power will act to interpret justice to their favor. Writing for example on “politics of scale” (Lebel et al., 2005), “politics of knowledge” (Contreras, 2007), “politics of allocation and scarcity” (Mehta, 2010) and “political economy of regionalization” (Glassman, 2010) can all offer insight as to how the politics of arenas of justice play out.

A range of state, non-state, and private actors (Figure 1) pursue their interests within arenas of water justice (Vernon et al 2010 in Dore et al 2012).¹⁹ They may do so both openly in public view, and also in hidden settings. Actors may be included or excluded (by degrees) from legal processes of decision making. This reflects actor’s power to claim access to be included within such decision-making, but also their willingness to participate as inclusion in a process does not guarantee an ability influence given a asymmetrical power relations.

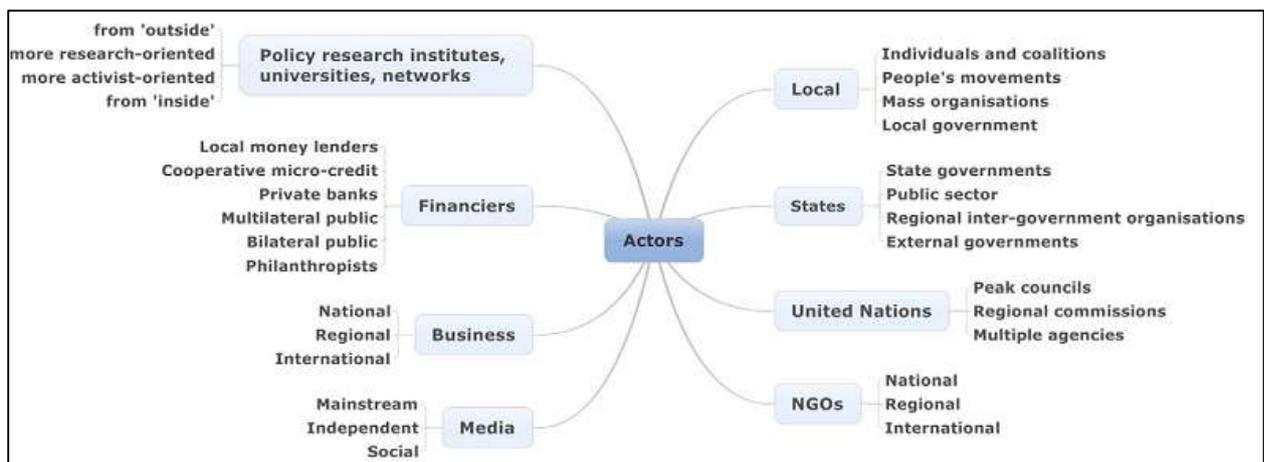


Figure 1: Actors involved in water governance in mainland Southeast Asia (reproduced from Dore et al, 2012)

¹⁸ Zeitoun et al (2014:182), highlighting this important point, write “...the point is that the same transboundary water arrangement may be seen as grossly unfair through one perspective, and ‘fair enough’ from another.”

¹⁹ Actors are guided by their own commitments to particular norms, rules of behavior, interests and needs, and the norms and rules of the formal and informal institutions that they interact within. For example, Richards and Gelleny (2009) characterize transnational corporations as either exploitative, transactional, responsive, or transformation depending upon the extent to which they actively undermine, are indifferent to, or promote human rights within their business practices.

Existing community water and related resource use rights – whether legally defined or customary - are threatened when a large hydropower dam is planned, as it involves actors from beyond the locality (provincial, national, regional, international) who seek to restructure these water and related resource use rights so as to build the project. As a cross-scale contestation unfolds, actors – both in favor and opposing a particular hydropower project - will strategically network and build allied coalitions where shared values and interests exist (McCarthy and Zald, 2001). These coalitions may span across the legal and extra-legal spaces of the arena, between various state, private, and non-state actors, and operate at and across scales.

Zwarteveen and Boelens (2014) usefully propose a number of key concepts that help “*identify, understand, analyze, and react to water-based forms of injustice*”:²⁰

- *Situated knowledge*: a commitment to direct engagement with those who experience water injustice and an appreciation of their specificity, rather than adopting a universalizing and homogenizing “outside” perspective. Methodologically, this requires the co-production of knowledge, including of meaning, truths and interpretation, and is “*of special importance for researching and understanding questions of justice, because understandings of justice more obviously combine ‘facts’ (about water availabilities, for instance) with opinions and values (about what is fair or just).*” (p148)
- *Socio-natures*: understanding nature, technology and society as a dynamic assemblage that is co-produced (see also Perreault, 2014). As Braun (2006:644) states “*Nature, as is now commonly asserted, is inextricably social, even as it cannot be reduced to the actions of humans alone.*” The notion of assemblage captures the reflexive character and irreducible complexity of human-non-human interaction, shaped by place, scale, and the materiality of nature. It also refers to how units of geographical analysis, such as “the watershed (as a natural unit of water management),” through knowledge-power actions become a naturalized and depoliticized discourses (e.g. see Sneddon, 2003 ; Glassman 2010; Joy et al, 2014)
- *Contestation*: Access to and control over water may involve various levels and forms of contestation. To draw out the political economy of access to and control over water resources, Boelens (2008) proposes Four Echelons of Rights Analysis as: “*...[1] water rights struggles involve not only disputes over the access to water, infrastructure and related resources, but also over [2] the contents of water rules and rights, [3] the recognition of legitimate authority, and [4] the discourses that are mobilised to sustain water governance structures and rights orders.*”
- *Complexity*: Understanding water resource use and distribution often entails gaps in knowledge and complex relationships (so called-wicked problems). In this context, politics of uncertainty, knowledge and scale – particularly via the use of ‘science’ - all play out as actors seek to control and legitimize water resources (e.g. see Leach et al 2010).
- *Scale and scalar politics*: Temporal and geographical scales are socially constructed, and depending upon their (contested) definition within politicized processes will define problems, solutions, and notions of justice in particular ways (Lebel et al., 2005).

²⁰ Zwarteveen and Boelens (2014) also include *Water Rights* in this list of analytical approaches, as already discussed above in section “*A Rights Based Approach to Large Hydropower Dams*”

A Rights Based Approach to Water Governance and the Nexus on Transboundary Rivers

In the next two sub-sections, recent developments in international regimes related to transboundary water governance and rights-based approaches are introduced and critically discussed, and in the third sub-section these briefly are related to the emerging food-water-energy nexus. The section highlights that both international water law and its relationship with other international regimes – namely human rights and corporate accountability – are evolving, and as a result new arenas of water justice have been created.

The International Watercourse Law

In August 2014, the “Convention on the Law of the Non-navigational Uses of International Watercourses” (the International Watercourse Law) entered in to force. Within Southeast Asia only Vietnam has ratified the treaty; however, the inter-governmental agreement that binds the four countries of the Lower Mekong River (Cambodia, Laos, Thailand and Vietnam) is drawn from a draft version of the International Watercourse Law (MRC, 1995).

As the principal customary international law on transboundary rivers, it 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 is the concept of “equitable and reasonable utilization”, defined in Article 5.1 as (UN, 1997):

“Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.”

Utilizing the language of the rights and duties of the watercourse state, Article 5.2 states (UN, 1997):

“Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.” (emphasis added)

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 on data sharing, available data, on notification for planned measures, and timeframes for consultation (Leb, 2013, UN, 1997, Rieu-Clarke, 2015a).²¹

Equity, however, is an elusive concept in international water law (Bingham et al., 2008). In Article 6, a list of “Factors relevant to equitable and reasonable utilization” are provided, without

²¹ See also http://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf

clear principles for weighting or prioritization being provided, although distributive justice principles of both equity and need are evident. Highlighting that each state will be inclined to utilize the concept of justice that most benefits their interests, Neal et al (2014:14) state “*generally upstream riparians favour the principle of equitable use while downstream riparians favour the obligation of no significant harm to be written into water agreements and treaties*” (see also Zeitoun et al, 2014).

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*” (Zeitoun et al, 2015:175), where there may be “*equality on paper and inequality in practice*” (2014: 178). From a critical hydropolitics perspective, Zeitoun et al (2014) state a number of reasons why this is so: *Assumptions of equality about actors perpetuate inequitable water allocation; The justice that matters is a function of power asymmetry and legitimacy; Power asymmetry can permit an illusion of justice.* From these insights, they conclude that more attention should be paid to the structures of injustices (see also Zeitoun and McLaughlin (2013) on “Mechanisms of injustice”²²).

Whilst the international watercourses law was lauded by some since its entry into force, its conceptual foundations has also been critiqued; Fox and Sneddon (2005) warn that its formulation of watersheds principally as river channels, whilst rendered legible to the state, risks (mis)-representing watercourses as “*simplified, one-dimensional structure composed primarily of water in a main channel.*” In the case of the 1995 Mekong Agreement, Fox and Sneddon (2005) highlight that the focus is on water and maintaining minimum water flows in the mainstream, thus seeking to avoid inter-state conflict over water shortages.²³ Yet in ecological reality the productivity of the Mekong basin is linked to *the range of flows*, both minimum and maximum, of the annual cycle of the flood pulse, together with other flood pulse characteristics such as timing, duration, height, extent, continuity of flooding, and number of peaks. Therefore, whilst water shortage is largely protected against, the vitality of the ecological system is not (Lamberts, 2008). In other words, whilst formal international watercourse law that emphasizes water allocation may be effective at avoiding inter-state conflict in the short term, it can “*paradoxically, undermine the foundations of ecological and social sustainability at the local scale, thereby threatening long-term stability*” (Fox and Sneddon, 2005).

Broadening international regimes on transboundary water governance

Recently, in addition to the International Watercourses Law and related legal norms on the environment, a wider array of international legal regimes have shaped transboundary water governance in relation to large dams, namely: international human rights law; and international investment law (Rieu-Clarke, 2015b). A growing number of studies have examine how these themes relate in pairs (foreign investment and environment, human rights and the environment etc), but very few that examine these relationships as applied to transboundary rivers and with regard to large hydropower development (see Bulto, 2011 and 2014 and Rieu-Clarke, 2015b for exceptions).

²² Mechanisms of injustice are “*the underlying structure and forces that drive and enable both the processes and the outcomes*” (Zeitoun et al, 2014:188)

²³ The 1995 Mekong Agreement is derived from a final draft version of the UN Convention on the Law of the Non-navigational Uses of International Watercourses

Rieu-Clarke (2015b), in an initial mapping paper, explores how environment, human rights, and international investment regimes currently interact on transboundary rivers. Beyond the International Watercourse Law, mentioned above, regarding international investment he details the implications of regional investment agreements (which, in Southeast Asia would principally be the ASEAN Economic Community to be finalized by the end of 2015), and the role third party dispute settlement procedure, for example those facilitated by the International Centre on the Settlement of Investment Disputes (ICSID), that generally have acted to defend the interests of foreign investors. Regarding human rights, Rieu-Clarke (2015b) emphasizes the Right to Water and the role of regional human rights institutions. 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.” (Rieu-Clarke, 2015b)

Key regulatory measures that the state might be required to maintain are: stakeholder consultation; and transboundary environmental impact assessment. Rieu-Clarke also emphasizes how various private sector codes-of-conduct may also determine required care by the state, including the OECD Guidelines on Multinational Enterprises and the International Hydropower Association’s, Hydropower Sustainability Assessment Protocol. Such international norms, including about the Right to Water, draw on concepts of “community of interest” and thus compliment (or challenge) sovereignty approaches to defining norms that apply to particular large dams (McIntyre, 2010).

With an emphasis on the role of the state, Rieu-Clarke (2015b) documents principally from the perspective of international relations and international law how the regimes interact. As highlighted by Hirsch and Jensen (2006), however, governments pursuing their national interest through inter-governmental negotiations on transboundary rivers may not be representing the interests of all, especially river-side communities who are often economically, socially or politically marginalized. Furthermore, it is crucial to question the functioning of the state and to determine how those who are marginalized experience the system. Introducing critical political economy and critical hydropolitics approaches could deepen the analysis of the interaction of these regimes (e.g. Sneddon and Fox 2006; Zeitoun et al, 2014).

Bringing Justice into the Nexus: A Rights-based approach

As problematized above, the construction of large hydropower dams on transboundary rivers produces environmental and social impacts at a range of scales, with implications for human rights (and rites). Despite this, defining justice in transboundary water governance – even with a focus on access to water – from a multi-disciplinary perspective is at an early stage (Zeitoun et al., 2014). Defining justice and the interrelationship between water and other resources, as explored by the food-water-energy nexus is considered on transboundary rivers (and their related transboundary market chains), is thus at an even earlier stage (Middleton et al., 2015a, Stirling, 2015, Leck et al., 2015, Allan et al., 2015).

Claims for justice have emerged related to individual components of the nexus, but not towards the nexus itself (Middleton et al., 2015a). In some cases, these claims draw on rights-based frameworks given that water, food, and energy are fundamental to meeting human needs. Food justice, also linked to access to land and related natural resources, is advocated for within a range of social movements such as Via Campesina, as well as more institutionalized processes such as the UN's Special Rapporteur on the Right to Food. Various food justice concepts have emerged, for example Food Sovereignty and Land Sovereignty (Patel 2009; Borras et al. 2011; Borras and Franco 2012; Agarwal 2014). Regarding water, there have been equivalent movements, including against water grabbing, and in pursuit of the Right to Water (Mehta et al. 2012; Sultana and Loftus 2012; Franco et al. 2014).²⁴ Meanwhile, questions have also been raised towards the production and distribution of energy. Hildyard et al (2012) highlight that attaining national energy security is typically interpreted as energy to ensure economic growth, which is not necessarily equivalent to “energy for all” (see also Pasqualetti and Sovacool, 2012).

Clearly, however, any normative framing of the nexus – whether rights-based or otherwise - must be embedded within (and is actually produced by) the political economy of food, water and energy. In response to more apolitical “systems thinking” approaches to the nexus, several researchers have recently sought to unpack the nexus through a more explicit political economy lens. For example, Foran (2015) proposes a “regime of provisioning” is his exploration of the interaction of nexused water, energy and food systems utilizing a critical social science perspective that highlights how these resources are produced historically and under particular social formations and relations (Figure 2). Foran (2015:663) considers that a regime of provision has three dimensions: “(1) a multilevel system of beliefs, rules, and contestation between incumbents and challengers; (2) a level and pattern of energy or resource flows (e.g. how much electricity is consumed per capita); and (3) the material infrastructure that supports those flows and associated system belief” Foran focuses on how micro discourses (e.g. a particular argument), institutions (core rules, practices, durable macro-discourses) and individual interests (e.g. security, livelihood...) have causal powers. His regime of provisioning approach is useful to understand the meso-scale social structures and their political economy, together with how meaning is produced (i.e. ideas and discourse). Arenas of water justice, where interests converge and are contested around allocation and access to the allocation of limited water and associated resources (i.e. “critical nodes” – see Smajgl and Ward, 2013), are embedded within these structures. Thus, an understanding of these structures could reveal how access to legal processes of justice may be structurally constrained country-by-country and case-by-case, and how actors navigate this “strategic action field” in the pursuit of their goals (Foran 2015:664).²⁵

²⁴ In a review of the activities of National Human Rights Institutions (NHRIs) on the Right to Water, the following rights are identified as highly relevant to water governance: right to water and sanitation; right to a healthy environment; right to food; right to health; rights of indigenous peoples; and rights of future generations (WaterLex and Wash United, 2014).

²⁵ With reference to field theory (Ray, 1999; Fligstein and McAdam, 2011; Goldstone and Useem, 2012), Foran (2015:664) writes “we can further view a regime of provisioning as a 'strategic action field' composed of nested, smaller arenas (e.g. social movements embedded in a particular political culture and distribution of power). The regime, and each sub-arena within it, is a field of goal-oriented striving, in which players have a common understanding of the rules governing their struggle.”

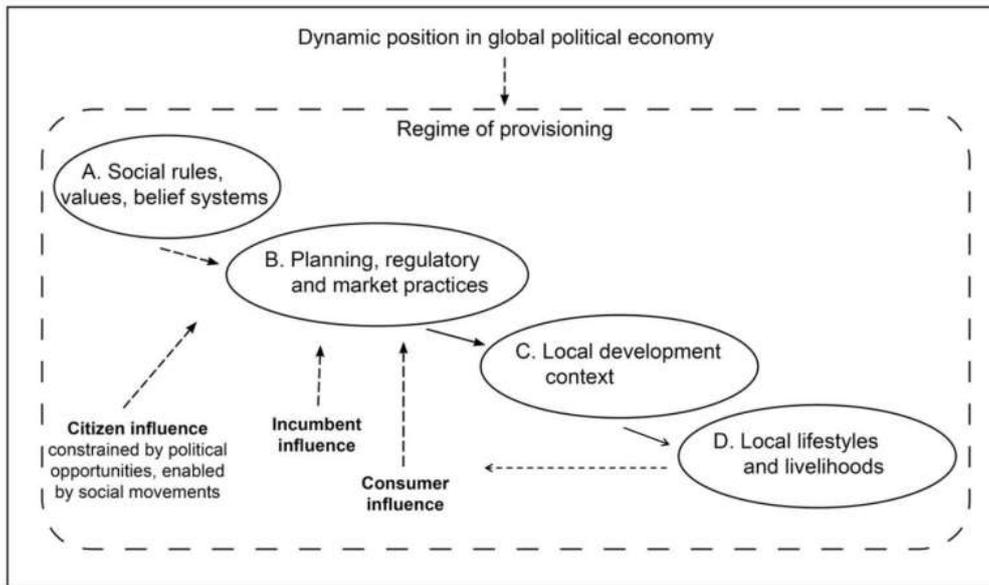


Figure 2: Regime of Provisioning (Reproduced from Foran, 2015:665)

Arenas of water justice in power-export hydropower projects on international rivers: A case study of the 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). Whilst the full proposed Mekong mainstream dam cascade holds the potential to generate up to 14,100 MW of electricity and thus to contribute significantly to the region’s economic growth and energy security, 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 (Grumbine et al., 2012, ICEM, 2010).

The 1,285 megawatt Xayaburi Dam in Northern Laos is the project at the most advanced stage of preparation, would export 95% of its electricity to Thailand, and is under development by a predominantly Thai private-sector consortium (Matthews, 2012, Thabchumpon and Middleton, 2012). Project proponents, including the Government of Laos (GoL), the project consortium²⁶, and some of Thailand relevant ministries and Thailand’s electricity utility EGAT, argue that the Xayaburi Dam would contribute towards Thailand’s energy security and generate cheap electricity, 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 NGOs and some riverside communities from Thailand, Cambodia and Vietnam²⁷ and international NGOs, who 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 capture fisheries, loss of sediment flows and other ecological changes. They also highlight how the project’s Environmental Impact Assessment (EIA) report,

²⁶ The project developer is a consortium formed of: Ch.Karnchang (30%); Natec Synergy (25%); EDL (20%); EGCO 12.5%; Bangkok Expressway (7.5%); and PT (5%). (GoL, 2013)

²⁷ In Laos, non-profit associations work within an extremely constrained political space, where there is a high risk associated with publically commenting on the GoL’s development plans related to hydropower.

published in August 2010, is of poor quality and does not consider transborder impacts; the original EIA report only considers impacts for 10 km downstream of the project (International Rivers, 2011b).

Decision-making and Arenas of Water Justice

The Xayaburi Dam has been surrounded by intense local, national, regional and even global politics (Matthews, 2012, Kirby et al., 2010). Key moments in decision-making around the project's construction include (see also, International Rivers 2014 and Rieu-Clarke 2015a):

- The GoL and the project developer signed a Memorandum of Understanding (MoU) of the Xayaburi Dam in May 2007, a Project Development Agreement (PDA) in November 2008, and the concession agreement (CA) 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 initiate a regional decision-making process through the MRC called the Procedures for Notification and Prior Consultation and Agreement (PNPCA).
- Subsequently, in December 2011, the MRC Council agreed to conduct a further study on the Mekong mainstream dam cascade, which to date has not been completed.
- After the GoL announced in July 2012 that the project had been redesigned to address neighboring countries concerns, the project's "ground breaking" ceremony was held in November 2012 attended by the Cambodian and Vietnamese governments, although construction on the riverbanks had proceeded since late 2010 and in the river since at least mid-2012.
- A court case was submitted in August 2012 by Thai villagers to the Thailand's Administrative Court challenging the role of the Thai government 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.
- As of November 2014, the project is about 45% complete (Worrell, 2014).

As the project decision-making process has played out, multiple arenas of water justice have been utilized by impacted communities and civil society allies (Table 3). Each arena has its own story of coalition building, strategic activities and politics. Particularly given the transboundary character of the Xayaburi Dam case - in terms of foreign direct investment, planned electricity trade, actors involved, and the project's location on a transboundary river – there is not a single arena of water justice that exists whose jurisdiction and authority that may offer a "silver bullet" for redressing injustices. Instead, therefore, impacted communities and civil society allies have pursued multiple arenas of water justice hoping that a critical momentum may be achieved.

Table 3: Typology of legal “arenas of water justice” for human rights protection for Xayaburi Dam	
<i>Scale</i>	<i>Arena</i>
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)²⁸ • 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 Prior Notification and Agreement (PNPCA) (Sept 2010 – April 2011) ○ Basin Development Plan 2 (2011) ○ MRC Council Study (Dec 2011) • ASEAN Intergovernmental Commission on Human Rights (April 2011)²⁹
International inter-governmental	<ul style="list-style-type: none"> • <i>N.A.</i> (Potentially UN Special Rapporteur on Right to Food)
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> • OECD Guidelines for Multinational Enterprises <ul style="list-style-type: none"> ○ Pöyry (August, 2012 – June 2013) ○ Andritz AG (April 2014)

Within each arena, actors’ narratives have drawn upon various scientific studies and also made claims towards the impacts on substantive and procedural rights and their interconnections (see Table 1 above), including:

- *Substantive Rights:* The Right to Life; The Right to Food³⁰; 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:

²⁸ Globally, National Human Rights Institutions have become more active on the Right to Water (see WaterLex, 2014). According to International Rivers: “In May 2012, the Thai National Human Rights Commission questioned the signing of the PPA, stating that they found irregularities in the PPA that did not conform to human rights protection principles under the Thai Constitution. In a public statement, they recommended, “The Prime Minister should review the implementation of the dam construction.” <http://www.internationalrivers.org/blogs/259-0>.

²⁹ See http://www.en.mahidol.ac.th/eng/envi_news/envi_news_full_e.php?id=1463

³⁰ See, for example, <http://www.earthrights.org/blog/rethinking-food-security-right-food-mekong>

- The formal institutions and legal processes, the wider extra-legal (or public) space that surrounds them, and the actors included or excluded from each
- how decision-making processes have unfolded within the arena, including as shaped by politics of: knowledge; uncertainty and complexity; and scale
- the implications for the definition and realization of justice

The selected arenas are: the “Procedures for Notification and Prior Consultation and Agreement” facilitated by the MRC, which in essence are an application of the International Watercourses Law to the project (i.e. a regional inter-governmental arena); 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 (i.e. an International voluntary/ non-binding mechanism arena, which draws on international human rights law obligations); and a court case submitted to the Supreme Administrative Court in Thailand (i.e. a national arena with implications for extra-territorial obligation).

The “PNPCA process/ international water courses” arena

As mentioned above, on 22 September 2010 the GoL initiated the MRC’s Procedures for Notification and Prior Consultation and Agreement (PNPCA), which is arguably the key arena of water justice. This process is required under Article 5 of the Mekong Agreement that 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 include on notification, prior consultation, and unanimous agreement for planned measures³¹ (Rieu-Clarke, 2015a). Further details on the process for inter-governmental consultation and agreement are provided in 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, 2015a), which has resulted in a “politics of uncertainty” around the legal norms in play (Middleton, 2014).

The PNPCA process officially commenced on 22nd October 2010, initiating the creation of a MRC PNPCA Joint Committee Working Group that reported to the MRC Joint Committee³² (Rieu-Clarke, 2015a). In terms of public meetings, the PNPCA process held eight “information sharing” meetings in Cambodia, Vietnam and Thailand (but not in Laos) and received online submissions.³³ The Xayaburi Dam’s environmental impact assessment (EIA), however, was only released after the meetings were held and therefore could not be subject to discussion (International Rivers 2011).³⁴

³¹ However, there is no right to veto in the Mekong Agreement. Therefore, as stated by Rieu-Clarke (2015a): “*lower Mekong states do not necessarily have to agree prior to the unilateral implementation of a proposed use. However, a planning state is still obliged to take into account the rights of other riparians, e.g. to an equitable and reasonable share in the uses of the Mekong.*”

³² The MRC Joint Committee is formed of senior officials at no less than Head of Department level of the four MRC member countries and meets approximately quarterly.

³³ See <http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process/> [Last accessed 6.10.13]

³⁴ The EIA report, once released, however was widely criticized by academics and NGOs, who stated there was: inadequate and incomplete evaluation of fishery and sediment impacts; no Cumulative Impact Assessment with the

Following a series of meetings of the MRC PNPCA Joint Committee Working Group, the MRC Joint Committee convened on 19 April 2011 to discuss the PNPCA.³⁵ 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 take place annually; however, when the Council Meeting was held, the Xayaburi Dam was not officially on the agenda.³⁶

Diverse interpretation of the PNPCA procedures and guidelines led to divergent conclusions on whether this regional consultation process was concluded or not. The GoL claimed that according to the PNPCA guidelines, the PNPCA process ended on 22 April 2011 six months after it officially started because no government had officially objected to the project. Arguably, however, it would be highly unlikely that a neighboring country would object so directly, given that a commonly cited principle of diplomacy in ASEAN is that of “non-interference.” To further its argument, the GoL commissioned a report by the consultancy group Pöryr assessing the compliance of the Xayaburi Dam with the MRC requirements (Pöryr Energy AG, 2011). Whilst the report itself was not published until August 2011, Pöryr issued a letter in June 2011 before its study was complete 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.*”³⁷

The letter was used by the GoL to inform the lead developer of the project, 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 Power Purchase Agreement (PPA) with Thailand’s electricity utility, EGAT, on 29 October 2011 (Thabchumpon and Middleton 2012). This reveals how actors utilize power to define justice, in this case regarding the interpretation of the PNPCA process.

other mainstream dams; and the EIA did not assess the trans-boundary impacts of the dam because the scope of the EIA only covered 10 kilometers downstream of the project, impoundment area and its watershed.

³⁵ Days before the meeting, an article in the Bangkok Post revealed that project construction and resettlement activities was already underway, with the GoL and the project developers drawing extensive criticism. Subsequently, Ch. Karnchang revealed in its annual report that this construction activity had been underway since late 2010.

³⁶ The MRC Council is formed of environment and water ministers from the four MRC member countries, and meets annually.

³⁷ At the time, the MRC’s official publically-stated 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.*” <http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level/>

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

“Lao PDR's unilateral action to prematurely terminate the PNPCCA process, without allowing its neighbor countries to properly conclude that process, violates the Mekong Agreement, and therefore international law” (Perkins Coie 2011)

The NGO International Rivers argued that: Laos was required to seek agreement with its neighbors before beginning the project, but had not “negotiated in good faith,” including because it was implementing the project while consultations are still underway; Laos was required to study the project’s transboundary impacts before the PNPCCA consultations took place; and Cambodia, Vietnam, and Thailand had a right to extend the prior consultation’s timeframe (Herbertson, 2013).

The MRC Secretariat, which had been asked by the Vietnam government to review the Pöyry report in the context of the MRC’s dam design guidelines, also concluded that the measures proposed would not result in the Xayaburi Dam’s compliance with the MRC standards. It stated:

“... 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 Secretariat, 2011a).

The GoL commissioned a second consultancy firm, Compagnie Nationale du Rhône (CNR), to review the Pöyry assessment which was published in March 2012 (CNR, 2012), which the GoL claimed supported the Pöyry assessment. But this was also subsequently challenged by civil society groups and its findings were arguably mis-represented by the GoL itself (International Rivers, 2012).

Legal (or normative) uncertainty has been compounded by the scientific uncertainty on studies that have been utilized by various actors within the PNPCCA process, such that the predicted impacts of the project (and its implications for human rights) are heavily contested between those who support and oppose the project. A wide range of actors have generated primary research and analysis 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 inter-governmental MRC (MRC Secretariat, 2011b, MRC Secretariat, 2011a); academics (e.g. Matthews, 2012; Grumbine et al 2012); think tanks (e.g. Cronin and Hamlin, 2012); and non-government organizations (e.g. Save the Mekong Coalition, 2010; International Rivers 2011, 2012).

At the 19th MRC Council meeting in January 2013, it was reported that the Government of Cambodia claimed that the GoL had mis-interpreted the 1995 Mekong Agreement in deciding to proceed with the project (Reuters 2013). According to International Rivers:³⁸

“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 regrets” that it could not sign the meeting’s official minutes, signaling that it did not acknowledge the criticisms.”

Rieu-Clarke (2015a), commenting on the same meeting, notes *“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 PNPCHA process that did not in the end produce a consensual agreement even amongst the four member governments. Commenting on the role of the Mekong Agreement and its significance to International Watercourse law, Rieu-Clarke (2015a: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.”*³⁹ The notions of justice that each actor pursued are clearly diverse, where not rendered easily visible, and where not reconciled or resolved by the end of the process. At the same time, the PNPCHA process represented an unprecedentedly public – although very much imperfect – decision-making process in a region where transparent and accountable government is often only weakly present. Yet ultimately affected communities and civil societies’ ability to influence in the core decisions of the arena, which is principally defined on paper as an inter-governmental process, was weak.

The “OECD Guidelines” arena

Related to the Finnish company Pöyry’s role in assessing the Laos government’s compliance with the PNPCHA process (Pöyry Energy AG, 2011), in June 2012, 15 civil society groups from 7 countries filed a complaint with the OECD Guidelines for Multinational Enterprises with the National Contact Point in Finland, which is the Ministry of Employment and the Economy

³⁸ <http://www.internationalrivers.org/resources/mekong-countries-at-odds-over-mega-dams-7824>

³⁹ Rieu-Clarke (2015a:146) states *“Key areas of ambiguity concerned when the notification should take place, what data and information should be shared, the requisite time period for consultations, whether the planned project could proceed during the consultation period, and what should be the next steps if the states fail to agree at the end of the consultation period.”*

(MEE).⁴⁰ This is an international arena where a set of voluntary guidelines evaluate and can make recommendations towards the role of private sector actors.

The arguments put forward in the complaint were (Siemenpuu Foundation Mekong Group, 2012):

- *Conflict of interest*: Pöyry produced a report in support of the Laos government's position that the PNPCA process had been concluded satisfactorily, whilst also negotiating other roles in the project's development.⁴¹
- *Report's conclusions questioned*: Pöyry concluded that "The Xayaburi HPP has principally been designed in accordance with the applicable MRC Design Guidelines" (Pöyry Energy AG, 2011). Despite this, it identifies a further 40 studies that were required to be conducted and did not clearly state where the Laos Government were not in compliance including regarding the effectiveness of the fish passage structure. The 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 the subsequent report (MRC Secretariat, 2011a), and also partly by the consultants Compagnie Nationale du Rhône that were also commissioned by the Government of Laos to assess the work of Pöyry (CNR, 2012).⁴²
- *Undermining regional cooperation*: The report was commissioned against the backdrop of a diplomatic dispute within the MRC, and in particular whether the Laos government 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*" (Siemenpuu Foundation Mekong Group, 2012:6)

Regarding violation of human rights, the OECD guidelines has a chapter that requires companies:⁴³

"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)

"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 (Siemenpuu Foundation Mekong Group, 2012:34):

⁴⁰ For documents submitted and a chronology of the case, see: http://oecdwatch.org/cases/Case_259; See also <http://www.internationalrivers.org/blogs/267/p%C3%B6yry-responds-on-its-role-in-the-xayaburi-dam>

⁴¹ In November 2012, signed a contract to supervise the project's construction. See <http://www.opendevelopmentcambodia.net/tag/poyry/> and

<http://www.phnompenhpost.com/index.php/2012111259686/National-news/controversial-poyry-tapped-for-xayaburi.html>

⁴² <http://www.internationalrivers.org/blogs/267/as-consultant-distances-itself-cracks-appear-in-laos%E2%80%99-portrayal-of-xayaburi-dam>

⁴³ OECD Guidelines, p. 24, Commentary 20 on paragraph A.12

“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.”

Pöyry’s initial response to the complaint, published in 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.”*⁴⁴ They argue that the complainants base their assessment of the potential effectiveness of mitigation measures on scientific uncertainty surrounding the measures (thus engaging in a “politics of uncertainty” – see Middleton, 2014). The case was accepted by MEE in October 2012, in which Pöyry argued that it was not the leading developer of the project, as consultants there were not responsible for how their services were used, and that ultimately their work had improved the project from an environmental friendly.

Following an attempt at mediation between Pöyry and the complainants in December 2012, Pöyry stated it was not interested in further dialogue with the complainant. Following statements prepared by the Finnish Ministries of Environment and Foreign Affairs, both Pöyry and the complainants issued responses. The case was concluded in June 2013 when the MEE found *“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.”*⁴⁵ 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 complaints the process of the complaint 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.”*⁴⁶ The NGO OECD Watch have argued that this is against the principles by which a complaint should proceed, citing a UK case where the NCP’s conclusion was revoked due to information not shared amongst all parties. They state:

⁴⁴ http://business-humanrights.org/sites/default/files/media/poyry_plc_statement_to_business_and_human_rights_resource_centre_120807.pdf

⁴⁵

http://www.tem.fi/en/current_issues/press_releases/press_release_archive/year_2013/statement_of_the_ministry_of_employment_and_the_economy_poyry_oym_complied_with_oecd_guidelines_in_laos_dam_project.110859.news

⁴⁶ https://www.facebook.com/permalink.php?id=164447100248670&story_fbid=677894275570614

“The case, which was the first ever handled by the Finnish NCP, raises serious concerns about the NCPs equitability. The NCP gave in to Pöyrys demands for an excessive degree of confidentiality and did not allow the complainants to see or rebut the companys response to the allegations.”⁴⁷

The complaints 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.”* In other words, whilst the arena was activated to challenge the role of a powerful actor, the official process proceeded without equity within the process. Despite this outcome, which was clearly disagreed with by the complainants, 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.⁴⁸

The “Thai National court” arena

Following the outcome of the PNPCA process, which civil society groups and riparian communities in Thailand felt had marginalized their concerns, it was decided that they would submit the case to the Thailand’s Administrative Court to challenge the role of the Thai government in the project, on the basis of the 2007 Constitution. In August 2012, the court case was submitted by 37 Thai villagers from eight Thai provinces along the Mekong River who would be affected by the project. The case was against five Thai government agencies involved in the Xayaburi Dam project in various way, including Thailand’s electricity utility EGAT, the Thai Cabinet, and the National Energy Planning Council. In February 2013, the court announced that it did not accept jurisdiction on the case, after which in March 2013 the plaintiffs appealed to the Supreme Administrative Court of Thailand.⁴⁹

In June 2014, the Supreme Administrative Court of Thailand reversed the lower court decision and accepted that the Mekong River Commission’s the PNPCA process had not complied with Thailand’s Constitution, in particular regarding information disclosure and public participation (LeFevre, 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.”⁵⁰* The court completed accepting evidence in late July 2015.⁵¹ It is now anticipated that the court will proceed with the hearing itself when the plaintiffs and the defendants will give testimony in person.

This case is unprecedented for Thailand as it involves Thai investment in a neighboring country. In other words, to an extent Thailand is considering the implications of its extra-territorial obligations. Whilst within the administrative court it is not possible to sue the private sector members of the consortium or its financiers, it has been possible to challenge the state agencies that have worked closely with them and one Thai bank that is partly state-owned (Krung Thai

⁴⁷ http://oecdwatch.org/cases/Case_259

⁴⁸ <http://www.mekong.fi/uploads/publications/090614%20Uimonen%20Mekong%20Seminaari.pdf>

⁴⁹ <http://www.internationalrivers.org/blogs/259-0>, <http://www.internationalrivers.org/blogs/254/thai-villagers-file-lawsuit-on-xayaburi-dam> and <http://www.earthrights.org/blog/thai-institutions-pushed-address-legal-violations-around-xayaburi-0>

⁵⁰ <http://www.internationalrivers.org/blogs/254-1>

⁵¹ <http://www.internationalrivers.org/blogs/254-1>

Bank). The case also does not challenge directly the GoL's decision to proceed with the project, but it does have implications for the PPA between EGAT and the project developer. Given that EGAT plans to buy 95% of the project's power (and that the project's construction is over half complete), should the PPA be cancelled the implications would be profound.

How the court will interpret the case – and thus justice – as it proceeds remains to be seen. However, through public street protest and in the media the Thai communities raising the case have argued that their substantive and procedural rights have been violated by the project, despite its location in another country, and that the court has already accepted the case to consider this is significant. The Thai communities also consider themselves as acting in solidarity with Laos communities who are also being impacted by the project, but reflecting the uneven access to justice across the region and particular in Laos, cannot act on their own behalf or even raise their concerns about the project.⁵²

Conclusion: Arenas of Water Justice and Pathways to Sustainability

Across rural mainland Southeast Asia, direct access to and sustainable use of natural resources are inextricably tied to people's wellbeing. Loss of access to natural resources – including due to hydropower dam construction – is a threat to livelihoods, and also to human rights.

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 paper has proposed the heuristic framework of “arenas of water justice” as a tool to analyze the various process of water governance that exist around large hydropower projects on transboundary rivers. These arenas are conceptualized as politicized spaces of water governance in which *a process* for claiming and/or defending the Right to Water takes place. The paper has problematized how justice has been understood in relation to water and its governance, and the implications for power and politics within arenas of water justice on transboundary rivers. It has contextualized these arenas to recent developments in international law, including the International Watercourse Law and its relationship with international human rights law, and also the role that extra territorial obligations (ETOs) might play in protecting these rights.

The Xayaburi Dam case study reveals how multiple arenas of water justice have been pursued by affected communities and civil society seeking to challenge the environmental and social impacts associated with the project. The case study also relates these impacts to a nexus approach, given that the Xayaburi Dam impacts food, water and energy resources. The political economy approach to the nexus of Foran (2015) was highlighted as a means by which to move beyond more apolitical interpretations of the nexus. Thus, the case study also reveals the interconnected nature of substantive and procedural rights, including the substantive rights that relate to food, water and energy (including health, livelihood, etc) and inclusion in/ exclusion from decision-making.

⁵² <http://www.mekongcommons.org/silence-of-the-dammed/>

From the perspective of international human rights, all human rights are interrelated, interdependent and indivisible. Therefore, a rights-based approach to the food-water-energy nexus could anchor “the nexus” in a clear normative framework which it at present lacks, despite the significant political connotations implicit to the way that nexus research is often conducted. Meanwhile, recent political economy research on the nexus in practice (for example Foran, 2015) could provide a clear analytical framework by which to materially express these human rights’ indivisibility. In turn, such analysis could support how rights are claimed and defended within arenas of water justice.

The initial exploration in this paper reveals that further work is required to explore how a political economy of the food-water-energy nexus can be linked to existing rights-based approaches to food, water and energy, but that it is a potentially important avenue of research to follow.⁵³ In turn, this research should lead to practical work in Southeast Asia on how existing human rights systems at the national, regional and international level, together with national justice systems that recognize ETOs, could utilize nexus insights and provide better access to justice for marginalized communities. This is especially relevant given that countries are becoming tied together through processes or regional economic integration as power-exporting (Laos, Myanmar) and power-importing (Thailand, Vietnam) countries, and yet access to justice is uneven, and especially weak in countries where projects are being or planned to be built, and when inter-governmental agreements on large hydropower dams appear to privilege the interests of project developers over affected riparian communities.

⁵³ The author has just started a project titled “*Seeking “Arenas of Justice” on Transboundary Rivers: A Rights-Based Approach to the Food-Water-Energy Nexus on the Salween and Mekong Rivers*” supported by the Strengthening Human Rights and Peace Education in ASEAN/Southeast Asia (SHAPE-SEA) research program, with a focus the role of national and regional human rights institutions in Southeast Asia towards large hydropower dams on the Mekong and Salween Rivers.

References

- AGARWAL, B. 2014. Food sovereignty, food security and democratic choice: critical contradictions, difficult conciliations. *The Journal of Peasant Studies*, 41, 1247-1268.
- ALLAN, T., KEULERTZ, M. & WOERTZ, E. 2015. The water–food–energy nexus: an introduction to nexus concepts and some conceptual and operational problems. *International Journal of Water Resources Development*, 31, 301-311.
- ALLOUCHE, J., MIDDLETON, C. & GYAWALI, D. 2015. Technical Veil, Hidden Politics: Interrogating the Power Linkages behind the Nexus. *Water Alternatives*, 8, 610-626.
- BADENOCH, N. & LEEPREECHA, P. 2011. Rights and Rites: Local Strategies to Manage Competition for Water Resources in Northern Thailand. In: LAZARUS, K., BADENOCH, N., DAO, N. & RESURRECCION, B. (eds.) *Water Rights and Social Justice in the Mekong Region*. London and Washington DC: Earthscan.
- BAIRD, I. G. 2014. The Global Land Grab Meta-Narrative, Asian Money Laundering and Elite Capture: Reconsidering the Cambodian Context. *Geopolitics*, 19, 431-453.
- BAIRD, I. G. & QUASTEL, N. 2015. Rescaling and Reordering Nature–Society Relations: The Nam Theun 2 Hydropower Dam and Laos–Thailand Electricity Networks. *Annals of the Association of American Geographers*, 1-19.
- BAKKER, K. 2005. Neoliberalizing Nature? Market Environmentalism in Water Supply in England and Wales. *Annals of the Association of American Geographers*, 95, 542-565.
- BINGHAM, J. D., ROBINSON, A. I., ANDERSON, A., BATJER, M., MAXFIELD, C., OGILVIE III, G. F. & TARKANIAN, L. 2008. *World's Major Rivers: An Introduction to International Water Law with Case Studies*. Nevada.
- BOELENS, R. 2008. Water rights arenas in the Andes: Upscaling the defence networks to localize water control. *Water Alternatives*, 1, 48-65.
- BOELENS, R. & ZWARTEVEEN, M. 2005. Prices and Politics in Andean Water Reforms. *Development and Change*, 36, 735-758.
- BOELENS, R., ZWARTEVEEN, M. & ROTH, D. 2005. Legal Complexity in the Analysis of Water Rights and Water Resources Management. In: ROTH, D., BOELENS, R. & ZWARTEVEEN, M. (eds.) *Liquid relations. Contested water rights and legal complexity*. New Brunswick, NJ: Rutgers University Press.
- BOER, B. & BOYLE, A. 2013. *Human Rights and the Environment: Background Paper to 13th Informal ASEM Seminar on Human Rights*. Copenhagen: Asia-Europe Meeting.
- BORRAS JR, S. M. & FRANCO, J. 2012. Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis. *Journal of Agrarian Change*, 12, 34-59.
- BORRAS JR., S., HALL, R., SCOONES, I., WHITE, B. & WOLFORD, W. 2011. Towards a better understanding of global land grabbing: an editorial introduction. *Journal of peasant Studies*, 38, 209-216.
- BRAUN, B. 2006. Environmental issues: global natures in the space of assemblage. *Progress in Human Geography*, 30, 644-654.
- BULTO, T. S. 2011. Towards Rights-Duties Congruence: Extraterritorial Application of the Human Right to Water in the African Human Rights System. *Netherlands Quarterly of Human Rights*, 49.
- BULTO, T. S. 2014. *The Extraterritorial Application of the Human Right to Water in*

- Africa*, Cambridge, Cambridge University Press.
- CIORCIAN, J. D. 2012. Institutionalizing Human Rights in ASEAN. *Human Rights Quarterly*, 34, 695-725.
- CNR 2012. Xayaburi Hydroelectric Power Project: Peer Review of the Compliance Report made by Pöyry. Vientiane: Ministry of Energy and Mines, Lao PDR.
- CONTRERAS, A. P. 2007. Synthesis: Discourse, power and knowledge. In: LEBEL, L., DORE, J., DANIEL, R. & KOMA, Y. S. (eds.) *Democratizing Water Governance in the Mekong Region*. Chiang Mai: Mekong Press.
- CRONIN, R. & HAMLIN, T. 2012. *Mekong Turning Point: Shared River for a Shared Future*. Washington DC: Stimson Center.
- DORE, J. 2014. An agenda for deliberative water governance arenas in the Mekong. *Water Policy*, 16, 194-214.
- DORE, J., LEBEL, L. & MOLLE, F. 2012. A framework for analysing transboundary water governance complexes, illustrated in the Mekong Region. *Journal of Hydrology*, 466–467, 23-36.
- ETO CONSORTIUM 2013. *Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights*. Heidelberg: FIAN International.
- FORAN, T. 2015. Node and regime: Interdisciplinary analysis of water-energy-food nexus in the Mekong region. *Water Alternatives* 8, 655-674.
- FOX, C. & SNEDDON, C. 2005. Flood Pulses, International Watercourse Law, and Common Pool Resources: A Case Study of the Mekong Lowlands. *WIDER Research Paper*. UNU-WIDER.
- FRANCO, J., FEODOROFF, T., KAY, S., KISHIMOTO, S. & PRACUCCI, G. 2014. *The Global Water Grab: A Primer*. Amsterdam: Trans National Institute (TNI).
- GLASSMAN, J. 2010. *Bounding the Mekong: The Asian Development Bank, China, and Thailand*, Honolulu, University of Hawai'i Press.
- GOMEZ, J. & RAMCHARAN, R. 2014. Evaluating Competing “Democratic” Discourses: The Impact on Human Rights Protection in Southeast Asia. *Journal of Current Southeast Asian Affairs*, 33, 49–77.
- GRUMBINE, E., DORE, J. & XU, J. 2012. Mekong hydropower: drivers of change and governance challenges. *Frontiers in Ecology and the Environment*, 91-98.
- HARVEY, D. 1996. *Justice, Nature and the Geography of Difference*, Oxford, Blackwell Publishers.
- HERBERTSON, K. 2013. Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement Berekely: International Rivers.
- HILDYARD, N., LOHMANN, L. & SEXTON, S. 2012. *Energy Security: For Whom? For What?* Sturminster Newton: The Corner House.
- HIRSCH, P. & JENSEN, K. M. 2006. *National Interest and Transboundary Water Governance in the Mekong*. Sydney: Australian Mekong Resource Center, University of Sydney.
- HOFF, H. 2011. *Understanding the Nexus*. Background Paper for the Bonn 2011 Conference: The Water, Energy and Food Security Nexus. Stockholm: Stockholm Environment Institute.
- HURWITZ, Z. 2014. *Dam Standards: A Rights-Based Approach - A Guide Book for Civil Society*. Berkeley: International Rivers.
- ICEM 2010. *MRC SEA For Hydropower On The Mekong Mainstream: SEA Main Final Report*. Hanoi.
- INTERNATIONAL RIVERS 2011a. *Sidestepping Science: Review of the Pöyry Report on the Xayaburi Dam*. Berkeley: International Rivers.
- INTERNATIONAL RIVERS 2011b. *Summary of Technical Reviews of the Xayaburi Environmental Impact Assessment*. Berkeley: International Rivers.

- INTERNATIONAL RIVERS 2012. Comments on CNR's report for the Government of Laos on the Xayaburi Dam Berekley: Internaitonal Rivers.
- INTERNATIONAL RIVERS 2014. Xayaburi Dam: Timeline of Events (Last updated: April 2014). Berkeley: International Rivers.
- JOY, K. J., KULKARNI, S., ROTH, D. & ZWARTEVEEN, M. 2014. Re-politicising water governance: exploring water re-allocations in terms of justice. *Local Environment*, 19, 954-973.
- KIRBY, M., KRITTASUDTHACHEEWA, C., MAINUDDIN, M., KEMP-BENEDICT, E., SWARTZ, C. & ROSA, E. D. L. 2010. The Mekong: a diverse basin facing the tensions of development. *Water International*, 35, 573-593.
- KNOX, J. H. 2012. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. *Human Rights Council: Twenty-second session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. New York: United Nations Human Rights Council.
- KNOX, J. H. 2014. Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report. *Human Rights Council: Twenty-fifth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*. New York: United Nations Human Rights Council.
- LAMBERTS, D. 2008. Little Impact, Much Damage: The Consequences Of Mekong River Flow Alterations For The Tonle Sap Ecosystem. In: KUMMU, M., KESKINEN, M. & VARIS, O. (eds.) *Modern Myths of the Mekong: A Critical Review of Water and Development Concepts, Principles and Policies*. Helsinki: Helsinki University of Technology.
- LAZARUS, K., BADENOCH, N., DAO, N. & RESURRECCION, B. (eds.) 2011. *Water Rights and Social Justice in the Mekong Region*, London and Washington DC: Earthscan.
- LEACH, M., SCOONES, I. & STIRLING, A. 2010. *Dynamic Sustainabilities: Technology, Environment, and Social Justice*, Abingdon, Earthscan.
- LEB, C. 2013. The UN Watercourses Convention: the eminence grise behind cooperation on transboundary watercourses. *Water International* 38, 146-155.
- LEBEL, L., GARDEN, P. & IMAMURA, M. 2005. The politics of scale, position, and place in the governance of water resources in the Mekong region. *Ecology and Society* 10, 18.
- LECK, H., CONWAY, D., BRADSHAW, M. & REES, J. 2015. Tracing the Water–Energy–Food Nexus: Description, Theory and Practice. *Geography Compass*, 9, 445-460.
- LEFEVRE, A. S. 2014. Thai court takes villagers' case against power firm, Laos dam. *Reuters*, 24 June 2014.
- MATTHEWS, N. 2012. Water grabbing in the Mekong basin – An analysis of the winners and losers of Thailand's hydropower development in Lao PDR *Water Alternatives*, 5, 392-411.
- MCCARTHY, J. D. & ZALD, M. N. 2001. The enduring vitality of the resource mobilization theory of social movements. *Handbook of sociological theory*. Springer.
- MCCULLY, P. 2001. *Silenced Rivers: The Ecology and Politics of Large Dams*, London and New York, Zed Books.
- MCINTYRE, O. 2010. International water law: concepts, evolution and development. In: EARLE, A., JÄGERSKOG, A. & OJENDAL, J. (eds.) *Transboundary Water Management: Principles and Practice*. London: Earthscan.

- MEHTA, L. 2010. *The Limits to Scarcity: Contesting the Politics of Allocation*, London and Washington DC, Earthscan.
- MEHTA, L., VELDWISCH, G. J. & FRANCO, J. 2012. Introduction to the Special Issue: Water grabbing? Focus on the (re)appropriation of finite water resources. *Water Alternatives*, 5, 193-207.
- MERME, V., AHLERS, R. & GUPTA, J. 2014. Private equity, public affair: Hydropower financing in the Mekong Basin. *Global Environmental Change*, 24, 20-29.
- MIDDLETON, C. 2014. The Politics of Uncertainty: Knowledge Production, Power and Politics on the Mekong River. *International Conference on Development and Cooperation of the Mekong Region*. Seoul National University.
- MIDDLETON, C., ALLOUCHE, J., GYAWALI, D. & ALLEN, S. 2015a. The rise and implications of the water-energy-food nexus in Southeast Asia through an environmental justice lens. *Water Alternatives*, 8, 627-654.
- MIDDLETON, C. & DORE, J. 2015. Transboundary Water and Electricity Governance in mainland Southeast Asia: Linkages, Disjunctures and Implications. *International Journal of Water Governance (Special Issue)*, 3, 93-120.
- MIDDLETON, C., GRUNDY-WARR, C. & YONG, M. L. 2013. Neoliberalizing Hydropower in the Mekong Basin: The Political Economy of Partial Enclosure. *Social Science Journal*, 43, 299-334.
- MIDDLETON, C., MATTHEWS, N. & MIRUMACHI, N. 2015b. Whose Risky Business?: Public-Private Partnerships (PPP), Build-Operate-Transfer (BOT) and Large Hydropower Dams in the Mekong Region. In: MATTHEWS, N. & GEHEB, K. (eds.) *Hydropower Development in the Mekong Region: Political, Socio-economic and Environmental Perspectives*. London: Earthscan.
- MIDDLETON, C. & PRITCHARD, A. 2013. Corporate Accountability in ASEAN: A Human Rights-Based Approach. Bangkok: Forum Asia.
- MIDDLETON, C. & PRITCHARD, A. 2014. Arenas of (in)justice in power-export hydropower projects on international rivers: The case of the Xayaburi Dam, Mekong River. *Land, Water and the Environment: The Politics of Rights*. University of Wisconsin-Madison.
- MOLLE, F., FORAN, T. & KÄKÖNEN, M. (eds.) 2009. *Contested Waterscapes in the Mekong Region: Hydropower, Livelihoods and Governance*, London, Sterling, VA: Earthscan.
- MOORE, D., DORE, J. & GYAWALI, D. 2010. The World Commission on Dams + 10: Revisiting the large dam controversy. *Water Alternatives*, 3, 3-13.
- MRC SECRETARIAT 2011a. Observations and Comments on the Pöyry Report on the Xayaburi Hydropower Project. Vientiane: Mekong River Commission Secretariat.
- MRC SECRETARIAT 2011b. Proposed Xayaburi Dam Project: MRCS Prior Consultation Project Review Report. Vientiane: Mekong River Commission.
- NEAL, M. J., LUKASIEWICZ, A. & SYME, G. J. 2014. Why justice matters in water governance: some ideas for a 'water justice framework'. *Water Policy*, 16, 1-18.
- ÖJENDAL, J., HANSSON, S. & HELLBERG, S. (eds.) 2012. *Politics and Development in a Transboundary Watershed: The Case of the Lower Mekong Basin*, Dordrecht, Heidelberg, London, New York: Springer.
- PASQUALETTI, M. J. & SOVACOOOL, B. K. 2012. The importance of scale to energy security. *Journal of Integrative Environmental Sciences*, 9, 167-180.
- PATEL, R. 2009. Food sovereignty. *The Journal of Peasant Studies*, 36, 663-706.
- PERREAULT, T. 2014. What kind of governance for what kind of equity? Towards a theorization of justice in water governance. *Water International*, 39, 233-245.

- PÖYRY ENERGY AG 2011. Compliance Report: Government of Lao PDR, Main Report, Xayaburi Hydroelectric Power Project, Run-of-River Plant.
- RIBOT, J. C. & PELUSO, N. L. 2003. A Theory of Access. *Rural Sociology*, 68, 153-181.
- RIEU-CLARKE, A. 2015a. Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy. *Asian Journal of International Law*, 5, 143-175.
- RIEU-CLARKE, A. 2015b. Transboundary Hydropower Projects Seen Through the Lens of Three International Legal Regimes—Foreign Investment, Environmental Protection and Human Rights. *International Journal of Water Governance*, 27–48.
- SAVE THE MEKONG COALITION 2010. Press Release: Save the Mekong Call - Cancel Xayaboury Dam on Mekong River's mainstream, Halt MRC PNPCA Process. Save the Mekong Coalition.
- SCHLOSBERG, D. 2004. Reconceiving environmental justice: global movements and political theories. *Environmental Politics*, 13, 517-540.
- SIEMENPUU FOUNDATION MEKONG GROUP 2012. Specific Instance to OECD National Contact Point in Finland: the role of Pöyry Group services in the process of the Xayaburi hydropower project in Lao PDR. Helsinki: Siemenpuu Foundation.
- SMAJGL, A. & WARD, J. (eds.) 2013. *The Water-FoodEnergy Nexus in the Mekong Region: Assessing Development Strategies Considering Cross-Sectoral and Transboundary Impacts*, New York, Heidelberg, Dordrecht, and London: Springer.
- SNEDDON, C. 2003. Reconfiguring scale and power: the Khong-Chi-Mun project in northeast Thailand. *Environment and Planning A*, 35, 2229-2250.
- SNEDDON, C. 2007. Nature's Materiality and the Circuitous Paths of Accumulation: Dispossession of Freshwater Fisheries in Cambodia. *Antipode*, 39, 167-193.
- SNEDDON, C. & FOX, C. 2006. Rethinking transboundary waters: A critical hydrogeopolitics of the Mekong basin. *Political Geography*, 25, 181-202.
- SNEDDON, C. & FOX, C. 2008. River basin politics and the rise of ecological and transnational democracy in Southeast Asia and Southern Africa. *Water Alternatives* 1, 66 - 88.
- STIRLING, A. 2015. Transdisciplinary Methods for Developing Nexus Capabilities: A Stimulus Paper for the Transdisciplinary Methods for Developing Nexus Capabilities Workshop to be held at the University of Sussex, 29-30th June 2015. Brighton and Hove: University of Sussex.
- SUHARDIMAN, D., WICHELNS, D., LEBEL, L. & SELLAMUTTU, S. S. 2014. Benefit sharing in Mekong Region hydropower: Whose benefits count? *Water Resources and Rural Development*, 4, 3-11.
- SULTANA, F. & LOFTUS, A. (eds.) 2012. *The Right to Water: Politics, Governance and Social Struggles*, London, Sterling, VA: Earthscan.
- TEAM CONSULTING 2010a. Environmental Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR. Bangkok: TEAM Consulting Engineering and Management Co. Ltd.
- TEAM CONSULTING 2010b. Social Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR. Bangkok: TEAM Consulting Engineering and Management Co. Ltd.
- THABCHUMPON, N. & MIDDLETON, C. 2012. Thai Foreign Direct Investment in the Xayaburi Dam in Lao PDR and its implications for Human Security and International Cooperation *Asian Review*, 25, 91-117.
- THOMAS, T. & CHANDRA, A. 2014. Thematic Study on CSR and Human Rights. Jakarta: ASEAN Intergovernmental Commission on Human Rights (AICHR)
- UN 1997. Convention on the Law of the Non-Navigational Uses of International Watercourses.

- WALKER, G. 2012. *Environmental Justice: Concepts, Evidence and Politics*, London and New York, Routledge.
- WATERLEX & WASH UNITED 2014. *The Human Rights To Water and Sanitation in Courts Worldwide A Selection of National, Regional And International Case Law*. Geneva: WaterLex.
- WCD 2000. *Dams and Development: A New Framework for Decision-Making - The Report of the World Commission on Dams* London: World Commission on Dams (WCD).
- WORRELL, S. 2014. Xayaburi dam nearly half done *Phnom Penh Post*, 3 November 2014.
- ZEITOUN, M. & MCLAUGHLIN, K. 2013. Basin justice: using social justice to address gaps in river basin management. *In: SIKOR, T. (ed.) Just Ecosystem Management*. Abingdon, UK and New York: Routledge.
- ZEITOUN, M., WARNER, J., MIRUMACHI, N., MATTHEWS, N., MCLAUGHLIN, K., WOODHOUSE, M., CASÇÃO, A. & ALLAN, T. 2014. Transboundary water justice: a combined reading of literature on critical transboundary water interaction and 'justice', for analysis and diplomacy. *Water Policy*, 16, 174-193.
- ZWARTEVEEN, M. Z. & BOELEN, R. 2014. Defining, researching and struggling for water justice: some conceptual building blocks for research and action. *Water International*, 39, 143-158.