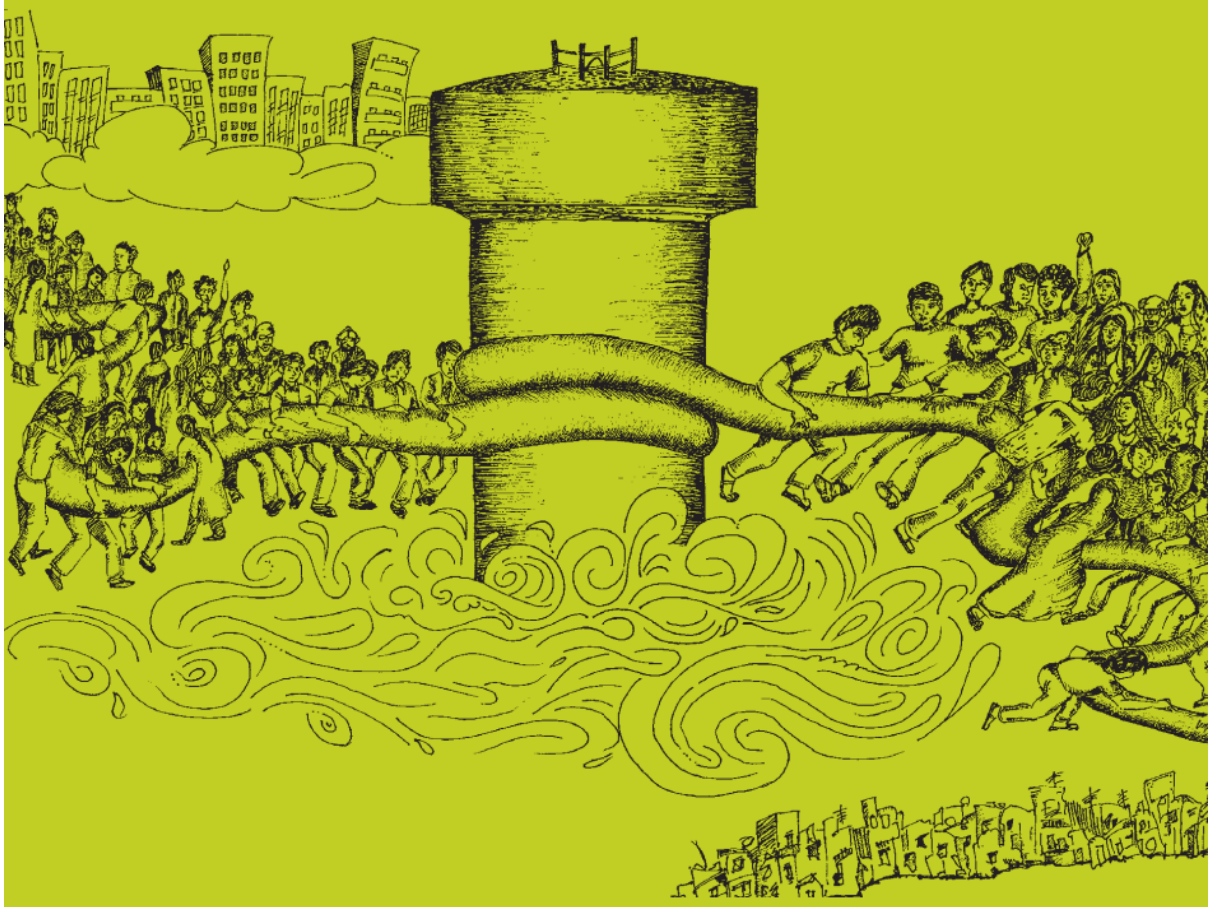
Resource Politics: Transforming Pathways to Sustainability



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"Arenas of Water Justice on Transboundary Rivers: A Human Rights-Based Approach to the Food-Water-Energy Nexus in Southeast Asia"

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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 human 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 human 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 and the politics surrounding them. Such rights are claimed and defended within arenas of water justice.

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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, Matthews et al. 2015). 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, Grundy-Warr et al. 2013). Many recent studies have 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, Badenoch et al. 2011), including on transboundary rivers (Neal, Lukasiewicz et al. 2014) and with regard to human 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 2015) 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 (Smajgl and Ward 2013; Allouche, Middleton et al. 2015). 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 (2015) 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 human rights-based approach (HRBA) to large hydropower dams and water governance on transboundary rivers in Southeast Asia in light of the International Watercourse Law, the Right to Water, and "the nexus". In the following section, a HRBA to large hydropower dams is discussed from the perspective of international human rights law, whilst recognizing that rights – including the right to water – are also fundamentally a social relationship and therefore bound up within power relations. This is followed by a section critically discussing the Right to the Environment and related Extra-Territorial Obligations (ETOs) 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 the Right to Water or seeking redress for human 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 HRBA 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 northern 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 human rights-based claims to political economy research on the food-water-energy nexus.

A Human 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 (McCully 2001; Molle, Foran et al. 2009; Mehta, Veldwisch et al. 2012). 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, Wichelns 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)[4], 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) including river related resources, yet substantial work remains to be done (Sultana and Loftus 2012).

Relatedly, there has been growing momentum around the right to a safe, clean and healthy environment. [5] In his statement to the Human Rights Council in March 2014, the current UN Special Rapporteur on Human Rights and the Environment, Professor John Knox, concluded that[6]: "*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

[4] 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).*"

[5] 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-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.

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

- 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).[7] Assessing large dams through the lens of a HRBA provides a normative framework by which the actions of government and private sector actors can by evaluated even where gaps or deficits in national law and transboundary regimes may exist. Other approaches to planning hydropower projects and evaluating their role in development have also drawn on the HRBA, in particular the World Commission on Dams that proposes a "rights and risks" approach (WCD 2000; Moore, Dore et al. 2010).

Table 1: Substantive and Procedural Human Rights Obligations Relevant to Large Hydropower Dams

Substantive obligations	*Procedural obligations*
• 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 • 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	• 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 • 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

[7] These rights are derived from: The International Bill of Human Rights, which indudes 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.

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 processes of negotiation and/or contestation 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, usually between national law and local customary arrangements (i.e. legal pluralism) (Boelens et al, 2005; for the Mekong region see Johns et al, 2010). Which rules are viewed as 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 a 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 HRBA 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 marginalized, 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 large 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, Ahlers et al. 2014), that there are linkages (and disconnects) between water and electricity governance (Middleton and Dore 2015), and that the

associated cause-and-effect of impacts to river resources due to electricity demand in urban centers are (tele-)connected across borders (Baird and Quastel 2015).

In Southeast Asia, there has been some promotion of a HRBA to development (Ciorcian 2012), including the Right to the Environment (Boer and Boyle 2013).[8] While individual government recognition of human rights is patchy and some governments appear to actively limit the diffusion of human 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. Civil society has also cautiously supported AICHR, whilst at the same time critiquing its lack of a protection role that means it is currently unable to receive and investigate cases (Gomez and Ramcharan 2014).[9]

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.*"[10] Signaling its intent 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 late 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 and environment cases in Southeast Asia, and given also the uneven access to justice across the region, the role of extraterritorial obligations (ETOs) could be a significant transboundary justice arrangement (Middleton and Pritchard 2013). ETOs are a recent evolution 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).[11] 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.*" [12] The implications of ETOs for the Right to Water on transboundary rivers has only recently begun to be explored (Bulto 2011; Bulto 2014).

Whilst until now most governments in Southeast Asia have interpreted their human rights obligations as applicable only within their own borders, the concept of ETOs is of growing

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[8] 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*"

[9] 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.

[10] 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*"

[11] 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)

[12] http://www.etoconsortium.org/en/thematic-focal-groups/extractive-industries-landgrab-transnational-corporations/ [Last accessed 17.9.15]; 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 17.9.15]

interest. For example, in September 2014, Chulalongkorn University, Thailand hosted a regional conference titled "*Rights-based governance beyond borders: The role of extraterritorial obligations (ETOs)*", whilst in April 2015 at the ASEAN Peoples Forum in Kuala Lumpur, Malaysia a session was organized titled "*ETOs in cross-border investment : the role of human rights institutions.*" In October 2014, five NHRIs in Southeast Asia together with eleven civil society groups signed the "*Bangkok Declaration on Extraterritorial Human Rights Obligations*", stating :

> "*We recognise the urgency of advancing the implementation of extraterritorial obligations (ETOs) given the accelerating pace of trade, investment, and broader economic integration between States in south-east Asia; the impending creation of the ASEAN Economic Community; increasing levels of migration and human trafficking in the region; and an increasing amount of cross-border economic, political, social, and military activity in the region and globally*" (APWLD 2014)

In the context of the Right to Water and the Right to the Environment, 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 furthering the principle of ETOs in mainland Southeast Asia.

Arenas of Water Justice

Whilst a HRBA to large hydropower dams on transboundary rivers 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 that are stated on paper can in practice be accessed (Ribot and Peluso 2003).[13] As planning and decision-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 large hydropower projects with unjust 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 the Right 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 scale[14], and involve contestation and/or cooperation between state, private sector, civil society, and community actors. Each arena can be understood as consisting of:

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

[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, namely: 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.

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 wider public in order for a decision itself to be claimed as legitimate. Thus formal institutions and processes are embedded within the wider public 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]

Table 2: Typology of legal "arenas of water justice" for human rights protection

Scale	*Arena*
National	• National justice system • National Human Rights Institution
Regional inter-governmental	• ASEAN Intergovernmental Committee on Human Rights • ASEAN Children and Women Commission
International inter-governmental	• UN - Human Rights Council • UN - Special Rapporteurs • Universal Periodic Review • Core treaties (Optional Protocol mechanisms - CEDAW, CRC etc).
International voluntary/ non-binding mechanisms	• Corporate policies of project developers / financiers • Multi-lateral guidelines (e.g. OECD Standards on Multi-National Corporations) • 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 claimed as an economic good and thus commoditized and privatized (Bakker 2005; Sneddon 2007). This transformation reconfigures control over, 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:* Water's distribution is uneven both spatially and temporally, therefore some places - at least before the intervention of institutions or technology - will hold a form of natural advantage in terms of access to or control over water resources
- *Water is essential for all life*: Both humans and the environment have a minimum (or basic) need for water for their survival. For humans, the Right to Water addresses the ability of humans to meet this basic need, whilst the concept of environmental flows is 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

[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.

material benefits, health benefits, and human security benefits. There are a range of theories of justice (prior right theory, intergenerational justice ….) that could guide how distribution of water might be "justly" prioritized beyond meeting basic needs, although which principle applies is often contested (Neal et al, 2014: 8)

- *Power asymmetries and water governance:* Decision-making over access to and control over water is inherently political, and entail interaction between actors of asymmetrical power relations. Power shapes who defines – or who is heard to define – what is just as dominant discourses and worldviews are privileged over marginalized ones.

Neal et al (2014) highlight the importance of rendering principles of justice visible and explicit in the analysis of water governance (see also Groenfeldt and Schmidt, 2013 on the value of water). 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.*"

Zeitoun et al (2014) emphasize that researchers and practitioners themselves should reflexively declare their values towards justice in undertaking water governance research.

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, Lukasiewicz 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. regardless of need or contribution). Meanwhile, considerations of procedural justice, meaning fair representation and due process, concerns participation, access to information, and access to redress, and relates also to the concept of deliberative democracy (Sneddon and Fox 2008; Dore 2014). Processes that may appear procedurally fair but that are undertaken in asymmetrical power relations, however, may result in highly inequitable outcomes, as a result of elite capture, tokenism, and the exclusion of alternatives (Zeitoun, Warner 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 Zwarteveen 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]

Zwarteveen and Boelens (2014) emphasize the limits to the expansion of libertarian and entitlement theories of justice[17] 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

[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*" (Zwarteveen and Boelens 2014:146)

of fair procedures. Highlighting the limits of liberal justice, Zwarteveen 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), Zwarteveen 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 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). Needless to say, there are many other conceptualizations of justice and water ethics across and within cultures globally (Llamas, Martínez-Cortina et al. 2009; Brown and Schmidt 2010).

Power and Politics within 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 spaces within which politicized processes unfold, recognizing power in its various forms and the power asymmetries that exist should be a key consideration, including in relation to how justice is defined within the process. Thus, writing on the "politics of scale" (Lebel, Garden 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 water justice play out. Even limited to the different strands of conceptualizing justice within liberalism, actors[18] 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.

A range of state, non-state, and private actors pursue their interests within arenas of water justice (Figure 1) (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.

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; occur between various state, private, and non-state actors; and operate across scales.

[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.

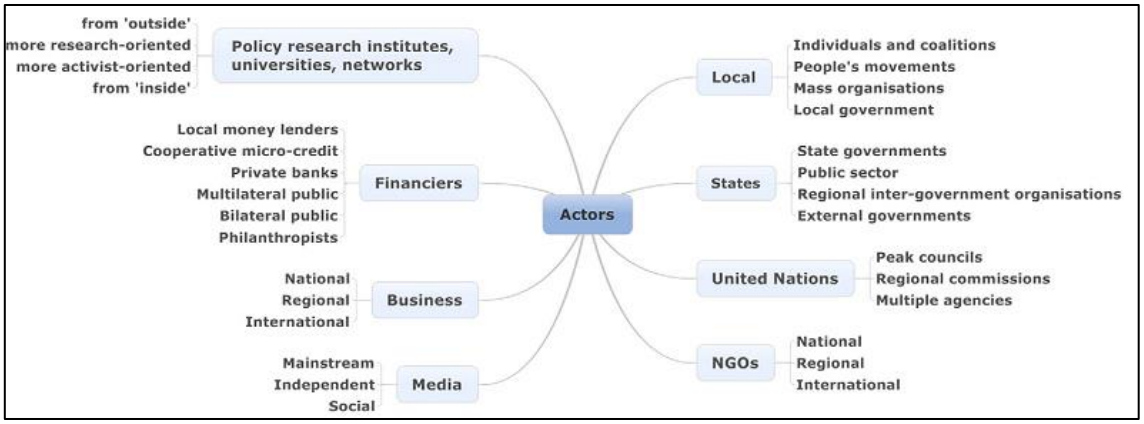

Figure 1: Actors involved in water governance in mainland Southeast Asia (reproduced from Dore et al, 2012)

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 naturalized and result in discourses that appear depoliticized but in fact are highly political (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 the (contested) definition of scale within politicized processes will define problems, solutions, and notions of justice in particular ways (Lebel, Garden et al. 2005).

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

A Human 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 human 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 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 Mekong Agreement (MRC, 1995) that binds the four countries of the Lower Mekong River (Cambodia, Laos, Thailand and Vietnam) within the Mekong River Commission is drawn from a draft version of the International Watercourse Law.

As the principal customary international law on transboundary rivers, the International Watercourse Law addresses the rights and obligations of States sharing transboundary rivers, in particular between those that have acceded to the convention. It is neither a veto right against other riparian states, nor an entitlement to unilateral use. Based on the principle of limited territorial sovereignty, core to the convention 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 (UN 1997; Leb 2013; Rieu-Clarke 2015).[21]

Equity, however, is an elusive concept in international water law (Bingham, Robinson et al. 2008). In Article 6 of the International Watercourses Convention, a list of "*Factors relevant to equitable and reasonable utilization*" are provided, without clear principles for weighting or prioritization, 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*

[21] See also http://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf [Last accessed 17.9.15]

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, 2014:175), 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, including: *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[s] 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 international environment laws and norms, 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 2015). A growing number of studies have examined 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).

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 (2015) emphasizes the Right to Water and the role of regional human rights institutions. When these regimes intersect around the

[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

"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 (2015b) also emphasizes how various private sector codes-of-conduct also determine required care by the state, including the OECD Guidelines on Multinational Enterprises and the International Hydropower Association's "Hydropower Sustainability Assessment Protocol." Such international norms, as well as the Right to Water, draw on the concept of a "community of interest" beyond the nation state alone 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 (2015) documents principally from the perspective of international relations and international law how these regimes interact. As highlighted by Hirsch and Jensen (2006), however, states in their pursuit of the "national interest" through inter-governmental negotiations on transboundary rivers do not always represent the interests of all citizens equally, especially those citizens who are economically, socially or politically marginalized (as river-side communities often are). Thus, introducing a critical political economy and critical hydropolitics analysis could deepen understanding of the interaction of these regimes and their outcome in terms of access to justice (e.g. Sneddon and Fox 2006; Zeitoun et al, 2014).

Bringing Justice into the Nexus: A Human 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, Warner et al. 2014). Analysis of justice that considers the interrelationship between water and other resources on transboundary rivers (and their related transboundary market chains), as explored by the food-water-energy nexus, is thus at an even earlier stage (Allan, Keulertz et al. 2015; Leck, Conway et al. 2015; Middleton, Allouche et al. 2015; Stirling 2015).

Claims for justice have emerged related to individual components of the nexus, but not towards the nexus itself (Middleton, Allouche et al. 2015). In some cases, these claims draw on human 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 Campasina, 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 as discussed extensively above (Mehta et al. 2012; Sultana and Loftus 2012; Franco et al. 2014).[24] Meanwhile,

[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).

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).

Any normative framing of the nexus – whether human rights-based or otherwise – must be embedded within the political economy of food, water and energy; indeed any meaningful notion of justice must emerge from those within the food/ water/ energy system itself. Yet, the predominant analytical approach to "the nexus" at present has been more apolitical "socio-ecological systems thinking", although several researchers have recently sought to unpack the nexus through a more explicit political economy lens (Leck, Conway et al. 2015). 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 (2015) 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 understanding the meso-scale social structures and their political economy, together with how meaning is produced (i.e. ideas and discourse). Where multiple actors interests converge and there is thus contestation around allocation and access to limited water and associate resources are termed "critical nodes" (see Smajgl and Ward, 2013), which are embedded within these meso-scale social structures. Thus, an understanding of these meso-scale social structures would reveal how processes within "arenas of water justice" may be structurally constrained country-by-country and case-by-case, and how actors navigate this "strategic action field"[25] in the pursuit of their goals (Foran 2015:664).

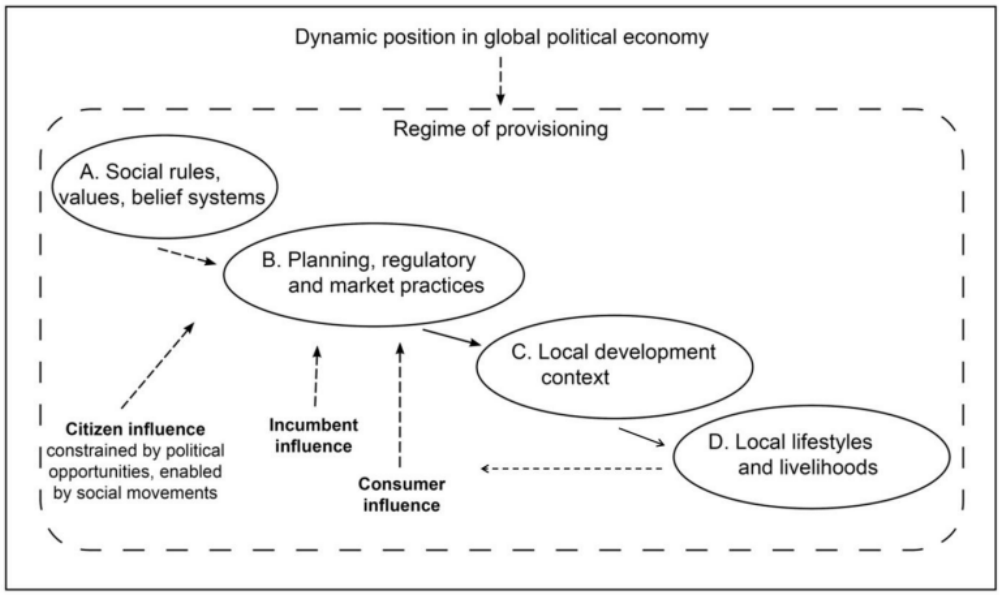

Figure 2: Regime of Provisioning (Reproduced from Foran, 2015:665)

[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.*"

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, Dore 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 to economic growth, by changing the river's hydrology and ecology and blocking major fish migrations and the movement of sediment, the mainstream dams could also put at risk the livelihoods, local economies and food security of millions of people (ICEM 2010; Grumbine, Dore et al. 2012).

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 now under construction by a predominantly Thai private-sector consortium[26] (Matthews 2012; Thabchumpon and Middleton 2012). Project proponents, including the Government of Laos (GoL), the project consortium, and some of Thailand's relevant ministries and Thailand's electricity utility EGAT, argue that the Xayaburi Dam would generate cheap electricity and contribute towards Thailand's energy security, and that the cross-border foreign direct investment and project revenues would bring "development" to Laos. Those opposing the project, including a number of local NGOs and international NGOs and some riverside communities from Thailand, Cambodia and Vietnam[27] under the banner "Save the Mekong Coalition"[28], emphasize that the Xayaburi Dam would require the resettlement of approximately 2,100 people from ten villages in Laos and that more than 200,000 people located near the dam would experience impacts to their livelihoods and food security, both within Laos and in neighboring countries due to impacts on migratory capture fisheries, loss of sediment flows and other ecological changes. They also highlight how the project's original Environmental Impact Assessment (EIA) report, published in August 2010, was of poor quality and did not consider transborder impacts (International Rivers 2011).[29]

Decision-making and Arenas of Water Justice

The Xayaburi Dam has been surrounded by intense local, national, regional and even global politics (Kirby, Krittasudthacheewa et al. 2010; Matthews 2012). 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

[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.
[28] http://www.savethemekong.org/ [Last accessed 17.9.15]
[29] It only considered impacts for 10 km downstream of the project

Notification and Prior Consultation and Agreement (PNPCA). The GoL concluded that the process was complete in April 2011, whilst Cambodia, Thailand and Vietnam requested further studies.

- Subsequently, in December 2011, the MRC Council agreed to conduct a further study on the Mekong mainstream dam cascade, which to date has not been completed.
- The GoL announced in July 2012 that the project had been redesigned to address neighboring countries concerns, and a "ground breaking" ceremony was held in November 2012 attended by the Cambodian and Vietnamese governments[30]
- 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.

Table 3: Typology of legal "arenas of water justice" for human rights protection for Xayaburi Dam

Scale	*Arena*
National	• Thailand's Power Development Plan (since 2010) • Laos Environmental Impact Assessment (February 2010) • Thailand National Human Rights Commission (February 2012)[31] • 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	• Mekong River Commission
	  ○ 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)[32]

International inter-governmental	• *N.A.* (Potentially UN Special Rapporteur on Right to Food)

International voluntary/ non-binding mechanisms	• OECD Guidelines for Multinational Enterprises
	  ○ Pöyry (August, 2012 – June 2013)
	  ○ Andritz AG (April 2014)

[30] Construction for the project on the riverbanks had actually proceeded since late 2010 and in the river since at least mid-2012.

[31] 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 [Last accessed 17.9.15]. Globally, National Human Rights Institutions have become more active on the Right to Water (see WaterLex, 2014).

[32] See http://www.en.mahidol.ac.th/eng/envi_news/envi_news_full_e.php?id=1463 [Last accessed 17.9.15]

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

- *Substantive Rights*: The Right to Life; The Right to Food[33]; 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:

- the formal institutions and legal processes, the wider public space that surrounds them, and the actors included or excluded from each
- how decision-making processes have unfolded 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 of water justice are:

- *An regional inter-governmental arena*: 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.);
- *An international voluntary/ non-binding mechanism arena, which draws on international human rights law obligations*: the complaint filed against the Finnish company Pöyry with the OECD Guidelines for Multinational Enterprises resulting from its role in supporting the GoL to proceed with the project
- *A national arena with implications for Thailand's extra-territorial obligations*: the court case submitted to the Supreme Administrative Court in Thailand.

The "PNPCA process/ international water courses" arena

On 22 September 2010, the GoL initiated the MRC's Procedures for Notification and Prior Consultation and Agreement (PNPCA), which has been a key arena of water justice in the case of the Xayaburi Dam. The PNPCA process is required under Article 5 of the Mekong Agreement 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 measures.[34] Further details on the process for inter-governmental consultation and agreement are provided various documents, including the "PNPCA Procedures", "Guidelines on the implementation of the PNPCA", and the "Preliminary Design Guidance for Proposed Mainstream Dams in the Lower Mekong Basin" report. Despite these documents, there has been considerable disagreement over how to interpret the rules and procedures of the PNPCA process (Rieu-Clarke 2015), which has resulted in a "politics of uncertainty" around the legal norms in play (Middleton 2014).

[33] See, for example, http://www.earthrights.org/blog/rethinking-food-security-right-food-mekong [Last accessed 17.9.15]

[34] 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.*"

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 Committee[35] (Rieu-Clarke 2015). 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[36], although civil society groups criticized that their opinion was not seriously taken into consideration from these meetings. Furthermore, the Xayaburi Dam's environmental impact assessment (EIA) was only released after the meetings were held and therefore was not subject to discussion (International Rivers 2011).[37]

Following a series of meetings of the experts who formed the MRC PNPCA Joint Committee Working Group, the MRC Joint Committee convened on 19 April 2011 to discuss the PNPCA (see Rieu-Clarke 2015a for a summary of this process).[38] 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.[39] The meeting, however, was held only in December 2011; whilst an agreement to delay the Xayaburi Dam was announced[40] much had happened in the meantime to progress the project and on the ground necessary preparation work continued.

Diverse interpretation of the PNPCA procedures and guidelines led to different conclusions on whether the PNPCA process was actually concluded or not. The GoL claimed that according to the PNPCA guidelines, the PNPCA process ended on 22 April 2011 six months after it formally commenced because no government had officially objected to the project.[41] To further its argument, the GoL commissioned a report by the consultancy group Pöyry assessing the compliance of the Xayaburi Dam with the MRC requirements (Pöyry Energy AG 2011). Whilst the report itself was not published until August 2011, Pöyry issued a letter in June 2011 concluding "*that the Prior Consultation Process had been ended*" and that "*the decision whether or not to proceed with the project rests solely with the Government of Lao.*"[42] At the time, the MRC's official

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[35] 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.

[36] See http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process/ [Last accessed 17.9.15]

[37] 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 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.

[38] 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.

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

[40] See http://www.internationalrivers.org/resources/mekong-governments-delay-xayaburi-dam-pending-further-study-3693 [last accessed 17.9.15]

[41] 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."

[42] See http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level/ [Last accessed 17.9.15]

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.*"

Pöyry's letter was used by the GoL to inform the lead developer of the project consortium, Thailand's Ch. Karnchang, and Thailand's Ministry of Energy in June and October 2011 respectively that the PNPCA process was complete; These letters paved the way for the project developer to proceeded 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 in positions of power use their influence to define justice, in this case regarding the interpretation of the PNPCA process and its closure. Furthermore, revealing the lack of public disclosure on the PPA, it was signed at a time when Thailand was experiencing its worst flooding in a decade and on a public holiday.

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

> "*Lao PDR's unilateral action to prematurely terminate the PNPCA process, without allowing its neighbor countries to properly conclude that process, violates the Mekong Agreement, and therefore international law*" (Perkins Coei 2011)

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

The MRC Secretariat, which had been asked by the Vietnam government to review the Pöyry (2011) report in the context of the MRC's dam design guidelines, concluded that the measures proposed by Pöyry would not result in the Xayaburi Dam's compliance with the MRC standards. It stated:

> "… *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 2011).

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 the CNR report's findings appeared to be mis-represented by the GoL itself (International Rivers 2012).

Uncertainty around how to interpret the rules of the PNPCA has been compounded by scientific uncertainty within studies that have been utilized by various actors within the PNPCA process. 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 2011; MRC Secretariat 2011); 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). Thus, the predicted impacts of the project, the effectiveness of technologies proposed to mitigate them, and the project's implications for human rights are heavily contested between those who support and oppose the project.

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). This despite the fact that the Xayaburi Dam was left off the official meeting agenda.[43] According to International Rivers:[44]

> "*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:145), 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 PNPCA process and in the end it did not 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.*"[45] Ultimately affected communities' and civil societies' ability to influence the core decisions of the arena, which is principally an inter-governmental process, was weak. At the same time, the PNPCA 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. Regarding ideas of justice, clearly amongst the many actors involved there are diverse definitions being invoked, and within the negotiation process each actors concept of justice (in a substantive, procedural and recognitional sense) was not explicitly stated but instead left open to interpretation by others.

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[43] http://www.internationalrivers.org/resources/xayaburi-dam-left-off-mrc-council-agenda-7795 [Last accessed 17.9.15]

[44] http://www.internationalrivers.org/resources/mekong-countries-at-odds-over-mega-dams-7824 [Last accessed 17.9.15]

[45] 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.*"

The "OECD Guidelines" arena

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 (NCP) in Finland regarding the Finnish company Pöyry's role in assessing the GoL's compliance with the PNPCA process (Pöyry Energy AG 2011). This is an international arena of water justice where a set of voluntary guidelines evaluate and can make recommendations towards the role of private sector actors (from the OECD), with the process facilitated by a NCP which in the case of Finland is the Ministry of Employment and the Economy (MEE).[46] The arguments put forward in the complaint were as follows (Siemenpuu Foundation Mekong Group 2012):

- *Conflict of interest*: Pöyry produced a report in support of the GoL's position that the PNPCA process had been concluded satisfactorily, whilst also negotiating other roles in the project's development.[47]
- *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 GoL 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 2011), and also partly by the consultants Compagnie Nationale du Rhône that were also commissioned by the GoL to assess the work of Pöyry (CNR 2012).[48]
- *Undermining regional cooperation:* The report was commissioned against the backdrop of a diplomatic dispute within the MRC, and in particular whether the GoL could proceed with the Xayaburi project. The complainants argued that the report – and therefore Pöyry – was "*party to an attempt to circumvent a not-concluded, still on-going, regional consultation process that aims at guaranteeing balanced and peaceful co-operation between the countries in the region*" (Siemenpuu Foundation Mekong Group, 2012:6)

Regarding violation of human rights, the OECD guidelines has a chapter that requires companies:[49]

> "*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):

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[46] For documents submitted and a chronology of the case, see: http://oecdwatch.org/cases/Case_259 [Last accessed 17.9.15]; See also http://www.internationalrivers.org/blogs/267/p%C3%B6yry-responds-on-its-role-in-the-xayaburi-dam [Last accessed 17.9.15]

[47] In November 2012, signed a contract to supervise the project's construction. See http://www.opendevelopmentcambodia.net/tag/poyry/ [Last accessed 17.9.15]and http://www.phnompenhpost.com/index.php/2012111259686/National-news/controversial-poeyry-tapped-for-xayaburi.html [Last accessed 17.9.15]

[48] http://www.internationalrivers.org/blogs/267/as-consultant-distances-itself-cracks-appear-in-laos%E2%80%99-portrayal-of-xayaburi-dam [Last accessed 17.9.15]

[49] 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.*"[50] 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 response to the complaint, Pöyry argued that it was not the leading developer of the project, as consultants they were not responsible for how their services were used, and that ultimately their work had improved the project to become more environmentally 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. Thus, following statements prepared by the Finnish Ministries of Environment and Foreign Affairs, both Pöyry and the complainants issued their final responses.

The case ended in June 2013 in which MEE concluded:

> "*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.*"[51]

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 itself was criticized because:

> "*The response to the complaint that Pöyry submitted to the MEE has been treated as strictly confidential, and [thus] the complainant has not been allowed to access central information regarding the handling of the case.*"[52]

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[50] http://business-humanrights.org/sites/default/files/media/poyry_plc_statement_to_business_and_human_rights_resource_centre_120807.pdf [Last accessed 17.9.15]
[51] http://www.tem.fi/en/current_issues/press_releases/press_release_archive/year_2013/statement_of_the_ministry_of_employment_and_the_economy_poyry_oyj_complied_with_oecd_guidelines_in_laos_dam_project.110859.news [Last accessed 17.9.15]
[52] https://www.facebook.com/permalink.php?id=164447100248670&story_fbid=677894275570614 [Last accessed 17.9.15]

The NGO OECD Watch 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:

> *"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."*[53]

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, from the perspective of the civil society complainants the official process proceeded without equity within the process. Despite this outcome, which was clearly disagreed with by the complainants (in particular in terms of procedural justice of the OECD complaint process itself), one organization - the Siemenpuu Foundation - noted that the case was "*An important precedent for the Finnish NCP*" because it made clear that Finnish consulting companies are subject to the OECD Guidelines.[54]

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 Thai government agencies 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 claimed that they would be affected by the project, supported by the Thai NGO Community Resource Center. 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.[55] According to the NGO EarthRights International, the basis of the case was to:

> *"…challenge the decision of the National Energy Policy Council and Thai Cabinet to approve the Power Purchase Agreement between the Electricity Generating Authority of Thailand (EGAT) and the Xayaburi Power Company Limited, the project's operator. The villagers argue that this approval was given without conducting an environmental and health impact assessment of the dam in Thailand along with public consultation, both of which are required under the Thai Constitution for activities that will significantly affect a community's natural environment."*[56]

The case related to the fact that consultations undertaken under the PNPCA process in Thailand were inadequate as regards to the standards expected under Thailand's 2007 Constitution, and that the project developers and the GoL had not undertaken a transboundary EIA for the project and thereby not assessed the impacts on Thai communities. Given that the Thai government had a role in the decision taken to proceed with the project and that there would be transboundary impacts on Thai communities, it was argued that the Thai constitution should apply, even though the project itself is located in neighboring Laos. Kruu Niwat, one of the

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[53] http://oecdwatch.org/cases/Case_259 [Last accessed 17.9.15]

[54] http://www.mekong.fi/uploads/publications/090614%20Uimonen%20Mekong%20Seminaari.pdf [Last accessed 17.9.15]

[55] Within the administrative court it is not possible to sue the private sector members of the consortium or its financiers.

[56] http://www.earthrights.org/blog/spirit-mekong-big-day-future-river [Last accessed 17.9.15]; see also "Public Statement by the Thai People's Network in Eight Mekong Provinces Thai Government Urged to Cancel Agreement to Buy Power from Xayaburi Dam Pending Further Impacts Assessment" dated 23 July 2012 at http://www.terraper.org/web/en/node/1285 [Last accessed 17.9.15]

leaders of the Thai People's Network in Eight Mekong Provinces, which is a grassroots group supporting the case is quoted by EarthRights International as stating:

> "*We have done everything to make the parties concerned aware of the issues but so far none of the departments or organizations we have appealed to has addressed the issue by suspending the project in order to avoid its impact. For this reason we … are seeking justice from the court.*" [57]

In February 2013, the court announced that it did not accept jurisdiction on the case on the basis of three grounds[58]:

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

In March 2013, however, the plaintiffs appealed to the Supreme Administrative Court of Thailand,[59] and in June 2014, the Supreme Administrative Court of Thailand reversed the lower court decision. The Supreme Administrative Court accepted that the MRC's PNPCA process as conducted in Thailand had not complied with the standards expected under 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.*"[60] The court completed accepting evidence in late July 2015.[61] It is now anticipated that the court will proceed with the hearing itself where the plaintiffs and the defendants will give testimony in person.

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

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[57] http://www.earthrights.org/blog/spirit-mekong-big-day-future-river [Last accessed 17.9.15]
[58] http://www.internationalrivers.org/blogs/254/thai-villagers-file-lawsuit-on-xayaburi-dam [Last accessed 17.9.15]
[59] http://www.internationalrivers.org/blogs/259-0 [Last accessed 17.9.15], http://www.internationalrivers.org/blogs/254/thai-villagers-file-lawsuit-on-xayaburi-dam [Last accessed 17.9.15] and http://www.earthrights.org/blog/thai-institutions-pushed-address-legal-violations-around-xayaburi-0 [Last accessed 17.9.15]
[60] http://www.internationalrivers.org/blogs/254-1 [Last accessed 17.9.15]
[61] http://www.internationalrivers.org/blogs/254-1 [Last accessed 17.9.15]

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 (and related resources) 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 might play in protecting these rights.

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

The interconnected relationship between food, water and energy as resources is also clearly demonstrated in the case of the Xayaburi Dam; the paper has pointed out, however, that "nexus" research to date has lacked a clear normative framework, despite the political implications implicit to the way that nexus research is often conducted. From the perspective of international human rights law, all human rights are interrelated, interdependent and indivisible. The case of the Xayaburi Dam reveals the interconnected nature of substantive and procedural rights, including substantive rights such as the Right to Life; the Right to Food; the Right to Health; and the Right to Housing, and procedural rights including the Right to Transparency and Access to Information; the Right to Participation in Decision-making; and the Right to Access to Justice.

This paper suggests, therefore, that developing a human rights-based approach to the food-water-energy nexus could anchor "the nexus" in a clear normative framework. To link the normative to the material, recent critical political economy research on the nexus, such as the "regimes of provisioning" approach of Tira Foran (2015), could provide a clear analytical and politically sensitized framework on the processes by which resources are allocated and accumulated. This future 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 seeking to defend their human rights.

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