“ARENAS OF WATER JUSTICE ON TRANSBOUNDARY RIVERS: Human Rights and Hydropower Dams on the Mekong River”

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Introduction

• How have processes of transboundary river resource dispossession by large hydropower dams have been challenged within “arenas of water justice” in Southeast Asia?
• In the context of: the Right to Water; the Right to the Environment; the entry into force of the International Watercourses Law;
• Case study of the Xayaburi Dam, Northern Laos

A Human Rights Based Approach to Large Hydropower Dams

• The planning, construction, operation and decommissioning of large hydropower dams have implications for a wide range of human rights as recognized in international law (Hurwitz, 2014; WCD, 2000)

Adapted from Hurwitz (2014)
“Rights” versus “Rites”

- The concept of justice itself is plural.
- (Universal) Human Rights-based claims:
  - Facilitates engagement with the state in a formalized and legalistic language that the state understands – if not always agrees with
- “Rites-based” approaches
  - Situational knowledge and culture practices and values

Extra Territorial Obligations (ETOs) in Southeast Asia

- Most States in Southeast Asia presently interpret their human rights obligations as applicable only within their own borders.
- Yet, there is some growing evidence of interest in ETOs.

Arenas of Water Justice: Rights on paper versus in practice

- Arenas of justice: “politicized spaces of governance in which a process for claiming and/or defending rights or seeking redress for rights violations take place”
- “arenas of struggle” rather than “arenas as institutions.”
- Not only “formal” arenas
- Hard and soft laws are relevant

Complexity of transboundary justice on transboundary rivers

- Typology of legal "arenas of water justice" for human rights protection
  - National
  - Regional or international
  - International voluntary or binding mechanisms
### Case Study: The Xayaburi Dam

- **Mekong River mainstream cascade** proposed since 1950s; revived since 2007
- **Project developers** of 11 projects are from Thailand, Malaysia, China, and Vietnam
  - 2 in Cambodia
  - 2 on Thai-Laos border
  - 7 in Laos
- **Xayaburi Dam** is located in Northern Laos officially commenced in Nov 2012 (but actually started in Nov 2010)

#### Xayaburi Dam
- 820 m long, 48 m high
- 1,260 MW
- 95% of electricity exported to Thailand
- Cost is US$3.5 billion

### Proponents and opponents of Xayaburi Dam

#### Project developers
- Ch Karnchang (50%)
- Partners since March 2011 (Xayabouri Power Company Limited):
  - PTT plc (25%)
  - EGCO (12.5%)
    - EGCO is 25% owned by EGAT
  - BKK Expressway (7.5%)
  - PT Construction and Irrigation (5%)

#### Proposed Financiers
- Kasikorn Bank,
- Bangkok Bank,
- Siam Commercial Bank
- Krung Thai Bank
- Thai Exim Bank

#### Other proponents include:
- Ministry of Energy and Mines (Laos)
- Ministry of Energy (Thailand)
- EGAT (Thailand)

#### Opponents include
- Save the Mekong Coalition of civil society groups
- Thai communities of the 7 Mekong River Provinces
- Cambodia and Vietnam government (?)

### Claimed “Benefits and Impacts” of Xayaburi Dam

#### Project proponents highlight:
- Ensuring Thailand’s “Energy Security”; and generation of cheap electricity
- Cross-border cooperation bringing “development” to Lao PDR through FDI and project revenues
- “Clean Energy”

#### Project Opponents Highlight:
- Resettlement of 2,130 people from 10 villages.
- More than 200,000 people located nearby would be affected
- Changes to ecosystem of the river, blocking fish migration to Northern Thailand
  - Up to 41 fish species would be at risk of extinction
- EIA is poor quality and does not examine cross border impacts

### Pathway that led to project construction

- MoU signed in May 2007
- An MRC-commissioned SEA report started in June 2009, and launched in October 2010
- Mekong River Commission hosted the PNPCA consultation process initiated in September 2010, and claimed to be concluded in July 2011
- Power Purchase Agreement signed in Oct 2011 (“fast-tracked” by EGAT)
- Ground breaking ceremony in Nov 2012
- Administrative court case (August 2012)
- Now more than 60% complete
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### Decision-making and Arenas of Water Justice

<table>
<thead>
<tr>
<th>Scale</th>
<th>Arena</th>
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<tr>
<td>National</td>
<td>• Thailand’s Power Development Plan (since 2010)</td>
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<td>• Laos Environmental Impact Assessment (February 2010)</td>
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<td>• Thailand National Human Rights Commission (February 2012)</td>
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<td>• Thailand Administrative Court (since August 2012) and Thailand Supreme Administrative Court (since June 2014)</td>
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<td>• Thai Senate Committee on Good Governance Promotion and Corruption Investigation (November 2012)</td>
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<td>Regional intergovernmental</td>
<td>• Mekong River Commission</td>
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<td>- Strategic Environmental Assessment (May 2009 – Oct 2010)</td>
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<td>- Procedures for Prior Notification and Agreement (PNPCA) (Sept 2010 – April 2011)</td>
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<td>- Basin Development Plan 2 (2011)</td>
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<td>- MRC Council Study (Dec 2011)</td>
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<td>• ASEM Intergovernmental Commission on Human Rights (April 2011)</td>
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<td>International intergovernmental</td>
<td>• OECD Guidelines for Multinational Enterprises</td>
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<td>- Pöyry (August, 2012 – June 2013)</td>
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<td>- AusAid (April 2014)</td>
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- Each arena has its own story of coalition building, and politics of claims, frames, and power
- Seeking justice through a critical momentum gained in multiple arenas of justice

### “PNPCA process/ international water courses” arena

- “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 claims for principles of justice were diverse,
  - Laos arguing the Right to Development
  - Cambodia and Vietnam highlighted the precautionary principle
  - Thailand was ambiguous

### OECD Guidelines on MNCs: Complaint

- 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
  - Conflict of interest: Pöyry produced a report in support of the GoL’s position whilst also negotiating other roles in the project’s development
  - Report’s conclusions questioned: Pöyry concluded that “The Xayaburi HPP has principally been designed in accordance with the applicable MRC Design Guidelines.” Both civil society and subsequently the MRC questioned this
  - Undermining regional cooperation: The report was commissioned against the backdrop of a diplomatic dispute within the MRC
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### OECD Guidelines on MNCs: Outcome

- The case ended in June 2013 in which the NCP 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.
  - “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.”
Seeking justice in the Thai Courts

- In August 2012, 37 Thai community representatives submitted a case to the Thai Administrative Court
  - Consultation not consistent with 2007 Thai Constitution
  - No Transboundary EOA undertaken
- Case was against 5 Thai State Agencies
- In February 2013, court ruled it did not have jurisdiction in the case, but this was overruled by the Supreme Administrative Court in June 2014
- Case ruled against in December 2015
- A significant case in terms of Thailand’s ETOs.

Other transboundary cases

- Don Sahong Dam case considered by SUHAKAM
- Hat Gyi Dam on the Salween River investigated by TNHRC twice
- Alongside other important cases:
  - Dawei SEZ
  - Several land dispossession cases in Cambodia, such as a Khon Kaen Sugar Company
- In May 2016, the Thai Cabinet instruction on Thai outbound FDI and the UNGPs

Conclusion: Arenas of Water Justice?

- 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 sometimes the recognition of these rights often seems distant.
- For Xayaburi Dam, legal claims for rights have been pursued through a range extra-territorial arenas of water justice
  - There is not a single arena of water justice that exists whose jurisdiction and authority may offer a “silver bullet”
  - Arenas are created, affirmed and reinforced, however, only through the innovative actions of affected communities, civil society groups, and allied individuals

www.csds-chula.org/transboundary-rivers/
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Thailand’s ETOs