Hard-law and soft-Law transnational accountability mechanisms and the public sphere in Southeast Asia

Carl Middleton
Center for Social Development Studies (CSDS), Faculty of Political Science, Chulalongkorn University
Electricity policy is public interest concern, not just a technical issue

What mechanisms are there for transnational accountability of cross-border investments?

What is the potential of:
- Hard and soft law?
- The transnational public sphere?
- [and how do they relate]

Focus on hydropower projects, which are transnational in many senses
- Various transnational actors (states; private; civil society)
- Ecological impacts locally and across borders
- Cross-border electricity trade; and finance
Transnational legal pluralism and water governance in SE Asia

• There are a widening array of laws, rules and norms related to hydropower and water governance are in play
  • 1995 Mekong Agreement (UN Watercourses Convention)
  • Various international human rights commitments;
  • National laws;
  • Industry-backed ‘hydropower sustainability assessment protocol’

• “hard law can be deceptively soft, and vice versa soft law remarkably hard”
"Political power is no longer concentrated and arranged hierarchically but dispersed across different levels of governance and dissolved into networks." (Kocan, 2008)

<table>
<thead>
<tr>
<th></th>
<th>National public sphere</th>
<th>Transnational public sphere</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Who</strong></td>
<td>National citizens</td>
<td>Dispersed groups of people (who do not constitute a “population”)</td>
</tr>
<tr>
<td><strong>What</strong></td>
<td>Often national interest rooted in a national economy</td>
<td>Stretches across the globe, in a transnational community. But, is there equivalent solidarities and identities</td>
</tr>
<tr>
<td><strong>Where</strong></td>
<td>National territory</td>
<td>Deterritorialized (cyber)space</td>
</tr>
<tr>
<td><strong>How</strong></td>
<td>National print media in national language</td>
<td>Transnational multi-lingual media, and visual means</td>
</tr>
<tr>
<td><strong>addressee of communication</strong></td>
<td>Sovereign government</td>
<td>Mix of public and private transnational powers (that is neither easily identifiable nor rendered accountable)</td>
</tr>
</tbody>
</table>

Nam Theun 2: Hydropower revival in SE Asia

• Nam Theun 2 construction started in 2005, and commissioned in 2010; heavily debated since early 1990s

• The World Bank invested heavily in communication. In the book, “Doing a Better Dam” book, the lead authors write:

“From the beginning, NT2 was a lightning rod for criticism; the debate on dams and NT2 had a long and contentious history. The World Bank had to be on guard against reputational risk from misinformation. Over time, it came to use communications as a strategic lever to influence the debate on NT2.”
A very “public” project: NT2 representation in the media

Xayaburi Dam and the transnational public sphere

- Xayaburi Dam is located in Northern Laos officially commenced in Nov 2012 (but actually started in Nov 2010); to be commissioned in 2019
- 95% Thai consortium led by Ch Karnchang; Financing from 4 Thai commercial banks and Thai Exim Bank
- 820 m long, 48 m high
- 1,260 MW; 95% of electricity to be exported to Thailand
- Cost is US$3.5 billion
Laos to Break Ground on Dam

2012-11-05

Work on the Xayaburi dam is to be officially launched this week despite objections.

Viraphonh said Monday that some aspects of the dam’s design had been changed to “reassure neighboring countries,” but he insisted that objections would not derail plans to finish the project by the end of 2019.

“I am very confident that we will not have any adverse impacts on the Mekong river,” Viraphonh told the BBC. “But any development will have changes. We have to balance between the benefits and the costs.”

Viraphonh said he believes that concerns about fish migration and sediment flow have been addressed through modifications to the original dam design.

Sediment will be allowed out of the bottom of the dam periodically through a flap and lifts, and ladders will help the fish travel upstream.

“We can sense that Vietnam and Cambodia now understand how we have addressed their concerns. We did address this properly with openness and put all our engineers at their disposal. We are convinced we are developing a very good dam,” Viraphonh said.

Opposition

Cambodia and Vietnam had earlier expressed their opposition to the project.
Xayaboury dam will have no transboundary impact: Project developers
By Times Reporters
(Latest Update October 09, 2012)

Developers of the Xayaboury hydropower plant in northern Laos expect to complete the redesign of the first run-of-river dam planned for the lower Mekong within the next few months, aiming to mitigate any negative impacts on neighbouring countries.

“We are redesigning the power plant and its hydraulic model is now being tested at the Asian Institute of Technology in Bangkok,” Xayaboury Power Company Deputy Managing Director, Mr Rewat Suwanakitti, said last week, adding that the new design should be completed within three months. The developers of the 1,285MW hydropower plant took the decision to redesign the dam after Cambodia and Vietnam expressed concerns that in its present form the migration of fish would be affected. They also said the dam would prevent the natural flow of
Vietnam and Cambodia hit back at landmark Laos dam

(Reuters) - Vietnam urged Laos to halt construction of a $3.5 billion hydropower dam pending further study, environmental activists said on Friday after a meeting of the Mekong River Commission.
Decision making in “arenas of justice”

- 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”
  - “Formal” and “informal” arenas
  - Hard and soft laws shape governance
  - Discourses within the media and social media also influence decision-making processes and outcomes

<table>
<thead>
<tr>
<th>Scale</th>
<th>Arena</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>- Thailand’s Power Development Plan (since 2010)</td>
</tr>
<tr>
<td></td>
<td>- Laos Environmental Impact Assessment (February 2010)</td>
</tr>
<tr>
<td></td>
<td>- Thailand National Human Rights Commission (February 2012)</td>
</tr>
<tr>
<td></td>
<td>- Thailand Administrative Court (since August 2012) and Thailand Supreme Administrative Court (since June 2014)</td>
</tr>
<tr>
<td></td>
<td>- Thai Senate Committee on Good Governance Promotion and Corruption Investigation (November 2012)</td>
</tr>
<tr>
<td>Regional inter-governmental</td>
<td>- Mekong River Commission</td>
</tr>
<tr>
<td></td>
<td>o Strategic Environmental Assessment (May 2009 – Oct 2010)</td>
</tr>
<tr>
<td></td>
<td>o Procedures for Prior Notification and Agreement (PNPCA) (Sept 2010 – April 2011)</td>
</tr>
<tr>
<td></td>
<td>o Basin Development Plan 2 (2011)</td>
</tr>
<tr>
<td></td>
<td>o MRC Council Study (Dec 2011)</td>
</tr>
<tr>
<td></td>
<td>- ASEAN Intergovernmental Commission on Human Rights (April 2011)</td>
</tr>
<tr>
<td>International inter-governmental</td>
<td>- N.A. (Potentially UN Special Rapporteur on Right to Food)</td>
</tr>
<tr>
<td>International voluntary/non-binding mechanisms</td>
<td>- OECD Guidelines for Multinational Enterprises</td>
</tr>
<tr>
<td></td>
<td>o Pöyry (August, 2012 – June 2013)</td>
</tr>
<tr>
<td></td>
<td>o Andritz AG (April 2014)</td>
</tr>
</tbody>
</table>

The MRC’s PNPCA process as a transnational public sphere

- Initiated in September 2010, required under Article 5 of the Mekong Agreement, pre-empting the launch of the SEA Report

- 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.

- The MRC Joint Committee convened on 19 April 2011 to discuss the PNPCA. 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”
Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement

Sun, 01/13/2013 - 8:45pm
By: Kirk Herbertson

On November 7, 2012, Laos officially began construction on the controversial Xayaburi Hydropower Project, the first mainstream dam proposed for the Lower Mekong River. The process has not gone smoothly. Construction activities began almost two years before the official announcement. Vietnam and Cambodia called for a delay in construction because concerns over the dam’s transboundary impacts remained unresolved. Laos never conducted a comprehensive analysis of the transboundary impacts, instead insisting that the dam was engineered to be environmentally sustainable. The Mekong River Commission’s (MRC) Secretariat disagreed with many of Laos’ claims, but its advice went unheeded. Although the dam is going forward, its risks remain unknown.
Laos has not violated Mekong pact: official

News Desk

Vientiane Times
Publication Date : 26-11-2012

Laos has complied with the procedures for notification, prior consultation and agreement under the 1995 Mekong Agreement before starting construction of the Xayaboury dam on the mainstream of the Mekong River, according to a senior official from the Lao National Mekong Committee Secretariat.

Lao National Mekong Committee Secretariat Deputy Secretary General, Aloune Xayavong, made the comment on Friday in response to a retired Thai senator and NGO officials who accused the Lao government of contravening the 1995 Mekong Agreement after beginning construction of the dam.

“It is a groundless accusation and all of the legal experts are well aware that we have not violated any international agreement,” he told Vientiane Times.

“I suspect that the people made this accusation because they wanted to discredit us and create dispute among the MRC member countries.”
Thailand as a source of political authority

- A transnational public sphere on Xayaburi dam opened up in Thailand, and tested the Thai Government’s authority on the project.

- Opinion of NHRCT in May 2012 – Prime Minister should review the implementation of the dam construction.

- In April 2014, Thailand’s Supreme Administrative Court reversed a 2012 lower court decision submitted by 37 Thai villagers:
  - MRC’s PNPCA had not complied with Thailand’s Constitution (2007)
  - Case against five Thai government agencies tied to the project.

- On 25 December 2015, the Supreme Administrative court rejected the case ... an appeal is pending.
Xayaburi dam project commits 100 million dollars to redesign

Vientiane - The Xayaburi dam will spend 100 million dollars to revamp its much-criticised project to mitigate its possible impact on the Mekong River, a media report said Thursday.
ETOs in SE Asia and the role of civil society

- 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.
- Civil society have played a key role as “an authority”

Discourses circulating within public spheres are challenging or legitimizing hydropower, including the “sustainable hydropower,” influence public perceptions towards hydropower (including in the context of climate change).

Transnational public spheres have been produced by civil society to shape the Nam Theun 2 and Xayaburi dam

• Respond to existing national and regional legal processes
• Within non-formal arenas

Transnational public spheres are created, affirmed and reinforced, however, only through the actions of affected communities, civil society groups, and allied individuals.
Thank you for listening

Carl.Chulalongkorn@gmail.com

www.csdss-chula.org