

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

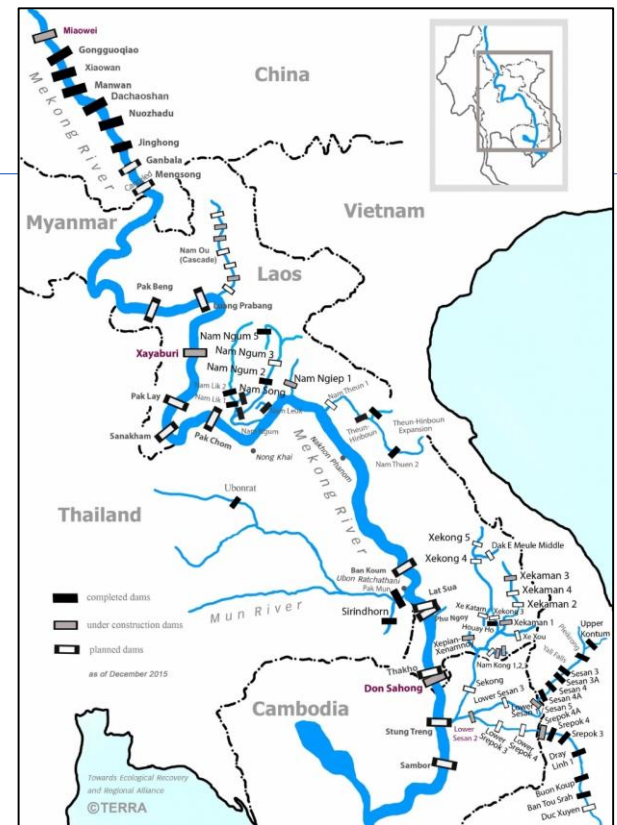


Carl Middleton

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

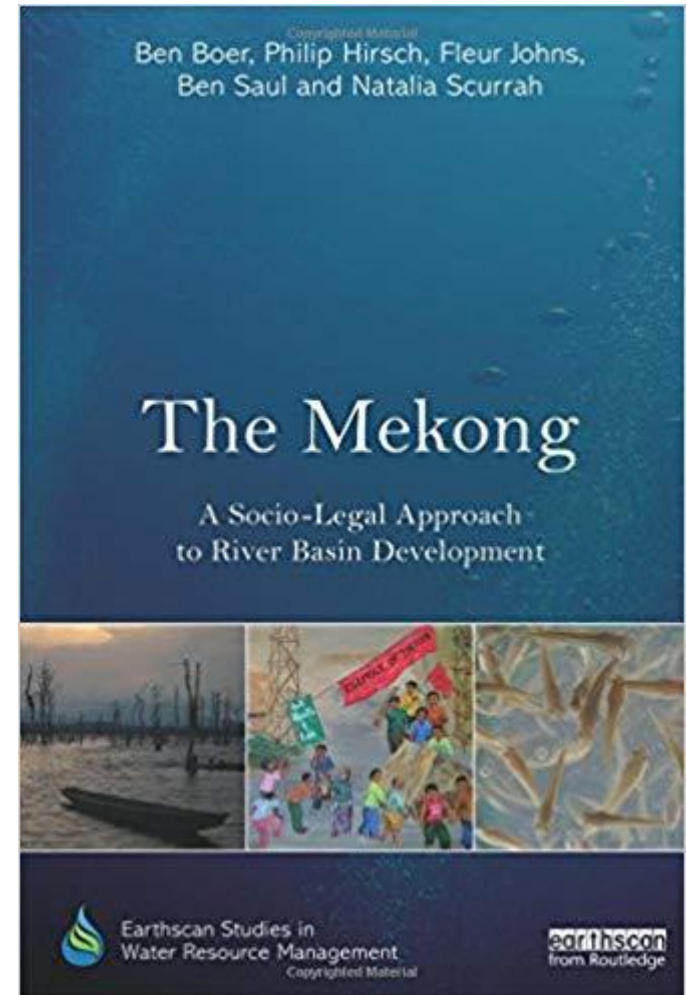
Introduction

- 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”



(The challenge of) transnational public spheres

“Political power is no longer concentrated and arranged hierarchically but dispersed across different levels of governance and dissolved into networks.” (Kocan, 2008)

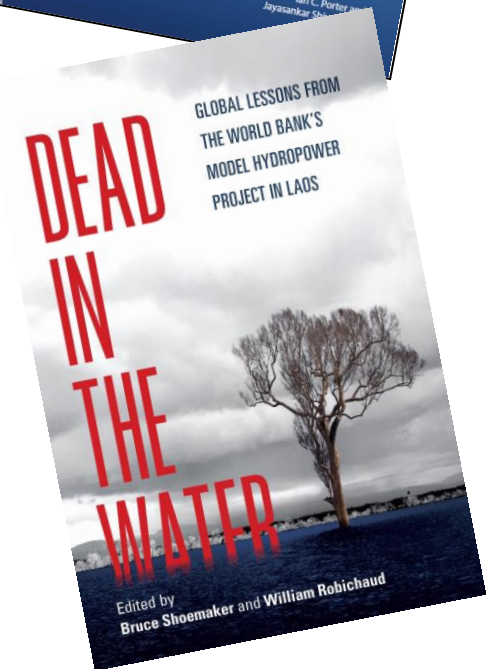
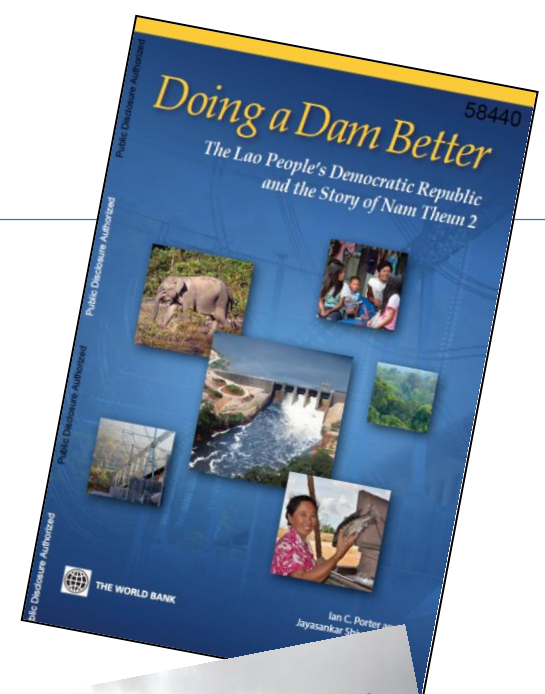
	National public sphere	Transnational public sphere
Who	National citizens	Dispersed groups of people (who do not constitute a “population”)
What	Often national interest rooted in a national economy	Stretches across the globe, in a transnational community. But, is there equivalent solidarities and identities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

Fraser, N. (2007). "Transnationalizing the Public Sphere: On the Legitimacy and Efficacy of Public Opinion in a PostWestphalian World." *Theory, Culture & Society* 24(4): 7-30.

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

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WORLD

LAOS DAM RAISES ETHICAL BAR

BY JONATHAN KENT ON 8/11/07 AT 4:32 PM

WORLD

Dam projects in poor countries tend to wreak havoc on the communities they displace. But the \$1.4 billion Nam Theun 2 dam in central Laos is a different story. Piu, a smallholder in her 30s, moved in May to a village built for some of the 1,200 families displaced by the project, scheduled for completion in 2009. "It's very beautiful," she says. Nearby, workmen finish neighboring units—wooden homes on stilts with a traditional feel.

The justification for NT2, like that for many big infrastructure projects, is to lift the locals out of poverty. Indeed, the dam's electricity will be a boon: over the next quarter century, developers expect to bring in \$2 billion, paying for the dam and much-needed economic development. But unlike dams elsewhere, NT2 may represent a new generation of massive World Bank projects. Prompted by a growing awareness of the impact that megadevelopments can have, the Bank now attaches strict conditions to its aid. "It used to be

MRC Mekong River Commission
For Sustainable Development

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Sustainable Hydropower

Development Banks Step Up Lending For Hydropower, Sustainability Remains Focus

By *Andrea Vittorio*

Leading multilateral development banks have recently stepped up financing of large hydropower projects after a decade-long slowdown due to environmental and social concerns, according to an analysis of bank data by BNA.

Lending by three major banks—the World Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development—increased fivefold from 2003 to 2012, as hydropower

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Dam the consequences

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Big, bad dams return to South-East Asia

Jun 13th 2007 | Asia

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TWO years ago the World Bank returned, after a decade's absence, to the business of financing giant hydroelectric dams. This was in spite of a damning (pardon the pun) report in 2000 from the World Commission on Dams, which had been set up to investigate the many concerns of economists, environmentalists and civil-society groups about big hydropower projects. The commission's report confirmed many of their fears about the underestimated costs and over-hyped benefits of such schemes.

Middleton, C. (2018) “Chapter 13: Branding Dams: Nam Theun 2 and its Role in Producing the Discourse of “Sustainable Hydropower”” (pp 271-292) in *Dead in the Water: Global Lessons from the World Bank's Model Hydropower Project in Laos* Madison: University of Wisconsin Press.

Xayaburi Dam and the transnational public sphere



Stimpson Institute

- 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



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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



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Vietnam and Cambodia hit back at landmark Laos dam



By Amy Saville Lefevre and Paul Carsten
BANGKOK | Fri Jan 18, 2013 9:05am EST

(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.

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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

<i>Scale</i>	<i>Arena</i>
National	<ul style="list-style-type: none"> • Thailand’s Power Development Plan (since 2010) • Laos Environmental Impact Assessment (February 2010) • Thailand National Human Rights Commission (February 2012)²⁸ • Thailand Administrative Court (since August 2012) and Thailand Supreme Administrative Court (since June 2014) • Thai Senate Committee on Good Governance Promotion and Corruption Investigation (November 2012)
Regional inter-governmental	<ul style="list-style-type: none"> • Mekong River Commission <ul style="list-style-type: none"> ◦ Strategic Environmental Assessment (May 2009 – Oct 2010) ◦ Procedures for Prior Notification and Agreement (PNPCA) (Sept 2010 – April 2011) ◦ Basin Development Plan 2 (2011) ◦ MRC Council Study (Dec 2011) • ASEAN Intergovernmental Commission on Human Rights (April 2011)²⁹
International inter-governmental	<ul style="list-style-type: none"> • N.A. (Potentially UN Special Rapporteur on Right to Food)
International voluntary/ non-binding mechanisms	<ul style="list-style-type: none"> • OECD Guidelines for Multinational Enterprises <ul style="list-style-type: none"> ◦ Pöyry (August, 2012 – June 2013) ◦ Andritz AG (April 2014)

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”***



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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.



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Thai court takes villagers' case against power firm, Laos dam

BY AMY SAWITTA LEFEVRE
BANGKOK, June 24 | Tue Jun 24, 2014 9:44am BST

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11/08/2014

(Reuters) - A Thai court accepted a lawsuit against state-owned Electricity Generating Authority of Thailand (EGAT) and four other state bodies on Tuesday for agreeing to buy electricity from a \$3.5 billion hydropower dam being built in neighbouring Laos.

The Xayaburi dam, which will be the first on the main stream of the Mekong River in Southeast Asia, is at the heart of landlocked Laos's ambitions to supply [power](#) to the



Communicative action? A satisfactory outcome?

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Xayaburi dam project commits 100 million dollars to redesign

Breaking News July 19, 2012 00:00

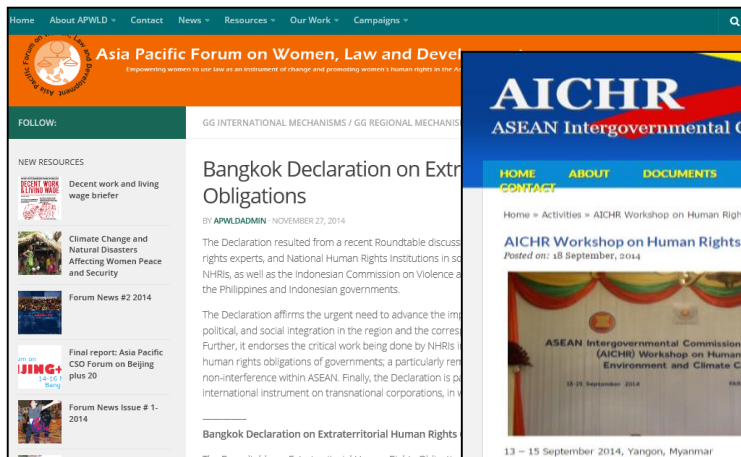
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Vientiane - The Xayaburi dam will spend 100 million dollars to revamp its much-criticised project to mitigate its possible impact on the Mekong River, a media report said Thursday.



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”



Conclusion

- 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

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