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**PROCEDURAL OBLIGATIONS OF
STATES PRESENTED IN
INTERNATIONAL LAW WHEN
PROPOSING HYDROPOWER
DEVELOPMENT PROJECT IN THE
LOWER MEKONG BASIN THROUGH
THE XAYABURI CASE STUDY**

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PhD

2021

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the requirements of the University of
Northumbria at Newcastle for the degree
of Doctor of Philosophy

Research undertaken in the Faculty of
Law

ABSTRACT

In complying with the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 and the Procedures for Notification, Prior Consultation and Agreement 2003, riparian States of the Lower Mekong Basin are obliged to notify the MRC and other States of their proposed projects (including hydropower development) that may harmfully affected the mainstream of the Lower Mekong. In practice, the submission of documents and the process of notification and consultation in the PNPCA, however, appear to be perplexed because the time frame and the language used in the PNPCA and the PNPCA Guidelines are equivocal. The Xayaburi Hydroelectric Power Project is chosen as a case study in this research because it was the first proposed large-scale mainstream dam in the Lower Mekong that was submitted and underwent the procedural process, where the 1995 Mekong Agreement and the PNPCA were put to test. This research employs a desk study which entails the examination and analysis of legal instruments, policies, and documents released or published by governments or organization, as well as textbooks, academic journals, and internet databases from reliable sources. The research will not seek to develop a new model or framework for the MRC and the LMB States but rather demonstrate how international law can be used as a guide or reference for the interpretation and improving the clarity, accuracy, and transparency of regional law. This research will be beneficial to a variety of fields, including water law, international environmental law, public law, human rights, and environmental justice. It will also be useful to the governments of riparian States that will be affected by future projects, as well as investors and development partners who will be investing in future projects and will have to deal with the PNPCA procedures, EIA processes, and public participation.

TABLE OF CONTENTS

Abstract	i
List of Figures	vi
List of Abbreviations	vii
Table of Treaties and Legal Instruments	xi
Table of Cases	xvi
Acknowledgements	xviii
Declaration	xix
Chapter 1 Introduction	1
1.1 Background	1
1.2 Gaps in Regional Law	3
1.3 Objective of the Research and Contribution to Knowledge	6
1.4 Research Question	6
1.5 Methodology	7
1.6 Chapter Outlines	12
1.7 Institutional and Cooperative Mechanism Where International Best Practice Might Inform Regional Practice in the Lower Mekong Basin	13
Chapter 2 Obligations to Notify and Consult	16
2.1 Introduction	16
2.2 Obligations of the State to Notify and Consult under the 1995 Mekong Agreement and the PNPCA Process	17
2.2.1 The 1995 Mekong Agreement (Substantive Obligations)	17
2.2.2 The PNPCA (Procedural Obligations)	19
2.2.3 What Procedural Obligations are States Required to Undertake According to the PNPCA Prior to Implementing Large-Scale Hydropower Development Projects?	22
2.2.4 Where is the PNPCA Process Deficient and Vague?	24

2.3 The Xayaburi Dam’s PNPCA Process: Problems and Challenges	26
2.4 How is the Obligation to Notify and Consult Recognised under International Law?	32
2.4.1 Soft Law	32
2.4.2 Treaty Law	34
2.4.3 Case Law	36
2.5 In What Way Can the UN Watercourses Convention Assist with Interpreting and Enhancing the Clarity Regarding the Obligation of States to Provide Notification and Consultation?	39
2.5.1 Appropriate and Fair Utilisation	41
2.5.2 Significant Damage	42
2.5.3 What Are Planned Measures?	43
2.5.4 What is the Threshold of Harm that Triggers Notification?	44
2.5.5 When to Notify	45
2.5.6 What Should the Notification Include?	46
2.5.7 The Period of Reply	47
2.5.8 When the Response Period is Ongoing or if no Response has been Provided, Can the State Making the Notification Implement the Planned Project?	48
2.5.9 Consultation and Negotiation	49
2.6 Conclusion	50
Chapter 3 Obligation to Perform an EIA	52
3.1 Introduction	52
3.2 What status does the SEA have under the MRC?	53
3.3 What were the findings of the SEA regarding mainstream dams?	55
3.3.1 Power Security	55
3.3.2 Economic Security	56
3.3.3 Ecosystem Security	56
3.3.4 Food Security	57
3.3.5 Social and Human Security	57

3.4 What gaps and weaknesses are there in Xayaburi's EIA?	58
3.4.1 Cumulative Impact	60
3.4.2 Impact on Fisheries	60
3.4.3 Impact on Ecosystem	61
3.4.4 Impact in Local Communities	61
3.5 What implications does the EIA in Laos have for the development of hydropower projects?	62
3.6 In what ways is the EIA acknowledged under International Law?	68
3.6.1 Soft Law	68
3.6.2 Treaty Law	69
3.6.3 Case Law	71
3.6.4 EIA in a Transboundary Context	73
3.7 In what ways can the Espoo Convention be utilised as a reference source to enhance the current implementation of EIA within the LMB?	75
3.7.1 Screening	76
3.7.2 Scoping	77
3.7.3 Notification	77
3.7.4 Public Participation	78
3.7.5 Conducting an EIA	79
3.7.6 Consultation Between States	80
3.7.7 Final Decision	80
3.8 Conclusion	81
Chapter 4 Public Participation: Access to Information, Participation, and Access to Justice	83
4.1 Introduction	83
4.2 What Is the Current Approach of the MRC on Public Participation, With A Specific Focus on the Rights of the Affected Public to Get Access to Information and to Partake in the Decision-Making Process?	84
4.3 What Are the Issues and Challenges in the Implementation and Practice of Public Participation as Part of the Decision-Making Process in the Xayaburi Project?	91
4.3.1 At Regional Level	91
4.3.2 At National Level	94

4.4 How Public Participation Is Recognized As “Procedural Rights” under International Environmental Law?	98
4.4.1 Soft Law	98
4.4.2 Treaty Law	100
4.4.3 Case Law	102
4.5 How Can the Aarhus Convention Be Used as A Source of Reference to Help with the Interpretation, Filling in the Gaps and Improving the Clarity and Transparency of the Current Practice of Public Participation?	104
4.5.1 Access to Information	106
4.5.2 Participation	111
4.5.3 Access to Justice	117
4.6 Conclusion	121
Chapter 5 Conclusion	123
5.1 Introduction	123
5.2 Findings and the Overall Conclusion	123
5.2.1 Chapter 2	123
5.2.2 Chapter 3	125
5.2.3 Chapter 4	130
5.3 Contribution to Knowledge	134
5.4 Further Research	134
Bibliography	135

LIST OF FIGURES

Figure 1: Factors and situations that necessitate States to notify and consult other States prior to implementation	21
Figure 2: The ESIA Process for the Phases During Project Development Until the Issuance of ECC (Environmental Compliance Certificate) for the ESIA (Environmental and Social Impact Assessment) and the ESMMP (Environmental and Social Management and Monitoring Plan)	66

LIST OF ABBREVIATIONS

ADR Alternative Dispute Resolution

ASEAN Association of South East Asian Nations

BDS Basin Development Strategy

BOT Built-Operate-Transfer

CBD Convention on Biodiversity

CBO Community-Based Organisation

CIA Cumulative Impact Assessment

CJEU European Court of Justice of the European Union

CNR Compagnie Nationale du Rhone

CSDP Communication Strategy and Disclosure Policy

DAC Development Assistance Committee

DESIA Department of Environmental and Social Impact Assessment

ECC Environmental Compliance Certificate

ECtHR European Court of Human Rights

EGAT Electricity Generating Authority of Thailand

EHIA Environmental Health Impact Assessment

EIA Environmental Impact Assessment

EMMP Environmental Management and Monitoring Plan

ERC Expert Review Committee

ESIA Environmental and Social Impact Assessment

EU European Union

Giz Deutsche Gesellschaft für Internationale Zusammenarbeit

GMS Greater Mekong Subregion Program

GOL Government of Laos

ICCPR International Covenant on Civil and Political Rights

ICEM International Centre for Environmental Management

ICJ International Court of Justice

IDT Information Disclosure Tribunal

IEE Initial Environmental Examination

ILC International Law Commission

ISH Initiative of Sustainable Hydropower

IUCN International Union for Conservation of Nature

JC Joint Committee

LMB Lower Mekong Basin

LMNC Laos Mekong Committee

MEA Multilateral Environmental Agreement

MRC Mekong River Commission

MEM Ministry of Energy and Mines

MLN Mekong Legal Network

MONREA Ministry of Natural Resources and Environment

MPI Ministry of Planning and Investment

MRC Mekong River Commission

NCPO National Council for Peace and Order

NEB National Environmental Board

NEPC National Energy Policy Council

NEQA Enhancement of Conservation of National Environmental Quality Act

NGO Non-Governmental Organisation

NHRCT National Human Rights Commission of Thailand

NMC National Mekong Committee

OAS Organisation of the American States

OECD Organisation for Economic Co-operation and Development

OHCHR Office of the United Nations High Commissioner for human Rights

OIB Official Information Board

ONEP Office of Natural Resources and Environmental Policy and Planning

PDIES Procedures for Data and Information Exchange and Sharing

PNPCA Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement

PNPCA Procedures for Notification, Prior Consultation, and Agreement

PNPCA JCWG Procedures for Notification, Prior Consultation, and Agreement

Joint Committee Working Group

PPA Power Purchase Agreement

PPS Public Participation Strategy

SADC Southern African Development Agency

SEA Strategic Environmental Assessment

SIA Social Impact Assessment

SIDA Swedish International Development Agency

STEA Science Technology and Environmental Agency

TDRI Thailand Development Research Institute

TNMC Thai National Mekong Committee

UN United Nations

UNCCD UN Convention to Combat Desertification

UNCED United Nations Conference on Environment and Development

UNECE United Nations Economic Commission for Europe

UNECLA United Nations Economic Commission for Latin America and the Caribbean

UNEP United Nations Environmental Programme

UNFCCC UN Framework Convention on Climate Change

UNGA United Nations General Assembly

UNHCR United Nations High Commissioner for Refugees

WREA Water Resources and Environmental Administration

WWF Wide Fund for Nature

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1909

Boundary Waters Treaty 1909, Washington (adopted on 11 January 1909, entered into force on 5 May 1910) 36 Stat. 2448 (1909)

1945

Statute of International Court of Justice (set up in 1945 under the Charter of the United Nations to be the principal judicial organ of the Organization, and its basic instrument, the Statute of the Court, forms an integral part of the Charter (Chapter XIV). It entered into force on 24 October 1945

1948

Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

1950

European Convention of Human Rights and Fundamental Freedoms 1950 (adopted on 4 November 1950, entered into force on 3 September 1953, as amended by Protocols Nos. 11 and 14 and entered into force on 1 November 1998, allows for the right of individual petition and compulsory jurisdiction of the Court for all the States Parties)

1960

Indus Water Treaty 1960, Karachi (adopted on 19 September 1960, entered into force on 12 January 1961) 419 UNTS 125 (1960)

1964

Agreement between the Government of the Polish People's Republic and the Government of the Union of Soviet Socialist Republics Concerning the Use of Water Resources in Frontier Waters 1964, Warsaw (adopted on 17 July 1964, entered into force on 16 February 1965) 552 UNTS 175 (1964)

Agreement concerning the River Niger Commission and the Navigation and Transport on the River Niger, Niamey (adopted on 25 November 1964, entered into force on 12 April 1966) 587 UNTS 8507 (1964)

1966

International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171

Rules on the Uses of the Waters of International Rivers (Helsinki Rules), adopted by the International Law Association at Helsinki in 1966 (I.L.A., Report of the Fifty-Second Conference, 1966, 477ff.)

1969

Vienna Convention on the Law of Treaties 1969 (adopted on 23 May 1969, entered into force on 27 January 1980) UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969)

1972

United Nations Conference on the Human Environment (Stockholm Declaration) approved on 15 December 1972 (UN Doc. A/RES/2994); 11 ILM 1417 (1972)

1975

Statute of the River Uruguay 1975, Salto (adopted on 25 February 1975, entered into force on 18 September 1976) 1295 UNTS 340 (1975)

1978

Great Lakes Water Quality Agreement 1978, Ottawa (adopted on 22 November 1978) UNTS 1153 (1978)

1982

UN Convention on the Law of the Sea 1982 (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3; 21 ILM 1261 (1982)

UN World Charter for Nature, adopted on 28 October 1982, UN GAOR, UN Doc. A/RES/37/7

1991

UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (Espoo convention), adopted on 25 February 1991, entered into

force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991)

1992

Enhancement of Conservation of National Environmental Quality Act B.E.2535 (1992), enacted on the 29th Day of March B.E. 2535 (29 March 1992)

UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention) 1992 (adopted on 17 March 1992, entered into force on 6 October 1996) 1936 UNTS 269 (1992)

United Nations Conference on Environment and Development (Rio Declaration) approved on 5 June 1992 (UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)

UN Convention on Bio Diversity, adopted on 5 June 1992, entered into force on 29 December 1993 (UN.Doc.UNEP/Bio.Div/N7-INC.S/4)

Agenda 21 (approved on 24 June 1992) UN GAOR, UN Doc A/CONF.151/26/Rev.176)

1994

Convention on the Cooperation for the Protection and Sustainable Use of the Danube River 1994, Sofia (adopted on 29 June 1994, entered into force on 22 October 1998) OJL 342/19 (1994)

UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) 1994, adopted on 17 June 1994, entered into force 26 December 1996 (UN.Doc. A/AC.241/27)

1995

Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand)

1997

Official Information Act B.E. 2540 (1997), enacted on the 2nd Day of September B.E. 2540 (2 September 1997)

1998

UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 1998 , adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999)

1999

Convention on the Protection of the Rhine 1999, Bern (adopted on 12 April 1999, entered into force on 1 January 2003) OJL 2000/289 (1999)

2000

Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) 2000, adopted on 7 August 2000, entered into force on 22 September 2003 40 ILM 321

2001

Procedures for Data and Information Exchange and Sharing (PDIES) 2001 (adopted by the Council on 1 November 2001 at its Eighth Meeting in Bangkok, Thailand)

Rule on Maintenance of Official Secrets, B.E.2544 (2001), enacted on the 23rd Day of February B.E. 2554 (23 February 2001)

2002

Charter of Waters of the Senegal River 2002 (adopted on May 2002)

2003

Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia)

Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) 2000 (adopted on 7 August 2000, entered into force on 22 September 2003) 40 ILM 321

2005

Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientiane, Laos)

2007

Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007)

2010

Lao People's Democratic Republic, Decree of Environmental Impact assessment 2010 (EIA Decree 2010), No.112/PM, (entered into force on 10 February 2010)

2014

Revised Rules of Procedures of the Mekong River Commission Secretariat 2014 (approved by the JC on 15 March 2014 at its Thirty Ninth meeting in Pakse, Champasak Province, Lao PDR)

2015

UN Framework Convention on Climate Change (UNFCCC) 2015, adopted on 12 December 2015, entered into force on 4 November 2016 (UN.Doc.FCCC/CP/2015/10/Add.1)

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Armenia ACCC/C/2004/8; ECE/MP. PP/C.1/2006/2/Add.1, 10 May 2006

Case concerning an Unlawful Act and Omission of an Administrative Agency or State Official and a Dispute in Connection with an Administrative Contract (Appeal Against the Order of the Administrative Courts of first Instance) (Order No.8/2014) (Supreme Administrative Court of Thailand), 17 April 2014

Case Concerning an Unlawful Act and Omission of an Administrative Agency or State Official and a Dispute in Connection with an Administrative Contract (Appeal Against the Order of the Administrative Courts of first Instance) (Order No.8/2014)
22

Case concerning Passage through the Great Belt, Finland v Denmark, Order, Provisional Measures, [1991] ICJ Rep 12, ICGJ 84 (ICJ 1991), 29th July 1991, United Nations [UN]; International Court of Justice [ICJ]

Case concerning the Passage through the Great Belt, Finland v Denmark, Order, Provisional Measures [1991] ICJ Rep 12, ICGJ 84 (ICJ 1991), 29th July 1991

Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Joinder of Proceedings) [2015] ICJ Rep

European Community ACCC/C/2007/21; ECE/MP. PP/C.1/2009/2/Add.1, 11
December 2009

Gabčíkovo-Nagymaros Dam Project (Hungary/Slovakia) (1997) ICJ Report
Judgments, Advisory Opinions and Orders, (September 25) (International Court of
Justice)

Hungary ACCC/C/2004/4; ECE/MP. PP/C.1/2005/2/Add.4, 14 March 2005

Indus Waters Kishenganga Arbitration, Pakistan v India (Final Award) ICGJ 478
(PCA 2013), 20th December 2013 (Permanent Court of Arbitration)

Kazakhstan ACCC/C/2004/1; ECE/MP. PP/C.1/2005/2/Add.1, 11 March 2005

Lac Lanoux Arbitration (France v Spain) (1957) UN Reports of International
Arbitral Awards 12 (UN Ad hoc Arbitral Tribunal)

Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ Reports,
(Judgment) General List No 135, 20 April 2010 (International Court of Justice)

Romania ACCC/C2005/15; ECE/MP. PP/2008/5/Add.7 16 April 2008

Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van
Groningen and College van Gedeputeerde Staten van Zuid-Holland (Environment
and consumers) (Cases C-165/09 to C-167/09) [2011] EUECJ (26 May 2011)

Taskin v Turkey App no 46117/99 [2004] ECHR 621

Tatar v Romania [2009] ECtHR 67021/01 112

Turkmenistan ACCC/C2004/5, ECE/MP. PP/C.1/2005/2/aDD.5, 14 March 2005

Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP. PP/C.1/2005/2/Add.3, 14
March 2005

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Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas, and contributions from the work of others.

Any ethical clearance for the research presented in this commentary has been approved. Approval has been sought and granted by the Faculty Ethics Committee/ University Ethics Committee [submission Reference: 989], on 28th August 2021.

I declare that the Word Count of this Thesis is 75, 038 words.

Name: Panithan Thiempetch

Signature:

Date: 1 October 2021

Chapter 1

Introduction

1.1 Background

The Mekong River (Dza Chu in Tibet) starts in Qinghai Province and merges with the Angqu River in Tibet before returning to China as the Lancang River.¹ The river travels through Yunnan Province before entering Southeast Asia via Myanmar, Laos, Thailand, Cambodia, and Vietnam before flowing out to the South China Sea. The Mekong River Basin is 795,000 square kilometres in size and is separated into two parts: the Upper Mekong Basin in Tibet and China; and the Lower Mekong Basin in Myanmar, Laos, Thailand, Cambodia, and Vietnam.²

I choose to do my PhD on this topic because the construction of large-scale dams becomes a major issue in the Lower Mekong Basin (LMB) due to rising in electricity demand and investment in hydropower developments. While hydropower development projects contribute to prosperity, poverty alleviation, and electricity generation and development in the LMB region, they have also created difficulties and conflicts between riparian states, project investors, and the general public who live along the river.³ In 2013, there were several proposed dams in China's Upper Mekong River and 11 proposed dams in the LMB.⁴ According to the International Centre for Environmental Management (ICEM), the Mekong River and its tributaries might have over 80 hydropower projects by 2030.⁵

According to Strategic Environmental Assessment (SEA) conducted by the ICEM, the 11 planned dams might cost fisheries some \$476 million annually, and imperil 550,000-800,000 million tonnes of migratory fish species in the river.⁶ Moreover, the Mekong River is considered as a home to roughly 65 million people who rely on the Mekong River's water resources for their lives, food security, and fisheries, as Guy Ziv

¹ Sophie Le Clue, 'Geopolitical Risks: Transboundary Rivers' (*China Water Risk*, 9 February 2012) <<http://chinawaterrisk.org/resources/analysis-reviews/geopolitical-risks-transboundary-rivers/>> accessed 25 July 2015

² Mekong River Commission, 'State of the Basin River Report' (2010) <http://www.mrcmekong.org/assets/Publications/basin-reports/MRC-SOB-report-2010full-report.pdf> accessed on 16 February 2015

³ Philip Hirsch and others, 'National Interests and Transboundary Water Governance in the Mekong' May 2006) <http://sydney.edu.au/mekong/documents/mekwatgov_mainreport.pdf> accessed 27 May 2015

⁴ Mekong River Commission, 'Assessment of Basin-Wide Development Scenarios –Main Report' November 2010) <http://reliefweb.int/sites/reliefweb.int/files/resources/61EFA57FCBAB2D51492577D70021DE6B-Full_Report.pdf> accessed 22 May 2015

⁵ International Centre for Environmental Management, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream' <<http://icem.com.au/portfolio-items/strategic-environmental-assessment-of-hydropower-on-the-mekong-mainstream/>> accessed 25 March 2015

⁶ Madev Mohan and Cynthia Morel (eds), *Business and Human Rights in South East Asia: Risk and Regulatory* (Routledge 2015), p.101; International Centre for Environmental Management, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream', p.11

points out in his article *Trading-off Fish Biodiversity, Food security, and Hydropower in the Mekong River Basin*. Most significantly, the Xayaburi Dam's impact alone required the relocation of 2,100 people.⁷ It may directly harm almost 202,000 people owing to the loss of agricultural land, river bank gardens, and access to forest and river products.⁸ The consultant strongly recommended that the large-scale dams in the LMB be delayed for 10 years, with reviews occurring every 3 years to ensure that additional studies are conducted effectively.⁹

The Xayaburi Hydroelectric Power Project (Xayaburi Dam) is selected as a case study in this research because it was the first large-scale mainstream dam proposal which was submitted and went through the Procedures for Notification, Prior Consultation, and Agreement (PNPCA) process. On 20th October 2010, the Mekong River Commission (MRC) Secretariat formally initiated the PNPCA process by sending the notification of the Xayaburi Project proposed by Laos to its riparian States.¹⁰ On 24th March 2011, the MRC Secretariat issued and submitted the *Prior Consultation and Review Report* to riparian States.¹¹ In its assessment, the MRC identified information gaps regarding transboundary impact and mitigating technologies.¹² Baran and other environmental experts concluded that Pöyry's Environmental Impact Assessment (EIA) report is insufficient in several critical areas, including transboundary impacts – It solely covers the impact within Laos. Although the riparian States were unable to agree on how to proceed with the project under the PNPCA, they agreed at the MRC Joint Committee (JC) Special Session that a decision on the prior consultation method should be given for Ministerial decision.¹³ Despite Lao's assertion that an extension of the 6-month consultation period was not necessary, Cambodia, Thailand and Vietnam requested an extension to consultation

⁷ Guy Zive and others, 'Trading-off Fish Biodiversity, Food Security, and Hydropower in Mekong River Basin' 28 January 2012) <<http://www.pnas.org/content/109/15/5609.full>> accessed 23 April 2015

⁸ International Rivers, 'The Xayaburi Dam: A Looming Threat to the Mekong River' (January, 2011) <http://www.internationalrivers.org/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 30 March 2015p.1

⁹ Procedures for Notification, Prior Consultation and Agreement (PNPCA) 2003, approved by the MRC Council on 13 November 2003 at its 10th Meeting in Phnom Penh, Cambodia; pursuant to the Mekong River Commission (MRC) Council's Resolution on the Water Utilization Programme of 18 October 1999, and the decision of the MRC Joint Committee (JC) in February 2003 on the Establishment of the Technical Drafting Group 4 for the Procedures for Notification, Prior Consultation and Agreement, hereinafter referred to as "the Procedures".

¹⁰ International River, 'Xayaburi Dam: Timeline of Events ' (International River, April 2014) <https://www.internationalrivers.org/sites/default/files/attached-files/xayaburi_dam_timeline_of_events_april_2014_0.pdf> accessed 9 January 2020

¹¹ Ibid.

¹² Mekong River Commission Secretariat, 'Prior Consultation Project Review Report' <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>> accessed 9 April 2015, p.39

¹³ Eric Baran and others, 'Review of The Fish and Fisheries Aspects in The Feasibility Study and the Environmental Impact Assessment of the Proposed Xayaburi Dam on The Mekong Mainstream' (*WWF Greater Mekong*, 31 March 2011) <http://webcache.googleusercontent.com/search?q=cache:kkXOqn8ojCUJ:panda.org/downloads/wwf_xayaburi_dam_review310311.pdf+&cd=1&hl=en&ct=clnk&gl=uk&client=safari> accessed 14 June 2015 Accessed on 15 April 2015

process.¹⁴ In addition to that, the MRC also called for additional research on transboundary implications, knowledge gaps and mitigation strategies, and public consultation.¹⁵ On 22nd October 2010, Laos claimed that the Xayaburi's PNPCA process was completed, and that it would proceed with the project autonomously.¹⁶ In their legal opinions, both the Mekong Legal Network (MLN) and Perkins Coie, determined in their legal opinions that Lao's unilateral move on 22 April 2011 to end the PNPCA process prematurely was a breach of obligations under the 1995 Mekong Agreement, the PNPCA, and customary international law.¹⁷ Besides, affected States and their citizens, along with international organizations, None-Governmental Organizations (NGOs), have also questioned the project's transparency, the accuracy of its EIA, and the PNPCA.¹⁸

1.2 Gaps in Regional Law

In the LMB region, States are obliged to notify and discuss with the JC prior to constructing large-scale project on the mainstream of the Lower Mekong River, as required by Article 5 of the 1995 Mekong Agreement.¹⁹ Concerning procedural requirements, the PNPCA procedure is guided by 5 principles, which are '(a) sovereign equality and territorial integrity; (b) equitable and reasonable utilization; (c) respect for rights and legitimate interests; (d) good faith; and (e) transparency.'²⁰ The PNPCA was drafted by the MRC's technical drafting group with a goal of achieving the 1995 Mekong Agreement's procedural objectives; it was subsequently signed by Council members from the four riparian States on 30 November 2003.²¹ To clarify and explain several key words in the 1995 Mekong Agreement and the PNPCA on the obligation to notify and consult, the Guidelines on the Implementation of the Procedures for Notification, Prior

¹⁴ Mekong River Commission, 'Xayaburi Hydropower Project Prior Consultation Process' (MRC, 5 December 2010 - 22 April 2011) <<http://www.mrcmekong.org/news-and-events/consultations/xayaburi-hydropower-project-prior-consultation-process/>> accessed 28 May 2015

¹⁵ Mekong River Commission Secretariat, 'Prior Consultation Project Review Report'; International Rivers, 'Xayaburi Dam: Timeline of Events (Last Updated: April 2014)' (*International Rivers*, April 2014) <http://www.internationalrivers.org/files/attached-files/xayaburi_dam_timeline_of_events_april_2014.pdf> accessed 28 May 2015

¹⁶ Carl Middleton, 'The Politics of Uncertainty: Knowledge Production, Power and Politics on the Mekong River' (International Conference on Development and Cooperation of the Mekong Region, 4-5 December 2014) p.6-12

¹⁷ Mekong Legal Network, 'Briefing Note on Duties of Notification, Prior Consultation, and Assessment Arising From International Law in Relation to the Xayaburi Dam Project' (OpenDevelopment Thailand, 2011) <https://data.thailand.opendevopmentmekong.net/library_record/duties-of-notification-prior-consultation-and-assessment-arising-from-international-law> accessed 5 January 2020; Stephen J. Higgs, 'Re: PNPCA Process for Xayaburi Dam' (*International Rivers*, 5 July 2011) <<http://www.internationalrivers.org/files/attached-files/xayaburipnpcaprocess.pdf>> accessed 29 May 2015

¹⁸ Mekong River Commission Secretariat, 'Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River' (*Mekong River Commission* 24 March 2011) <https://www.diis.dk/files/media/publications/import/extra/rp2013-20-transboundary_water_governance-webversion_1.pdf> accessed 20 July 2019

¹⁹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (The 1995 Mekong Agreement), Article 5

²⁰ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia)

²¹ Ibid.

Consultation, and Agreement (PNPCA Guidelines) were provided as a supplementary tool.²²

Nonetheless, the time period and terminology used in the PNPCA Guidelines are ambiguous; consequently, the notification and consultations, as well as the submission of documents become perplexing and difficult to implement in practice. To begin, the PNPCA states that the time period for prior consultations begins on the date the document is received, but does not specify who or which party must be notified (Section I.B.1., PNPCA Guidelines).²³ As a result, it may be unclear whether the time period begins with the submission of papers to the National Mekong Committee (NMC), the Secretary, the JC, or the notified States.

Secondly, while the notification and consultation documents must be provided to the JC at least six months prior to the project's start date, Section I.B.1 of the PNPCA Guidelines stated that 'the Secretariat may request up to one month in advance of the implementation.'²⁴ Therefore, the language used in this section of the PNPCA Guidelines is ambiguous because the notified State is required to allow at least six months for the consultation process (review, evaluation, and response), but the internal process under the secretary alone could take up to one month; if that one month applied, the project may have already been begun even before the consultation period is complete.

Thirdly, while the PNPCA indicated that a State should refrain from implementing a planned project during the notification and prior consultation process (Section 5.4.3 of the PNPCA)²⁵; it makes no distinction between preparation or preparatory activities such as road and site access.²⁶

Fourthly, under Section I.A.2 of the PNPCA Guidelines, there is no agreed-upon definition of what constitutes relevant data required for consultation purposes²⁷; therefore, it is difficult for notifying State to collect and supply all accessible and available materials for the submission within six months before the project's scheduled start date. It is reasonable to question that this compressed timeline will allow the notified State to gather

²² Mekong River Commission, 'PNPCA Guidelines' (*Mekong River Commission*, <<http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf>> accessed 30 July 2015 accessed 28 March 2015

²³ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.B.1

²⁴ Ibid

²⁵ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.3

²⁶ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy' (2015) 5 (2015) *Asian Journal of International Law* 143-175

²⁷ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.A.2

sufficient information prior to the submission. Additionally, if the period needs to be prolonged beyond six months, it is subject to approval by the JC and the notified State.

Fifthly, the PNPCA does not give a clear solution (aside from the extension) for the outcome or conclusion of the consultation if State and Parties to the consultation are unable to achieve an agreement, or when the extension is refused. There is no provision in the PNPCA authorizing the MRC to provide an interim injunction or interim order, or to impose any consequence, in the event of a breach of the MRC's JC's decision, or the PNPCA.²⁸ The 1995 Mekong Agreement's provisions merely provide that the Parties may also turn to alternative dispute resolution mechanisms under Article 34 (resolution by the MRC)²⁹ and Article 35 (resolutions by governments through diplomatic channels and mediation in accordance with international law).³⁰

Sixthly, the PNPCA does not apply to China or Myanmar, as they are not Parties to the 1995 Mekong Agreement. China and Myanmar retain their status as upstream partners or dialogue partners; furthermore, China acknowledges the Upper Mekong River as its own national river.³¹ To enhance cooperation among riparian governments, several regional mechanisms have been established, including the MRC, the Greater Mekong Subregion (GMS) Program, and the Association of Southeast Asian nations (ASEAN). As China and Myanmar are not MRC members, they are not bound by the PNPCA or the 1995 Mekong Agreement and the PNPCA.³²

Finally, while the Guidelines indicate that an EIA and Initial Environmental Examination (IEE) be conducted and implied by customary international law, they are neither mandatory nor obligatory under the 1995 Mekong Agreement or the PNPCA.³³ National EIA may not be sufficient to gather information about transboundary EIA; additionally, each State has its own EIA based on national law and domestic legislation.³⁴ Thus, cooperation among riparian States and the practice of transboundary EIA and SEA together with public engagement in environmental decision-making should employ a more effective alternatives strategy for ensuring the effectiveness of the Mekong's PNPCA procedures.³⁵

²⁸ Alistair Rieu-Clarke, *supra* note 26

²⁹ 1995 Mekong Agreement, Article 34

³⁰ 1995 Mekong Agreement, Article 35

³¹ Qi Gao, *A Procedural Framework for Transboundary Water Management in the Mekong River Basin* (Brill 2014) 4-6

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

1.3 Objective of the Research and Contribution to Knowledge

It is worth noting that this research is based on legal analysis rather than a socio-economic analysis; therefore, it will not affect the LMB's States' internal affairs or economic and development strategies. The thesis focuses on a critical, qualitative analysis of legal materials of the primary sources, such as the 1995 Mekong Agreements, the PNPCA, the Espoo Convention, the Aarhus Convention, the Rio Declaration, Agenda 21, the Earth Summit, judicial and arbitral practice; and secondary sources, such as textbooks, journals, articles, and academic commentaries relating to a number of established and emerging rules of procedural law. Moreover, the thesis also entails a comparative analysis of international law, regional law, and national law with the aim to find how international law could fill in the gaps and help strengthen the regional and national law regarding procedural aspects of States' obligations in dealing with large-scale hydropower development projects in the LMB. Notwithstanding that this method has the tendency to be formalistic in the study of legal doctrine, it also allows for the discovery of common ground and best practice in terms of procedural steps and obligations to be followed prior to the authorisation and implementation of large-scale project in the region.

Chapters 2, 3 and 4 will expand and explore the details of the challenges surrounding the application of these legal procedures, as well as national law on EIA and public participation conduct as parts of requirements for the Xayaburi Project. The Xayaburi Dam Project is utilized as a case study in this research because it was the first large-scale dam in the LMB to have been subjected to the procedural scrutiny required under the 1995 Mekong Agreement and the PNPCA. Cambodia, Laos, Thailand, and Vietnam are obliged under the 1995 Mekong Agreement and the PNPCA to notify, consult, and achieve an agreement with one another prior to proceeding with large-scale projects in the LMB.

This research embraces a legal study that will be beneficial to several areas of relevance, including water law, international environmental law, public law, human rights, and environmental justice. It will also be useful to the governments of the riparian States that will be affected by the future projects and or investors and development partners that will be making an investment in future projects and who must deal with the conduction of public participation and the EIA within a transboundary context.

It should be highlighted that this research is based on a legal study (pure law) rather than a socio-economic analysis. As a result, it will not affect the LMB States' internal affairs or economic and development strategies. The research will not attempt to resolve the Xayaburi Dam conflict or find a solution to it, but will instead use it as a lesson or case study for the improvement and development of a better procedural mechanism in dealing with future projects. As of 2021, two large-scale dams on the LMB, the Xayaburi Dam and the Don Sahong Dam have been completed. The PNPCA review processes

have been finalised for the Pak Beng Dam, Pak Lay Dam and Luang Prabang Dam. The Luang Prabang Dam construction began in 2020 and is expected to be completed in 2027, while the Pak Beng Dam and the Pak Lay Dam will start the construction in 2022. Cambodia announced in March 2020 that it would postpone the constructions of its two planned dams, which are the Stung Treng Dam and Sambor Dam.

1.4 Research Question

Although the Xayaburi Dam was built and put into operation on 29th October 2019, it has created numerous critical challenges under the LMB's regional law. The events concerning the Xayaburi Dam under the PNPCA raised a number of questions on how procedural law relating to transboundary water project in the LMB should be applied and interpreted: How long should the notification and consultation period be? When should the notification be submitted? What documents and information should be provided and exchanged during the notification and consultation period? Does it include an EIA? What should the scope and content of an EIA be for a project that could have significant detrimental transboundary effect? What should be done if the watercourse States are unable reach an agreement within a specified time-frame? Is it permissible for a proposed State to proceed with the project without the permission of possibly impacted States? What are the public's rights in terms of obtaining environmental information, participating in decision-making process on environmental projects that may affect them, and seeking redress when their rights are violated? Should such rights extend to possibly impacted individuals who live on the other side of the border? Therefore, the overarching question of this research is what are the gaps in regional law from the application of the 1995 Mekong Agreement and the PNPCA process and how international law can fill in can fill in those gaps and ambiguities improve the clarity, accuracy, and transparency of regional law on notification and consultation, EIA practice and public participation.

1.5 Methodology

The research employed in this study is a desk study, which entails the examination and analysis of legal instruments, policies, and documents released or published by governments and organizations, as well as textbooks, academic journals, and internet database from reliable sources. Through the examination and collation of synthesis, this research will identify and examine the environmental principles and procedural requirements applicable under international environmental law when a state intends to undertake a project that may have a major detrimental effect. International legal instruments, in particular, the United Nations Watercourses Convention on the Law of the Non-Navigational Uses of International Watercourses Convention 1997 (UN Watercourses

Convention)³⁶, the United Nations Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context 1991 (Espoo Convention)³⁷, and the UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters 1998 (Aarhus convention)³⁸ will be explored and analysed.

The UN Watercourses Convention is chosen as the best practice on obligations of a State to notify and consult in this study for a variety of reasons.³⁹ To begin, the UN Member States and prominent water law scholars recognized the UN Watercourses Convention as the universal treaty codifying customary law governing international watercourses, particularly regarding the prevention of significant transboundary harm, equitable and reasonable utilization, and prior notification and consultation regarding planned measures.⁴⁰ Secondly, on the major cases concerning the construction of a project on international watercourse, the International Court of Justice (ICJ) relied on the UN Watercourses Convention as a source of reference. For instance, the ICJ cited the UN Watercourses Convention in its decision in the *Gabčíkovo-Nagymaros* case barely 4 months before it entered into force in 2014.⁴¹ Additionally, the ICJ also applied the principle of equitable and reasonable utilization and prevention of significant harm provided in the UN Watercourses Convention in the *Pulp Mills* case in 2010 even though Slovakia, Argentina, and Uruguay were not yet the Parties to the UN Watercourses Convention at that time.⁴² Thirdly, the UN Watercourses Convention establishes a framework of principles and standards that can be adjusted to the needs and interests of riparian States who are the Parties to the Convention.⁴³ In other words, the UN

³⁶ UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (adopted on 21 May 1997, entered into force on 17 August 2014) 36 ILM 700 (1997)

³⁷ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991)

³⁸ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999)

³⁹ Patricia Wouters, 'The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond' (1999) 43 German Yearbook of International Law 293-336; UN General Assembly Official Records, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNGA Res. 51/869, UN Doc. A/Res/51/869, 21 May 1997)

⁴⁰ Salman Salman, 'Entry Into Force of the UN Watercourses Convention: Why Should It Matter?' (2015) 31(1) International Journal of Water Resources Development 4-16; Owen McIntyre and Mara Tignino, 'Reconciling the UN Watercourses Convention and Recent Developments in International Law' in Alistair Rieu-Clarke and Flavia Rocha Loures (eds), *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Governance* (The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Governance, Earth Scan 2013) 186-303; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention User's Guide* (IHP-HELP UNESCO Centre For Water Law Policy and Science 2012) 100-159

⁴¹ *Gabčíkovo-Nagymaros Dam Project* (Hungary/Slovakia) (1997) ICJ Report Judgments, Advisory Opinions and Orders, (September 25) (International Court of Justice), Paragraph 85

⁴² *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) [2010] ICJ Reports, (Judgment) General List No 135, 20 April 2010 (International Court of Justice), Paragraph 170-177.

⁴³ Stephen McCaffrey, 'Convention on the Law of the Non-Navigational Uses of International Watercourses' (*UN Audio Visual Library of International Law*, 21 May 1997) <<https://legal.un.org/avl/ha/clnuiw/clnuiw.html#>> accessed 2 February 2020

Watercourses Convention was created to complement, facilitate, and assist existing and future basin accords, as well as other watercourses treaty, by serving as a framework and filling in gaps, but not necessarily replacing them.⁴⁴ For example, both the Southern African Development Community's Revised Protocol on Shared Watercourses 2000, and the Nile River Basin Cooperative Framework are examples of instruments that have applied and adopted the UN Watercourses Convention's provisions to their regional and basin specific context.⁴⁵

In this research, the Espoo Convention is selected as the best practice for transboundary EIA for several reasons. Firstly, the Espoo Convention was drafted and administered by the UNECE; the Convention was found on the fundamental customary law as defined in Principle 17 and 18 of the Rio Declaration.⁴⁶ Additionally, according to the practice under the Aarhus Convention, foreign impacts and foreign actors are considered throughout the domestic EIA procedure when there is a possibility of transboundary harm.⁴⁷ Since its entering into force on 27 June 1997, the Espoo Convention has been regarded as the first international treaty providing specific details of procedural obligations of States with respect to conducting transboundary EIA at an early stage of project preparation.⁴⁸ Secondly, despite being a European legal instrument, the Espoo Convention is open to all members beyond the UNECE region with its objective of becoming a universal instrument.⁴⁹ According to Christian Friis Bach, the then UNECE Executive Secretary, acclaimed that the Espoo Convention's opening for signature could help filling in a gap in the practice of EIA under international law; it can also advance EIA as a critical tool for sustainable development.⁵⁰ Some Asian States, such as Korea, Japan, Mongolia, Vietnam, and Indonesia, as well as Iraq and Iran in the Middle East have expressed their interest in adopting or developing transboundary EIA based on the Espoo Convention.⁵¹ There are 45 Parties to the Espoo Convention, including the EU, the

⁴⁴ Flavia Loures and others, 'Everything You Need to Know About the UN Watercourses Convention' (World Wide Fund For Nature (WWF), January 2015) <<https://www.gcint.org/wp-content/uploads/2015/09/UNWC.pdf>> accessed 22 January 2020; Ariel Litke and Alistair Rieu-Clarke, 'The UN Watercourses Convention: A Milestone in the History of International Water Law' (Global Water Forum, 2 February 2015) <<https://globalwaterforum.org/2015/02/02/the-un-watercourses-convention-a-milestone-in-the-history-of-international-water-law/>> accessed 25 January 2020

⁴⁵ Ibid.

⁴⁶ Tseming Yang, 'The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law' (2019) 70(525) *Hasting Law Journal* 525-572

⁴⁷ Timo Koivurova, 'Could the Espoo Convention Become a Global Regime for Environmental Impact Assessment and Strategic Environmental Assessment?' in Robin Warner and Simon Marsden (eds), *Transboundary Environmental Governance: Island, Coastal and Marine Perspective* (Transboundary Environmental Governance: Island, Coastal and Marine Perspective, Ashgate 2012) 323-342

⁴⁸ UNECE, 'Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) - the 'Espoo (EIA) Convention'' (UNECE, <<https://www.unece.org/fileadmin/DAM/env/eia/eia.htm>> accessed 20 September 2019

⁴⁹ UNECE, 'UNECE Espoo Convention on Environmental Impact Assessment Become a Global Instrument' (UNECE, 27 August 2014) <<http://www.unece.org/index.php?id=36354>> accessed 20 September 2019

⁵⁰ Ibid.

⁵¹ Korea Environment Institute, 'Workshop on Environmental Impact Assessment in a Transboundary Context in Eastern Asia, Seoul, Republic of Korea, 13-15 June 2012' (UNECE, May 2013) <https://www.unece.org/fileadmin/DAM/env/eia/documents/Events/SeoulJun12/2012TEIA_Workshop_report_final.pdf> accessed 2 October 2019; Nicholas Bremer, 'Transboundary Environmental Impact Assessment of

UNECE Member States, the Central Asian States; of their signatories (if not yet ratified) also include Russia, the US and Canada.⁵² According to that, the Espoo Convention's Parties range from Europe to North America and Asia. Finally, the UNECE Espoo Secretariat has supported regional preparation for the development of future transboundary EIA in the Mekong region.⁵³ During the Mekong2Rio: International Conference on Transboundary River Basin development in 2012, Koivurova and Nguyen Van Duyen, the then MRC's environmental governance specialist, recommended that the LMB States develop a practice of transboundary EIA by following the Espoo Convention's lead; and if transboundary EIA is conducted, it could supplement the MRC's PNPCA process.⁵⁴

The Aarhus Convention is identified in this study as the best practice for the rights of public to gain access to environmental information, to participate in making an environmental decision, and to get access to justice for a variety of reasons. Firstly, the Aarhus Convention is widely regarded as one of the most advanced environmental treaties regarding public participation in transboundary environmental issues. The former UN Secretary General, Kofi Annan, remarked that the Aarhus Convention as the most ambitious instrument in environmental democracy established under the auspices of the UN; its adoption marked an extraordinary moment in the evaluation of public participation rights international law.⁵⁵ He also stressed that we must redouble our commitment to environmental rights – not just in Europe but globally.⁵⁶ Similarly, Jendroska, Ebbesson, Stec, and Casy-Lefkovitz regarded the Aarhus Convention as the most public-friendly environmental treaty, stating that it has the potential to serve as a global framework for bolstering citizen's environmental rights through the application of the best international standard and practice in relation to public access to information and decision-making process.⁵⁷ Secondly, according to Kravechenk and Boyle, the key provisions of the

Large-Dams in the Euphrates-Tigris Region: An Analysis of International law Binding Iran, Iraq, Syria and Turkey' (2016) 25(1) Review of European, Comparative and International Environmental Law, 92-106

⁵² UNECE, 'Status of Ratification' (UNECE, <<https://unece.org/fileadmin/DAM/env/eia/ratification.htm>> accessed 15 September 2021; Simon Marsden, *Protecting the Third Pole: Transplanting International Law* (Edward Elgar Publishing Company 2019) 133

⁵³ UNECE, 'Information on the Workshop on the Globalization of the Espoo Convention and the Protocol on SEA, and the Role of International Financial Institutions (UN Doc. ECE/MP/EIA/WG.2/2016/6/INF.11' 21 October 2016)

<https://www.unece.org/fileadmin/DAM/env/eia/documents/WG2.6_Nov2016/ece.mp.eia.2016.6.INF.11_global_workshop_FINAL.pdf> accessed 25 September 2019

⁵⁴ MRC, 'A Conference Booklet and Mekong2Rio Programmes and Presentations' (MRC, 1-3 May 2012) <<http://www.mrcmekong.org/news-and-events/events/mekong2rio/mekong2rio-presentations/>> accessed 12 August 2019

⁵⁵ Kofi Annan, 'What People Are Saying About the Aarhus Convention?' (UNECE, 30 October 2001) <<https://www.unece.org/fileadmin/DAM/env/pp/documents/statements.pdf>> accessed 20 January 2018

⁵⁶ Ibid.

⁵⁷ Jerzy Jendroska, 'UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe' (1998) 13 National Environmental Enforcement Journal 159; Jonas Ebbesson and others, 'The Aarhus Convention: An Implementation Guide (UN.Doc.ECE/CEP/72/Rev.1' (UNECE, 2014)

<http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf

Aarhus Convention, which are the three pillars on public access to environmental information, their right to participate in the decision-making, and access to justice, are based on fundamental environmental rights recognized in international law, such as Principle 1 of the Stockholm Declaration, Principle 10 of the Rio Declaration, and the World Charter of Nature.⁵⁸ Therefore, the Aarhus Convention is the first regional Convention to codify soft law principles making them legally enforceable. Finally, the Aarhus Convention has inspired the development and implementation of public participation provisions in environmental law in numerous regions throughout the world; given its effectiveness in protecting three pillars of procedural rights and in reflecting customary law on public participation in environmental matters⁵⁹; thus, the Aarhus Convention can be used as a model in strengthening the practice of public participation worldwide. For instance, by emphasizing the nature of public involvement, and access to justice for developing countries, the 2010 UNEP Guidelines (the Bali Guidelines) reflect the Aarhus Convention's three pillars.⁶⁰ The Organization of American States' Public Participation Strategy (OAS) also cited the Aarhus Convention as an excellent mechanism that formalizes the States' commitment to the public procedural rights; in this regard, the OAS utilized the Aarhus Convention as a model for its regional instrument.⁶¹ Another example is the United Nations Economic Commission for Africa (UNECA) which has lauded the Aarhus Convention as a model of public participation regime in its report on *Improving Public Participation in the Sustainable Development of Mineral Resources in Africa*.⁶² In addition to that, the United Nations Economic Commission for Latin America, and the Caribbean (UNECLAC) adopted the regional agreement on Access to Information and Justice in Environmental Matters in Latin America and the Caribbean, which was modelled after the Aarhus Convention.⁶³

Methodologically, Chapter 2,3, and 4 of the research will begin with an examination of the MRC's regional law related to notification and consultation process

> accessed 10 November 2018; UNECE, 'Environmental Rights Not A Luxury -Aarhus Convention Enters into Force' (UNECE, 2001) <www.unece.org/press/pr2001/01env15e.html> accessed 15 September 2018

⁵⁸ Jeroen van Bekhoven, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact ' (2016) 11(2) National Taiwan University Law Review 219; Svitlana Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted' (2012) 7(2) Florida Agricultural and Mechanical University Law Review 163; Alan Boyle, 'Human Rights and the Environment: Where Next?'-642

⁵⁹ Jona Razzaque, 'Implementing International Procedural Rights and Obligations: Serving the Environment and Poor Communities ' (International Institute for Environment and Development, 2005) <<http://pubs.iied.org/pdfs/G00466.pdf>> accessed 20 January 2019

⁶⁰ Uzuazo Etemire, 'Insights on the UNEP Bali Guidelines and the Development of Environmental Democratic Rights' (2016) 28(3) Journal of Environmental Law 393-413

⁶¹ Organization of the American States (OAS), 'Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development' (OAS, 13-14 April 2001) <http://www.oas.org/dsd/PDF_files/ispenglish.pdf> accessed 27 January 2018

⁶² UNECA, 'Improving Public Participation in the Sustainable Development of Mineral Resources in Africa' (UNECA, 2004) <www.africaminingvision.org/amv_resources/AMV/public_participation.pdf> accessed 25 January 2018

⁶³ UNECE, 'UNECE Welcomes Adoption of Regional Agreement to Protect Environmental Rights in Latin American and the Caribbean' (UNECE, 5 March 2018) <<https://unece.org/environment/press/unece-welcomes-adoption-regional-agreement-protect-environmental-rights-latin>> accessed 15 September 2021

(Chapter 2); the practice of EIA (Chapter 3), which will focus on Lao's EIA law because the Xayaburi Dam is built within the territorial jurisdiction of Laos; and public rights to gain access to environmental information, public participation, and rights to gain access to justice (Chapter 4), which will focus on Thailand because the Xayaburi Project lawsuit, which was brought before the Supreme Administrative Court of Thailand, was the first community-led lawsuit in the LMB related to the construction of large-scale dam on the mainstream of the Lower Mekong River and the first lawsuit on a transboundary project in the LMB. However, it is important to note that the final outcome of the case is under the discretionary power of national court of Thailand; and it is beyond the scope of this study. Secondly, in each Chapter, the research will examine the facts of the case study and determine what concerns and challenges were encountered; how regional law and national law were applied to the facts; and what gaps and ambiguities existed in the law's interpretation and application. Thirdly, the thesis will explore and analyse the legal principles and practices governing States' procedural obligations under international law, including customary international law, treaty law, and international case law concerning projects on international watercourses, and projects that may have significant adverse effects across border. Finally, in each chapter, the thesis will analyse and explore how the provisions under the UN Watercourses Convention, the Espoo Convention, and the Aarhus Convention, respectively, might be utilized as a source of reference or a guide for interpreting, filling in the gaps, and clarifying the present regional practice in the LMB.

1.6 Chapter Outlines

The structure of the thesis consists of 5 Chapters. Chapter 1 (this chapter) is a brief introduction to the background information on the geography of, and the issues on the hydropower projects in the Lower Mekong. It also provides the timeline of the Xayaburi Project and a brief summary of legal principles that are pertinent to the research context, to help readers understand the on-going issues on the projects and the notification and consultation process under the 1995 Mekong Agreement and the PNPCA.

Chapter 2 will firstly give an overview of what are the legal obligations of the States to notify and consult under the 1995 Mekong Agreement and the PNPCA. Secondly, it will identify what the problems and challenges faced in the Xayaburi Project 's PNPCA process. Thirdly, it will explain how the obligations to notify and consult are recognized under international law. The final section of the Chapter will analyze the provisions on notification and consultation under the UN Watercourses Convention, and find how the UN Watercourses Convention can help with the interpretation and improving the clarity of the State's obligations to notify and consult.

Chapter 3 will begin by looking at what the overall impacts of the large-scale dams on the LMB (as reported by the SEA) are. Secondly, it will consider the possible impacts

of the Xayaburi Dam, and what might be the gaps and flaws in the Xayaburi's EIA. Thirdly, because the Xayaburi's EIA was conducted according to Laos's EIA requirement, this Chapter will consider how the EIA is regulated in Laos; and what might be its implications to hydropower projects. Fourthly, it will explore how the EIA practice is developed and recognized under international law. Finally, it will analyse how the Espoo Convention can be used as a source of reference to help improve the practice of EIA in the LMB.

Chapter 4 will firstly encapsulate what the current approach of the MRC on to public participation, with specific focus on the rights of the affected public to get access to information and to partake in the decision-making process are. Secondly, it will identify the issues and challenges in the implementation and practice of public participation (as part of the decision-making process) in the Xayaburi Project. Thirdly, it will delineate how public participation is recognized as "procedural rights" under international law. Finally, it will analyze the provisions under the Aarhus Convention and find how it can be used as a source of reference to help with the interpretation, filling the gaps and improving transparency of the current practice of public participation in the Lower Mekong.

Chapter 5 concludes the thesis on how international law, in particular the UN Watercourses Convention, the Espoo Convention and the Aarhus Convention could help strengthen the current law in the LMB on the obligations to notify and consult, to conduct an EIA, and to allow the public to participate in the decision-making process on the environmental project that will affect them.

1.7 Institutional and Cooperative Mechanism Where International Best Practice Might Inform Regional Practice in the Lower Mekong Basin

The MRC directed the ICEM, an independent agent, to conduct the SEA for all 12 planned large-scale dams in the LMB because there is no regional agreement on transboundary EIA among the LMB States.⁶⁴ The SEA undertaken by the ICEM was ordered by the MRC with the permission of the LMB States and the JC, in contrast to the SEA Directive and Protocol, which augment the Espoo Convention and require a proposing State to engage with potentially affected States and their affected people.⁶⁵ Even though the SEA conducted by the ICEM is supposed to be an "independent study" for a "technical process" for recommendations and does not legally obligate the LMB States to follow it, Cambodia, Vietnam, NGOs, donors, and the MRC itself were all in

⁶⁴ MRC, 'Strategic Environmental Assessment of Mainstream Dams' (MRC, 2015) <<http://www.mrcmekong.org/about-mrc/completion-of-strategic-cycle-2011-2015/initiative-on-sustainable-hydropower/strategic-environmental-assessment-of-mainstream-dams/>> accessed 2 August 2019; ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report' (ICEM, 2010) <<http://icem.com.au/portfolio-items/sea-of-hydropower-on-the-mekong-mainstream-summary-of-the-final-report/>> accessed 25 June 2019

⁶⁵ MRC, 'Inception Report: The MRC SEA of Hydropower on the Mekong Mainstream ' 13 December 2009) <http://www.icem.com.au/documents/envassessment/mrc_sea_hp/1.%20inception/reports/pdf/IR_VOL1_final.pdf> accessed 28 July 2019

support of the SEA's recommendations that further studies particularly the transboundary EIA and social impact should be carried out.⁶⁶ Whilst the PNPCA focuses on the proposed individual project, the SEA could be considered as a supplement to the PNPCA process because it provides further information on the "potential combined transboundary impact" of large-scale dams on the mainstream of the LMB.⁶⁷

In terms of the obligations to consult the public, even though the PNPCA Procedures do not explicitly require stakeholder consultation, the PNPCA Joint Committee Working Group (PNPCA JCWG) decided, on its first meeting on 26 October 2016 that stakeholder consultations at both regional and national levels should also be included in the PNPCA process for the proposed Xayaburi Project.⁶⁸ This demonstrates that the PNPCA JCWG did take into account the practice of international law on public consultation when making the decision. Hence, the stakeholder consultation in the Xayaburi's PNPCA process, which included potentially affected public, may well set a precedent for other large-scale hydropower development projects on the mainstream of the LMB where the MRC and the LMB States include public consultation as part of its due diligent obligation.⁶⁹

In response to the 2003 recommendations made by the JC to adopt and apply a transboundary EIA within the LMB, the MRC set to work on the drafting of regional EIA. During the Mekong2Rio: International Conference on Transboundary River Basin 2012 in Phuket, Thailand, Koivurova and Nguyen Van Duyen (the then MRC's environmental governance's specialist) recommended that the LMB States should develop a practice of transboundary EIA by drawing on the best practice of the Espoo Convention. Regional preparation for the development of the future transboundary EIA in the LMB region has also been supported by the UNECE Espoo Secretariat.⁷⁰ Nevertheless, the issues on how the regional transboundary EIA should be drafted and applied to each LMB State is beyond the scope of this thesis.

⁶⁶ Oliver Hensengerth, 'Where is the Power: Transnational Networks, Authority and the Dispute Over the Xayaburi Dam on the Lower Mekong Mainstream' (2015) 40(5)-(6) *Water International* 911

⁶⁷ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report' (MRC, October 2010) <<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-FR-summary-13oct.pdf>> accessed 25 July 2019

⁶⁸ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project' (*Mekong River Commission (MRC)*, 24 March 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>> accessed 10 November 2018

⁶⁹ Alistair rieu-Clarke, 'Transboundary hydropower Projects on the Mainstream of the Lower Mekong River - The Case of public Participation and Its National implications for Basin States' in Mara Tignino and Komlan Sangbana (eds), *Public Participation and Water Resources Management: Where Do We Stand in International Law?* (Public Participation and Water Resources Management: Where Do We Stand in International Law?, UNESCO 2015)

⁷⁰ UNECE, 'Information on the Workshop on the Globalization of the Espoo Convention and the Protocol on SEA, and the Role of International Financial Institutions (UN Doc. ECE/MP/EIA/WG.2/2016/6/INF.11' 21 October 2016)

<https://www.unece.org/fileadmin/DAM/env/eia/documents/WG2.6_Nov2016/ece.mp.eia.2016.6.INF.11_global_workshop_FINAL.pdf> accessed 25 September 2019

To promote transboundary data sharing on the policies, plans, programs, and projects, the MRC set up Procedures for Data and Information Exchange and Sharing (PDIES), which were implemented by the LMB States in 2001. The PDIES addresses general data and information gathering, entering to the MRC information system, and data-sharing among riparian States. In handling with large-scale hydropower development projects, a proposing States, potentially affected States, project developers and environmental agencies may decide to go for a joint EIA report, which amounts to an EIA in transboundary context, the best approach to do that is for them to first prepare a joint environmental report on the entire project, so that they can appraise the overall impact of the project. Then, they can prepare an individual national EIA report (carried out by each riparian State) that should later be shared among Member States through the PDIES

Chapter 2

Obligations to Notify and Consult

2.1 Introduction

In the event that a State intends to implement new measures, projects or activities inside its borders that have the potential to create considerable cross-border damage to surrounding States, the State making the proposition (notification) is required to make the necessary notification and consult with the States that could possibly be impacted (notified) about possible adverse effects or consequences this could have for them.⁷¹ According to the International Law Commission (ILC) “significant harm” is defined as something that can be detected but not necessarily severe or sizeable⁷², and it must have adverse impacts on the health, industrial, property, environmental or agricultural sectors of other States.⁷³

The requirements for States to ensure notification and consultation have been broadly recognised in international declarations on environmental law, principles, regulations, treaties, in addition to judicial arbitral judgements⁷⁴ which will be explained in greater depth in Section 3 of this Chapter). The aim of notifying and consulting is to provide the chance to the States who receive the notification to evaluate and offer their suggestions and viewpoints on the suggested projects, while simultaneously allowing the State making the notification to consider the interests of the State being notified prior to finalising the project plan.⁷⁵

According to international water law, the requirement to notify and consult is not merely regarded as the act of stating to the States being notified that a project is being considered for their mutual waterways, but is also perceived to be a process of “cooperation in good faith”, in which both sides suitably inform and communicate with each other by sharing data, consulting, and negotiating with the objective of reaching a

⁷¹ Owen McIntyre, 'The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources' (*European Society of International Law*, <<https://esil-sedi.eu/wp-content/uploads/2018/04/McIntyre.pdf>> accessed 29 March 2017; Alistair Rieu-Clarke, 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases' (2014) 24(1) *Yearbook of International Environmental Law* 102-130; Maria Manuela Farrajota, 'Notification and Consultation in the Law Applicable to International Watercourses' in Laurence Boisson de Chazournes and Salman Salman (eds), *Water Resources and International Law* (Water Resources and International Law, The Hague Academy of International Law 2005) 281

⁷² ILC, *Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session: Yearbook of International Law Commission 2001 Volume II, Part 2 on the Commentary on the Draft Articles on Prevention on Transboundary Harm from Hazardous Activities* (UN Doc. A/CN.4/SER.A/2001/Add.1(Part 2)) 2001)152

⁷³ Ibid

⁷⁴ Laurence Boisson de Chazournes and Komlan Sangbana, 'Principle 19: Notification on Activities with Transboundary Impact' in Jorge Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (The Rio Declaration on Environment and Development: A Commentary, Oxford university Press 2015) 493-507

⁷⁵ International Law Committee of New South Wales, *The Practitioner's Guide to International Law* (2 edn, LexisNexis Butterworths 2014) 172

consensus regarding how the intended actions can be applied.⁷⁶ In general, such intended actions and suggested projects involve building dams as well as hydroelectric power plants or reservoirs to manage and use the water on cross-border waterways.⁷⁷

The Xayaburi project marked the first time that a large-scale dam was built in the mainstream section of the lower Mekong River; hence, it was also the first time that it was necessary to conduct a consultation process before launching the project, as stipulated in the Procedures for Notification, Prior-consultation and Agreement (PNPCA).

Nevertheless, as a result of insufficient clarity, the PNPCA's legally binding status, as well as deficiencies and vagueness in the existing practices in the region, the States in the Lower Mekong Basin (LMB) were forced to address the problem of how the law should be interpreted and applied.

In order to review how both customary international law as well as the UN Watercourses Convention could assist with interpreting and enhance the clarity of the law determining how States are obliged to provide notification and consultation regarding large-scale dams that are planned to be constructed in the LMB, this Chapter is separated into four parts, which will include: (i) the requirement to provide notification and consultation according to the 1995 Mekong Agreement and the PNPCA, (ii) the PNPCA process of the Xayaburi Dam: issues and complexities (iii) the way in which the requirements to notify and consult are acknowledged according to international law (iv) the way in which the UN Watercourses Convention can assist with interpreting and enhancing the clarity of the requirements of States to provide notification and consultation.

2.2 Obligations of the States to Notify and Consult under the 1995 Mekong

Agreement and the PNPCA Process

2.2.1 The 1995 Mekong Agreement (Substantive Obligations)

On 5 April 2005, Thailand, Laos, Cambodia and Vietnam all became signatories to and ratified the 1995 Mekong Agreement; it also came into effect on that day.⁷⁸ Resultantly, this agreement has become a legally enforceable treaty of the riparian States located in the Lower Mekong Basin (LMB).

⁷⁶ Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) 139-149; Owen McIntyre, 'The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay' (2011) 4(2) *Water Alternatives* 124-144; Cameron Hutchison, 'The Duty to Negotiate International Environmental Disputes in Good Faith' (2006) 2(2) *McGill International Journal of Sustainable Development Law and Policy* 117-153

⁷⁷ Stephen McCaffrey, *The Law of International Watercourses* (2 edn, Oxford University Press 2010) 285-286

⁷⁸ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand)

As stipulated in Article 1 of the 1995 Mekong Agreement, States in the LMB are obliged to:

Co-operate in all fields of sustainable development, the utilization, management and conservation of the water of the Mekong River including, but not limited to irrigation, hydropower, navigation, flood control, fisheries, timber floating, recreation and tourism, in a manner to optimize the multiple-use and mutual benefits of all riparians and to minimize the harmful effects that might result from natural causes and man-made activities.⁷⁹

To achieve this, it is additionally mandated by the 1995 Mekong Agreement that States in the LMB are obliged to 'use the water in the Mekong River Network reasonably and equitably inside their respective borders'⁸⁰, while simultaneously protecting the environment, natural resources, water ecology and creatures, as well as the balance of nature from contamination or other adverse impacts caused by any planned developments or water usage.⁸¹ Furthermore, the States in the LMB are obliged to strive to prevent, reduce and mitigate detrimental impacts to the environment that could happen...resulting from the utilisation of the water resources in the Mekong River basin or the release of waste and return flow.⁸²

It can be seen that to some degree, the terminology used in the 1995 Mekong Agreement is reflective of the basic tenets (substantive requirements) stipulated in the UN Watercourses Convention, including the requirement to use the water resources reasonably and equitably⁸³, the requirement to work cooperatively⁸⁴, as well as the requirement to ensure that adverse effects do not occur⁸⁵. Such substantive obligations will be explored in greater depth in the following part on the UN Watercourses Convention.

With regard to the institutional bodies, the Mekong River Commission consists of the Council, the Joint Committee (JC) as well as Secretariat.⁸⁶ Representatives who are either ministers or on the cabinet (one from every State) sit on the Council, which meets once per year at a minimum (Articles 15 and 17 of the 1995 Mekong Agreement).⁸⁷ The

⁷⁹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 1

⁸⁰ 1995 Mekong Agreement, Article 5

⁸¹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 3

⁸² 1995 Mekong Agreement, Article 7

⁸³ UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (adopted on 21 May 1997, entered into force on 17 August 2014) 36 ILM 700 (1997) (UN Watercourses Convention) Article 5

⁸⁴ UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (adopted on 21 May 1997, entered into force on 17 August 2014) 36 ILM 700 (1997) (UN Watercourses Convention) Article 8

⁸⁵ UN Watercourses Convention 1997, Article 7

⁸⁶ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 12

⁸⁷ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995

Council is primarily responsible for making decisions regarding how the 1995 Mekong Agreement is applied, along with its processes, projects, plans and programmes aimed at developing the basin, in addition to providing support and guidance to facilitate cooperation between member States in terms of how the Lower Mekong River is used and managed (Article 18 of the Mekong Agreement).⁸⁸ The JC consists of a representative from every State who is at least a Department Head, and it convenes on a bi-annual basis for the purpose of overseeing, monitoring and assisting the process of implementing the Council's decisions (Article 21, 23 and 24 of the Mekong Agreement).⁸⁹ On the other hand, the Secretariat is tasked with delivering administrative and technical assistance to the States, the Council and the JC (Article 28 of the 1995 Mekong Agreement).⁹⁰ In each of the States, the MRC receives support from the respective National Mekong River Committees (NMC) in each State, which promote collaboration among the MRC and the agencies and ministries of the State, and also assist with activities and the implantation of the policies of the MRC at the country level.⁹¹

Between 2000 and 2008, five procedural rules were codified by the MRC, which assisted with implementing the 1995 Mekong Agreement.⁹² From the aforementioned procedures, procedural steps were stipulated in the Procedures for Notification, Prior Consultation and Agreement 2003 (PNPCA) that States are required to adhere to when projects, plans and activities are proposed for the Mekong River mainstream that could potentially affect adjoining States.

2.2.2 The PNPCA (Procedural Obligations)

The technical drafting committee of the MRC was responsible for developing the Procedures for Notification, Prior Consultation and Agreement 2003 (PNPCA)⁹³, which was intended to satisfy the substantive obligations detailed in the 1995 Mekong

in Chiang Rai, Thailand), Article 15; Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 17

⁸⁸ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 18

⁸⁹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 21; Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 23; Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 24

⁹⁰ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 28

⁹¹ Philip Hirsch, 'Water Governance Reform and Catchment Management in the Mekong Region' (2006) 15(2) *The Journal of Environment & Development* 184-201

⁹² Remy Kinna and Alistair rieu-Clarke, *The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?* (Brill 2017) 33

⁹³ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia)

Agreement. States are obliged to undergo the process of providing and notifications and consultations with each other regarding how the Mekong River is used according to the PNPCA.⁹⁴ Despite the fact that the PNPCA received approval from the MRC in 2003⁹⁵, and the JC adopted PNPCA Guidelines) in 2005⁹⁶, they are not officially recognised as a treaty but are rather a collection of procedural rules that supplement the 1995 Mekong Agreement.⁹⁷ Although the PNPCA and the PNPCA guidelines are not legally-binding, according to Article 31(3)(b) of Vienna Convention⁹⁸, as well as scholars, such as Rieu-Clarke, Bearden and Loures recognised that it does offer necessary guidance regarding the requirements of the LMB States regarding the procedures for notifying and consulting before activities on development projects in the Mekong River Basin are implemented.⁹⁹

For the substantive obligations to be implemented, Article 5 of the 1995 Mekong Agreement stipulates the factors and conditions where notification and prior consultation are required for planned projects and activities.¹⁰⁰ Such factors and situations are associated with the river type (tributary or mainstream), season (dry or wet) as well as the manner in which the basin is used (inter- or intra-basin).¹⁰¹

⁹⁴ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy' (2015) 5(1) Asian Journal of International Law 143; 1995 Mekong Agreement, Article 5

⁹⁵ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia)

⁹⁶ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos)

⁹⁷ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy' Note...; Bennett Bearden, Alistair Rieu-Clarke and Sokhem Pech, 'Mekong Basin' in Flavia Rocha and Alistair Rieu-Clarke (eds), *The UN Watercourses Convention in Force* (The UN Watercourses Convention in Force, Earthscan from Routledge 2013) 195

⁹⁸ United Nations, Vienna Convention on the Law of Treaties (adopted on 23 May 1969), entry into force on 27 January 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875 (1969)

⁹⁹ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy', Bennett Bearden, Alistair Rieu-Clarke and Sokhem Pech, 'Mekong Basin' 195

¹⁰⁰ 1995 Mekong Agreement, Article 5:

- A. On tributaries of the Mekong River, including Tole Sap, intra-basin uses and inter-basin diversions shall be subject to notification to the Joint Committee.
- B. On the mainstream of the Mekong river:
 1. During the wet season:
 - a) Intra-basin use shall be subject to notification to the joint Committee.
 - b) Inter-basin diversion shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.
 2. During the dry season:
 - a) Intra-basin use shall be subject to prior consultation which aims at arriving at an agreement by the Joint Committee.
 - b) Any inter-basin diversion project shall be agreed upon by the Joint Committee through a specific agreement for each project prior to any proposed diversion. However, should there be a surplus quantity of water available in excess of the proposed uses of all Parties in any dry season, verified and unanimously confirmed as such by the joint Committee, an inter basin diversion of the surplus could be made subject to prior consultation.

¹⁰¹ MRC, 'Procedural Rules for Mekong Water Diplomacy: Procedures for Notification, Prior Consultation and Agreement' (MRC, 2018) <<http://www.mrcmekong.org/assets/Publications/PNPCA-brochure-11th-design-final.pdf>> accessed 12 October 2019











Type of River	Season	Scope of water-use	Required procedure
 Mainstream	 Dry	Inter-basin (from the Mekong basin to another basin)	 Specific Agreement
		Intra-basin (within the Mekong basin)	 Prior Consultation
	 Wet	Inter-basin (from the Mekong basin to another basin)	 Prior Consultation
		Intra-basin (within the Mekong basin)	 Notification
 Tributary	 Both	Both inter and intra-basin	 Notification

Figure 1: Factors and situations that necessitate States to notify and consult other States prior to implementation

Source: Procedural Rules for Mekong Water Diplomacy: Procedures for Notification, Prior Consultation and Agreement¹⁰²

*Please note that Prior Consultation = Notification + Consultation.¹⁰³

Although notifications must only be made to the JC for planned inter and intra-basin uses of the Mekong River (in both dry and wet seasons), in addition to intra-basin usage of the Mekong River mainstream in the wet season, both the JC and adjoining States must be consulted in advance when intra-basin and inter-basin uses of the mainstream are planned in the dry season and wet season, respectively.¹⁰⁴ Cases that require all States involved to ratify a particular agreement are where the project either involves inter-basin use or there are plans to divert the Mekong River mainstream to a different water basin.¹⁰⁵

In accordance with Article 5 of the 1995 Mekong Agreement, Section 5.1 of the PNPCA stipulates that States must consult both the JC and adjacent States in advance regarding the nature of their plans to use the water where it consists of:

- a. Inter-basin diversion from mainstream in the wet season;

¹⁰² Ibid

¹⁰³ 1995 Mekong Agreement, Chapter II:

Prior Consultation: Timely notification plus additional data and information to the Joint Committee as provided in the Rules for Water Utilization and Inter-Basin Diversion under Article 26, that would allow other member riparians to discuss and evaluate the impact of the proposed use upon their use of water and any other affects. Which is the basis for arriving at an agreement. Prior-consultation is neither a right to veto the use nor unilateral right to use water by any riparian without taking into account other's riparian rights.

¹⁰⁴ 1995 Mekong Agreement, Article 5

¹⁰⁵ Ibid

- b. Intra-basin uses of the mainstream in the dry season; and
- c. Inter-basin diversion of the excess volume of water in the dry season.¹⁰⁶

Due to the fact that the large-scales dams planned to be constructed on the Mekong River mainstream (which includes the Xayaburi Project) are evaluated as being intra-basin usage of the Mekong River mainstream in both wet and dry seasons, according to the PNPCA, both notification and advance consultation are required.¹⁰⁷

Before the Xayaburi Project, hydropower plants situated in the LMB were only built on Mekong Basin tributaries (Pak Mun, Yali Falls, Sesan, Xepian Xenamnoi etc.)¹⁰⁸; therefore, based on the Mekong Agreement, it was not necessary to launch a consultation process in advance. On the other hand, the Xayaburi Project represented the first time that a dam had been built on the mainstream section of the Mekong River; resultantly, it is the first example of a large-scale dam situated on the Mekong River mainstream that was obliged to undergo “prior-consultation” according to the PNPCA.

2.2.3 What Procedural Obligations are States Required to Undertake

According to the PNPCA Prior to Implementing Large-Scale Hydropower Development Projects?

As stipulated in the PNPCA, prior to implementing large-scale hydropower development projects on the LMB mainstream, the State intending to do so is obliged to provide notification to the MRC Secretariat (through the NMC) regarding the suggested project and deliver the necessary documentation at an appropriate time (Section 5.4.1 of the PNPCA).¹⁰⁹ In this case, an appropriate time implies that the MRC Secretariat must be notified at least six months prior to the launch of the project (Section I.A.1 of the PNPCA Guidelines).¹¹⁰

With regard to what the notification should contain, the documentation accompanying the notification submission must include a feasibility study report, plan of implementation, timeline, and any other pertinent information (Section 4.2 of the PNPCA).¹¹¹ Additionally, it is recommended in the PNPCA Guidelines that such documentation should incorporate a summary of impact evaluation, which could be an

¹⁰⁶ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.1

¹⁰⁷ Yumiko Yasuda, *Rules, Norms and NGO Advocacy Strategies: Hydropower Development on the Mekong River* (Earthscan Studies in Water Resource Management, Routledge 2015) 90-91

¹⁰⁸ EarthRights International, 'Land, Water, Rights: Voices from the Tibetan Plateau to the Mekong Delta' (*EarthRights International*, 2012) <<https://earthrights.org/wp-content/uploads/documents/land-water-rights.pdf>> accessed 22 September 2021

¹⁰⁹ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.1

¹¹⁰ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.A.1

¹¹¹ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 4.2

IEE or EIA, as well as technical information for assessment (Section I.A.2 and I.B.2 of the PNPCA Guidelines).¹¹² After the Secretariat receives the documentation, it can take around one month to ensure that the documents are complete, after which, the notification is forwarded to JC and relevant States for their assessment and response.¹¹³

The advance consultation commences after the notification and project documentation has been received by each of the JC members (Section 5.4.2 of the PNPCA).¹¹⁴ Once the documents have been received by the notified States, they are allowed a period of six months for the purpose of reviewing and assessing the possible effects the project may cause and recommending any suitable actions for preventing damage (Section 5.5 of the PNPCA).¹¹⁵ If the notification has not been provided, the relevant States are empowered to request the JC to demand the NMC of the State proposing the project to notify them accordingly (Section 5.6 of the PNPCA).¹¹⁶

While the consultation process is ongoing, the States who received the notification can submit a request for further details, a presentation or consultation, and/or a site inspection of the proposed site to assess the potential consequences.¹¹⁷ The Secretariat will assign a special Working Group for the purpose of reviewing certain aspects, including the safety of the dam, fish migration and sediment flow patterns as well as the potential ecological effects.¹¹⁸ This will be followed by a consultation process that will occur both regionally (performed by the MRC Secretariate) and nationally (performed by the NMC)¹¹⁹

Once the advance consultation is complete, the State receiving the notification will deliver a response document to the JC along with their feedback and viewpoints (Section 5.4.2 of the PNPCA)¹²⁰; after the consultation process has ended, the JC will attempt to establish a “unanimous agreement” regarding the specific conditions that could be imposed on the suggested project (Section 5.4.3 of the PNPCA).¹²¹ Nevertheless, it is

¹¹² Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.A.2; Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.B.2

¹¹³ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.1

¹¹⁴ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.2

¹¹⁵ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.5

¹¹⁶ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.6

¹¹⁷ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.2

¹¹⁸ Ibid

¹¹⁹ MRC, 'Procedural Rules for Mekong Water Diplomacy: Procedures for Notification, Prior Consultation and Agreement' Note

¹²⁰ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.2

¹²¹ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.3

important to note that this agreement does not mean that the project is approved or disapproved, but instead, it allows the States receiving the notification to express their views and offer suggestions for actions to prevent possible harmful effects.¹²² If additional time is required, it is possible to extend the six-month period of advance consultation by a further six months (section 5.5 of the PNPCA)¹²³

Ultimately, if it is not possible to reach an agreement, the case will be referred to the MRC Council by the JC in order to settle the dispute according to the Article 34 (resolution by the MRC) of the 1995 Mekong Agreement.¹²⁴ In the event that the dispute cannot be resolved by the MRC, the case will subsequently be referred to the relevant States, who have the option to seek resolution to the dispute through negotiations via diplomacy or mediation (Article 35 of the 1995 Mekong Agreement).¹²⁵

2.2.4 Where is the PNPCA Process Deficient and Vague?

Despite the fact that the development of the PNPCA was conducted by the technical drafting committee of the MRC with the objective of meeting the aims of the 1995 Mekong Agreement in procedural terms, certain deficiencies and a lack of clarity can be seen in particular aspects of the PNPCA as well as the accompanying Guidelines.

First, the PNPCA stipulates that the advance consultation process commences when the document is initially received, although there is no specification in terms of which Parties require notification (Section I.B.1, PNPCA Guidelines).¹²⁶ Hence, this may lead to confusion regarding whether the time starts from the moment when the documentation is delivered to the National Mekong Committee (NMC), the MRC Secretary, the Joint Committee or to the Notified States.

Second, although it is necessary to submit the consultation documentation to the Joint Committee a minimum of six months prior to starting the project, it is recognised that the Secretariat can demand it up to one month prior to the project being implemented (Section I.B.1, PNPCA Guidelines).¹²⁷ The terminology employed within the PNPCA Guidelines is ambiguous in this section as the States being notified are normally obliged to allocate a minimum of six months for the consultation period (including reviewing,

¹²² Prior-consultation is neither a right to veto a use nor a unilateral right to use water by any riparian without taking into account other riparian's rights.

¹²³ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.6

¹²⁴ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 34

¹²⁵ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 35

¹²⁶ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.B.1

¹²⁷ Ibid

evaluating and responding); however, it can take up to a month for the internal process under the Secretariat to be completed, and if that month is included, it is possible that the project may have already started before the consultation process has finished.

Third, it is stipulated in the PNPCA that suggested projects should not be implemented by the States while the process of notifying and advance consultation is ongoing (Section 5.4.3 of the PNPCA)¹²⁸, although it does not specify whether the “preparation or preparatory works”, including roads and site access are considered aspects of implementation.¹²⁹

Fourth, if the notification’s content and format as well as the documentation that must be provided according to Section I.A.2 of the PNPCA Guidelines¹³⁰ are considered, there is no uniform standard regarding what can be defined as “relevant” data “necessary” for the consultation process; in reality, it is hard for the States submitting the notification to collect and offer “all” possible data for the submission inside six months of the planned project start date.¹³¹ It is questionable whether this limited timeframe will be sufficient for the State making the notification to gather enough data prior to submitting the documentation. Furthermore, in the event that an extension to the six-month period is required, this must still be approved by the JC and the States receiving the notification.

Fifth, there is a lack of clarity in the PNPCA regarding potential solutions (except for possible extensions) with respect to the results or the conclusion to the consultations in situations where: (i) an agreement cannot be reached between the States and relevant Parties and/or (ii) the extension has been declined. No provision exists that authorises the MRC to approve an injunction or interim order, or apply sanctions in cases where the decision of the Joint Committee, the Mekong Agreement or the PNPCA itself are breached. The 1995 Mekong Agreement Provisions only state that the Parties have the alternative option to seek a dispute settlement according to Article 34 (resolution by the MRC)¹³² and Article 35 (resolution by governments via “diplomatic channels” and “mediation” under international law) of the 1995 Mekong Agreement.¹³³

Sixth, the PNPCA is not applicable to China and Myanmar as they have not ratified the 1995 Mekong Agreement (neither country is included in the MRC): the status of these countries is merely maintained as “upstream partners” and/or “dialogue partners”

¹²⁸ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.3

¹²⁹ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy'

¹³⁰ Guidelines on Implementation of the Procedures on Notification, Prior Consultation and Agreement (PNPCA Guidelines) (adopted on 31 August 2005 at the Twenty-Second Meeting of the MRC Joint Committee in Vientienne, Laos) Section I.A.2

¹³¹ Ibid

¹³² 1995 Mekong Agreement, Article 34

¹³³ 1995 Mekong Agreement, Article 35

to the Lower Mekong Region¹³⁴; on the other hand, the Upper Mekong River is exclusively recognised by China as its state river (Lancang River).¹³⁵ Certain regional bodies, including the Mekong River Commission (MRC), the Greater Mekong Subregion Program (the GMS Program) as well as the South East Asian Nations (ASEAN) have been established to enable the riparian states to cooperate more effectively.¹³⁶ Due to the fact that Myanmar and China are not MRC members, they are not legally obliged to give prior notification and consultation as stipulated in the PNPCA and the 1995 Mekong Agreement. Nevertheless, to increase the efficiency of the process of consulting, notifying and negotiating among all the States that border the Mekong River, only focusing on the Lower Mekong areas would not be enough. It is important to encourage and foster communication and collaboration among all riparian States in terms of the use of the Mekong River, avoiding risk and damage and seeking resolution in good faith; furthermore, to ensure the effectiveness of this cooperation, the complete exclusion of Myanmar and China from these processes should be prevented.

Lastly, although the Guidelines do suggest the IEE and EIA and they are inferred under customary international law, the terms of the 1995 Mekong Agreement as well as the PNPCA do not make them obligatory or legally-binding. Only having a national EIA may not be enough in order to obtain data regarding “transboundary effects”; furthermore, EIAs have been established in all states that are grounded on the respective national standards and legislations. Therefore, the aim of cooperation as well as the practice of transboundary EIA and SEA with the involvement of the public should represent a more robust different approach to make the process of negotiating and consulting in the Mekong more effective.

In summary, the timeframe and terminology employed in the PNPCA Guidelines ambiguous; this has led to confusion surrounding the process of notifying and advance consultation according to the PNPCA, rendering it complex to implement in practice.

2.3 The Xayaburi Dam’s PNPCA Process: Problems and Challenges

The PNPCA process of the Xayaburi Project commenced when the MRC Secretariat was notified by the LAOS of its intention to construct the dam, and delivered the notification form along with associated documentation on 20 September 2010.¹³⁷ After receiving this notification and documentation, which contained a feasibility study in addition to both the EIA and SIA reports, the Secretariat forwarded them to JC on 22

¹³⁴ Qi Gao, *A Procedural Framework for Transboundary Water Management in the Mekong River Basin* (Brill 2014) 4-6

¹³⁵ Ibid

¹³⁶ Ibid

¹³⁷ MRC, 'Xayaburi Hydropower Project Prior Consultation Process' (*Mekong River Commission (MRC)*, 15th Dec 2010 - 22nd Apr 2011) <<http://www.mrcmekong.org/topics/pnpca-prior-consultation/xayaburi-hydropower-project-prior-consultation-process/>> accessed 8 November 2018

October 2010.¹³⁸ Although the documentation was disseminated by the JC to the LMB States on 22 April 2011, they were not made publicly available.¹³⁹ In October 2010, the JC established the PNPCA Working Group for the purpose of implementing and overseeing the PNPCA procedures.¹⁴⁰ In Article 5.5.1 of the PNPCA, it is stated that the time allotted for advance consultation will be six months starting from the time that the documents on advance consultation are received, and the PNPCA process for the Xayaburi dam was provisionally planned to be finished by 22 April 2011.

In the first six months of the process, Task Groups were allocated by the MRC Secretariat, which consisted of outside specialists tasked with conducting “technical reviews” of the Xayaburi Dam with regard to aquatic resources, sediment control, water standards, as well as dam navigation and safety.¹⁴¹ In March 2011, the “Prior-consultation Project Review Report” was published by the MRC, which presented the technical review findings as well as recommendations on additional studies on cross-border effects and mitigation strategies prior to implementing the Xayaburi Project.¹⁴² The report findings corresponded to the SEA report of the ICEM on the 12 dams situated on the mainstream section of the Mekong River published in 2010, which suggested that additional studies were required while also recommending that all large-scale dams on the river be delayed for 10 years.¹⁴³

On 17 April 2011, it was reported in the Bangkok Post that although negotiations surrounding the Xayaburi Dam under the PNPCA were still ongoing, work to construct the access road for the project site had commenced.¹⁴⁴ However, Viraphonh Viravong, the Director General of Lao’s Department of Electricity, Ministry of Mines, contended that it was not uncommon for such roads to be constructed in Laos; its purpose was to develop the dam location as well as the Province of Xayaburi.¹⁴⁵

¹³⁸ MRC Secretariat, 'Prior Consultation Project Review Report: Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River' (MRC, 24 March 2011) <<http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>> accessed 5 November 2018; Annex IA

¹³⁹ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project' (Mekong River Commission (MRC), 24 March 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>> accessed 10 November 2018

¹⁴⁰ MRC Secretariat, 'Prior Consultation Project Review Report: Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River' Note...

¹⁴¹ MRC, 'Annex 1C: International, Regional and MRC Secretariat Experts' (MRC, 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Annex1C-International-Regional-MRCS-Experts.pdf>> accessed 2 December 2019

¹⁴² MRC Secretariat, 'Prior Consultation Project Review Report: Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River', Note...

¹⁴³ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report' (MRC, October 2010) <<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-FR-summary-13oct.pdf>> accessed 25 July 2019

¹⁴⁴ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy', Note...

¹⁴⁵ Bangkok Post, 'Early Work on Dam 'Normal Practice': Laos Defends Jumping Gun on Xayaburi Construction Work' (Bangkok Post, 8 May 2011) <<https://www.bangkokpost.com/thailand/local/235879/early-work-on-dam-normal-practice>> accessed 15 December 2019

The JC convened a special session on 19 April 2011, at which no consensus could be reached among the LMB States regarding the Xayaburi Dam, even though the six-month threshold for the PNPCA process was close to being completed. As part of its formal response, Cambodia requested a thorough study to assess the cross-border and cumulative effects, in addition to increased focus on sharing benefits and disclosing information.¹⁴⁶ Additionally, Thailand expressed concern regarding the lack of clarity in terms of mitigation strategies in the event that the Xayaburi Dam was eventually constructed by Laos.¹⁴⁷ On the other hand, Vietnam emphasised that the Xayaburi Project had not been adequately evaluated and assessments had not taken into account the effects on the Mekong Delta or States in downstream regions.¹⁴⁸

The LMB States consented to an extension of the PNPCA process – additional discussions regarding the Xayaburi Project would be scheduled involving ministers from the respective States, while Laos was required to consider the viewpoints and opinions of the other States before it continued with the project.¹⁴⁹ However, at this meeting, Laos was insistent that the Xayaburi Project had ended, and if the process was extended for the purpose of conducting additional studies that required greater than six months, the concerns of all Parties would not be satisfied.¹⁵⁰

While Thailand, Vietnam and Cambodia responded by requesting an extension, they were not specific in terms of its length. All decisions regarding the authorisation of extensions should be made by the JC – as detailed in Section 5.5 of the PNPCA.¹⁵¹ As stipulated in Article 27 of the 1995 Mekong Agreement, ‘a decision of the Joint committee shall be unanimous as otherwise provided in its rules of procedures.’¹⁵² In reality, it is difficult for all member States of the JC to reach a unanimous decision, as extension could be blocked by the member State who proposed the project.

¹⁴⁶ H. E. Mr. Kol Vathana (Communication Focal Point of the Kingdom of Cambodia), 'Mekong River Commission Procedures for Notification, Prior Consultation and Agreement: Form/Format for Reply to Prior Consultation for the Xayaburi Project' (*Mekong River Commission*, 13 April 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Cambodia-Reply-Form.pdf>> accessed 2 January 2020

¹⁴⁷ Burachat Buasuwan (Secretary General of the Thai Ministry of Natural Resources and Environment), 'Mekong River Commission Procedures for Notification, Prior Consultation and Agreement: Form/Format for Reply to Prior Consultation for the Xayaburi Project' (*Mekong River Commission*, April 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Thailand-Reply-Form.pdf>> accessed 2 January 2020

¹⁴⁸ Dr. Le Duc Trung (Director General of Vietnam National Mekong Committee), 'Mekong River Commission Procedures for Notification, Prior Consultation and Agreement: Form/Format for Reply to Prior Consultation for the Xayaburi Project' (*Mekong River Commission*, 15 April 2011,) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Viet-Nam-Reply-Form.pdf>> accessed 2 January 2020

¹⁴⁹ MRC, 'Lower Mekong Countries Take Prior Consultation on Xayaburi Project to Ministerial Level' (*Mekong River Commission*, 19 April 2011) <<http://www.mrcmekong.org/news-and-events/news/lower-mekong-countries-take-prior-consultation-on-xayaburi-project-to-ministerial-level/>> accessed 5 January 2020

¹⁵⁰ Ibid

¹⁵¹ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.5

¹⁵² Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 27

On 5 May 2011, Laos commissioned Pöyry to evaluate whether the Xayaburi Project was compliant with the MRC Stand: The Preliminary Design Guidance for the Proposed mainstream Dam in the Lower Mekong Basin.¹⁵³ On 8 August 2011, Pöyry completed the report, concluding that the Xayaburi Project was primarily compliant with the standard of the MRC.¹⁵⁴ Nevertheless, it determined that another 40 technical and scientific studies were required, but proposed that such studies could be performed either while the Xayaburi Dam was being constructed or upon its completion.¹⁵⁵ It was also recognised in the report that in the Xayaburi Dam case, Laos was solely responsible for deciding whether the project should proceed.¹⁵⁶

The 18th ASEAN summit was held on 7 May 2011, at which the Prime Minister of Laos (Thongsingh Thammavong) provided assurances to the Prime Minister of Vietnam (Nguyen Tan Dung) that Laos had decided to apply a temporary suspension to the Xayaburi construction project until such time that an agreement could be reached.¹⁵⁷ Nevertheless, on 8 June 2011, a letter was sent by the Ministry of Energy and Mines for Laos to the Xayaburi Power Company Ltd. as well as Ch.Karnchang indicating that the PNPCA process had been concluded at the meeting of the JC, implying that Laos would be proceeding with the project implementation.¹⁵⁸

Letters were sent by both the international law firm Perkins Coie, (instructed by International River) as well as the Mekong Legal Network to the MRC and the Foreign Ministers of the LMB States requesting a legal review and that they were concerned about the decision of Laos to end the PNPCA process earlier than planned, and that their unilateral decision to commence building the Xayaburi Dam represented a violation of international law as well as the State's obligations detailed in both the 1995 Mekong Agreement and the PNPCA.¹⁵⁹ The MRC Council convened in December 2011 attended by ministers of the respective States, where the decision was made by all LMB States

¹⁵³ International River, 'Sidestepping Science: Review of the Pöyry: Report on the Xayaburi Dam' 2011) <<https://www.internationalrivers.org/resources/sidestepping-science-review-of-the-pöyry-report-on-the-xayaburi-dam-3372>> accessed 2 January 2020

¹⁵⁴ Pöyry Energy AG, 'Compliance Report: Government of Lao PDR (Main Report): Xayaburi Hydroelectric Power Project, Run-of-River Plant (Report Number 9A000248), ' (*International River*, 9 August 2011) <https://www.internationalrivers.org/sites/default/files/attached-files/poyry_xayaburi_compliance_report.pdf> accessed 3 January 2019

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Thanh Nien News, 'Vietnam Hails Laos for Suspending Xayaburi Dam' (*Thanh Nien News*, 8 May 2011) <<http://www.thanhniennews.com/politics/vietnam-hails-laos-for-suspending-xayaburi-dam-12416.html>> accessed 15 December 2019

¹⁵⁸ Thomas Miller, 'Laos Goes 'Rogue' on Dam ' (*The Phnom Penh Post*, 24 June 2011) <<https://www.phnompenhpost.com/national/laos-goes-rogue-dam>> accessed 2 January 2020

¹⁵⁹ Stephen J.Higgs (Perkins Coie), 'Re: PNPCA Process for Xayaburi Dam' (*International River*, 5 July 2011) <<<https://www.internationalrivers.org/files/attached-files/xayaburipnpcaprocess.pdf>> accessed 5 January 2020; Mekong Legal Network, 'Briefing Note on Duties of Notification, Prior Consultation, and Assessment Arising From International Law in Relation to the Xayaburi Dam Project' (*OpenDevelopment Thailand*, 2011) <https://data.thailand.opendevlopmentmekong.net/library_record/duties-of-notification-prior-consultation-and-assessment-arising-from-international-law> accessed 5 January 2020

that the Xayaburi Dam construction project should be suspended pending additional studies.¹⁶⁰

Seeking legitimisation for its actions, in January 2012, Laos commissioned the Compagnie Nationale du Rhône (CNR) to perform a peer review of the report published by Pöyry, which reached the conclusion that the Xayaburi Project was compliant with the guidelines of the MRC and additional practices.¹⁶¹ However, it was acknowledged by the CNR that the Pöyry report collated had merely reviewed information already available about the project, and no consideration was given to examining factors such as the migration of fish or additional cross-border effects.

Between 16 and 17 July 2012, representatives from other countries were invited to Laos by the Ministry of Energy and Mines, including diplomats, donors and development partners for the purpose of visiting the proposed location of the Xayaburi.¹⁶² While they were visiting, Laos reiterated that while the Xayaburi Dam Project would proceed as scheduled, additional studies would be conducted during the process.¹⁶³ On 18 July 2012, Asawin Konsiri, Chairman of Ch.Karnchang, dismissed the rumours that the project had been suspended.¹⁶⁴ The firm proceeded with its construction activities, promising that the Xayaburi Project would be finished on time.¹⁶⁵

On 7 August 2012, a lawsuit was filed by villages in Thailand at the country's Administrative Court claiming that both the EGAT and relevant governmental agencies had breached their constitutional rights by ratifying the PPA and approving the financial investment in the Xayaburi project with no prior consultation or public disclosure of the project specifications, even while the PNPCA process was still ongoing.¹⁶⁶ The aforementioned case will be reviewed in more depth in Chapter 4.

On 7 November 2012, Laos officially broke ground at the Xayaburi site at a ceremony attended by representatives from the other riparian States.¹⁶⁷ On 17 January 2013, the Annual General Meeting of the MRC was held, at which both Vietnam and

¹⁶⁰ MRC, 'Minutes of the Eighteenth Meeting of the MRC Council, 8 December 2011 in Siem Reap, Cambodia' (8 December 2011) <<http://www.mrcmekong.org/assets/Publications/governance/Minutes-of-the-18th-Council.pdf>> accessed 4 January 2020; AsianScientist, 'Xayaburi Dam Decision Delayed, Pending Further Studies' (*AsianScientist*, 8 December 2011) <<https://www.asianscientist.com/2011/12/topnews/xayaburi-dam-northern-laos-delayed-mekong-river-commission-2011/>> accessed 5 January 2020

¹⁶¹ International River, 'Xayaburi Dam: Timeline of Events' (*International River*, April 2014) <https://www.internationalrivers.org/sites/default/files/attached-files/xayaburi_dam_timeline_of_events_april_2014_0.pdf> accessed 9 January 2020

¹⁶² Ibid

¹⁶³ Dararat Weerapong, 'MWD Considers Local and International Communities' Concern Over Xayaburi Dam' (*IUCN*, 1 August 2012) <<https://www.iucn.org/content/mwd-considers-local-and-international-communities-concerns-over-xayaburi-dam>> accessed 6 January 2020

¹⁶⁴ Nareerat Wiriyapong, 'CK Shrug Off Dam Report' (*Bangkok Post*, 18 July 2012)

<<https://www.bangkokpost.com/business/302993/ck-shrugs-off-dam-report>> accessed 8 January 2020

¹⁶⁵ Ibid

¹⁶⁶ Michelle Nijhuis, 'Dam Projects Ignite A legal Battle Over Mekong River's Future' (*National Geographic*, 12 July 2014) <<https://www.nationalgeographic.com/news/special-features/2014/07/140711-mekong-river-laos-thailand-dams-environment/>> accessed 5 January 2020

¹⁶⁷ International River, 'Xayaburi Dam: Timeline of Events', Note...

Cambodia argued that the 1995 Mekong Agreement and PNPCA had been misconstrued by Laos when it decided to proceed with the Xayaburi Project without waiting for the advance consultation to end.¹⁶⁸ Unfortunately, Laos did not consent to sign the minutes once the meeting had concluded, indicating that it did not recognise the outcomes of the meeting and the objection to the Xayaburi Dam.¹⁶⁹

In summary, regardless of whether it was not possible to conclude the PNPCA process of the Xayaburi Dam and an extension had been granted, or whether it concluded on 22 April 2011, Laos made the unilateral decision to start constructing the Xayaburi Dam. Resultantly, the project reached completion and became completely operational in October 2019.¹⁷⁰

Although the Xayaburi Dam was built and put into operation on 29th October 2019, it has created numerous critical challenges under the LMB's regional law. The events concerning the Xayaburi Dam under the PNPCA raised a number of questions on how procedural law relating to transboundary water project in the LMB should be applied and interpreted: How long should the notification and consultation period be? When should the notification be submitted? What documents and information must be provided and exchanged during the notification and consultation period? Does it include an EIA? What should the scope and content of an EIA be for a project that could have significant detrimental transboundary effect? What should be done if the watercourse States are unable reach an agreement within a specified time-frame? Is it permissible for a propped State to proceed with the project without the permission of possibly impacted States? What are the public's rights in terms of obtaining environmental information, participating in decision-making process on environmental projects that may affect them, and seeking redress when their rights are violated? Should such rights extend to possibly impacted individuals who live on the other side of the border?

¹⁶⁸ Amy Sawitta Lefevre and Paul Carlsten, 'Vietnam and Cambodia Hit Back at Landmark Laos Dam' (*Reuter*, 18 January 2013) <<https://www.reuters.com/article/us-laos-dam/vietnam-and-cambodia-hit-back-at-landmark-laos-dam-idUSBRE90H0B220130118>> accessed 8 January 2020

¹⁶⁹ Ibid; Kirk Hebertson, 'Mekong Countries at Odds Over Mega-Dams' (*Fair Observer*, 5 February 2013) <https://www.fairobserver.com/region/central_south_asia/mekong-countries-odds-over-mega-dams/> accessed 8 January 2020

¹⁷⁰ Radio Free Asia, 'Laos's Controversial Xayaburi Dam on Mekong River Begins Operations' (*Radio Free Asia*, 29 October 2019) <<https://www.rfa.org/english/news/laos/xayaburi-dam-begins-operations-10292019175158.html>> accessed 11 January 2020

2.4 How is the Obligation to Notify and Consult Recognised under International Law?

2.4.1 Soft Law

One of the first soft law instruments in the area of international watercourses was the Helsinki Rules on the Uses of the Water of International Rivers 1966 (Helsinki Rules) developed by the International Law Association (ILA) in the field of international watercourses.¹⁷¹ In terms of notifying and consulting, Article XXIX of the Helsinki Rules states that irrespective of where they are located within a drainage basin, States are required to provide other States in the Basin, whose interests could be significantly impacted, notification of any planned construction or project that could change the basin's regime¹⁷²; furthermore, the State receiving the notification should be given an appropriate time for the purpose of assessing the planned project and to provide its opinions.¹⁷³

Subsequently, the Berlin Rules on Water Resources were adopted by the Resources by the ILA in 2004.¹⁷⁴ According to Articles 57 and 58 of the Berlin Rules, States are required to provide prompt notification and consultation to other States regarding any programmes, plans, projects or activities that could have a substantial negative impact on them, in order to find a mutually satisfactory resolution to possible problems¹⁷⁵ and consult other States of a programme, plan, project and activity that may adversely affect them significantly, so that they can reach an equitable solution on potential issues.¹⁷⁶

Although both the Berlin and Helsinki Rules are merely guidelines/documents relating to the ILA's work and are not legally enforceable, both of them convey the principles considered by the ILA to be developing norms/rules of customary international law.¹⁷⁷ Due to the fact that the ILA is also acknowledged for the role that it plays in terms of developing and articulating "cogens" via its works, the statements, legal

¹⁷¹ Alistair Rieu-Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (IWA Publishing 2005) 143

¹⁷² Rules on the Uses of the Waters of International Rivers (Helsinki Rules), adopted by the International Law Association at Helsinki in 1966 (I.L.A., Report of the Fifty-Second Conference, 1966, 477ff.) Article XXIX(2)

¹⁷³ Rules on the Uses of the Waters of International Rivers (Helsinki Rules), adopted by the International Law Association at Helsinki in 1966 (I.L.A., Report of the Fifty-Second Conference, 1966, 477ff.) Article XXIX(3)

¹⁷⁴ Salman Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law' (2007) 23(4) *Water Resources Development* 625-640

¹⁷⁵ Rules on Water Resources 2004 (Berlin Rules), adopted by the International Law Association at Berlin in 2004 (I.L.A., Report of the Seventy-First Conference (2004), 334) Article 57

¹⁷⁶ Rules on Water Resources 2004 (Berlin Rules), adopted by the International Law Association at Berlin in 2004 (I.L.A., Report of the Seventy-First Conference (2004), 334) Article 58

¹⁷⁷ Joseph Dellapenna and Joyeeta Gupta, 'Toward Global Law on Water' (2008) 14(4) *Global Governance* 437-453; Salman Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law', *Supra* Note 104; Gerhard Loibl, Joseph W Dellapenna and Malgosia Fitzmaurice, 'International Law Association Berlin Conference (2004) on Water Resources Law: Berlin Rules on Water Resources' (*California Water Services*, 2004) <http://www.cawater-info.net/library/eng/berlin_rules.pdf> accessed 12 January 2020; Salman Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law'

recommendations as well as the principles and rules of the ILA are regarded as being the source from which customary international law is derived.¹⁷⁸

Recommendation 51(b)(i) of the Stockholm Declaration published in 1972 regarding the obligation to notify and consult regarding scheduled projects impacting mutual watercourses suggested that,

when major water resource activities are contemplated that may have a significant environmental effect on another country, the other country should be notified well in advance of the activities envisaged.¹⁷⁹

The obligation to provide advance notification and consultation regarding projects that could have cross-border effects received increased recognition according to Principle 19 of the Rio Declaration, which recognised that:

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary effect and shall consult with those States at an early stage and in good faith.¹⁸⁰

According to the Principle, the requirement to provide consultation and notification is associated with the obligation to prevent harm (rule regarding no substantial damage).¹⁸¹ This principle was derived from the desire to honour the territorial sovereignty of adjoining States when using mutual watercourses outside the field of national jurisdiction – the principle of the limited territorial sovereignty.¹⁸² Principle 2 of the Rio Declaration states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developments policies, and the responsibility to ensure that activities

¹⁷⁸ M. H. Mendelson and Rein Mullerson, 'International Law Association London Conference (2000): Final Report of the Committee on the Formation of Customary (General International Law) on the Statements of Principles Applicable to the Formation of General Customary International Law' (*University of Michigan*, 2000) <<https://www.law.umich.edu/facultyhome/drwcasesbook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf>> accessed 15 January 2020

¹⁷⁹ United Nations Conference on the Human Environment (Stockholm Declaration) approved on 15 December 1972 (UN Doc. A/RES/2994); 11 ILM 1417 (1972) Recommendation 51(b)(i)

¹⁸⁰ United Nations Conference on Environment and Development (Rio Declaration) approved on 5 June 1992 (UN Doc. A/CONF.151/26 (vol. I)); 31 ILM 874 (1992) Principle 19

¹⁸¹ Owen McIntyre, 'Sovereignty and the Procedural Rules of International Water Law' in Owen McIntyre and Tedesse Kasse Woldetsad (eds), *A History of Water Series III (Volume 2) on Sovereignty and International Water Law* (A History of Water Series III (Volume 2) on Sovereignty and International Water Law, I.B Tauris & Co.Ltd 2015) 312-320

¹⁸² *Ibid*

within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁸³

Resultantly, the fundamental aim of the requirement to provide notification and consultation is to ensure that adjoining States are protected from possible substantial cross-border harm resulting from the planned activities or projects.¹⁸⁴ Although such soft law rules and declarations are not legally enforceable in themselves, they have played an important role in the gradual advancement of environmental agreements reached internationally and regionally regarding the requirement to provide notification and consultation on proposed works and projects that could have possible substantial effects.¹⁸⁵

2.4.2 Treaty Law

The requirement to give notification and consultation has been included in various cross-border waterway treaties. The following are examples from various different regions.

One of the earliest instruments in Africa that can be mentioned is Article 12 of the Agreement related to the River Niger Commission and the Navigation and Transport on the River Niger 1964, according to which States have an obligation to advise the Commission with sufficient notice and advance consultation of all studies and works of the planned projects on either the tributaries or mainstream of the River Niger that could potentially biologically impact the ecological characteristics of the river.¹⁸⁶ Other examples include Article 4 of the Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) 2000¹⁸⁷ as well as Article 10 of the Charter of Waters of the Senegal River 2002.¹⁸⁸

In the context of Asia, Article 5 of the 1995 Mekong Agreement as well as the PNPCA incorporate a requirement to provide notification and consultation (as mentioned

¹⁸³ Rio Declaration on Environment and Development 1992 (Rio Declaration), approved on 5 June 1992 (UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992) Principle 17

¹⁸⁴ Tim Stephen, *International Courts and Environmental Protection* (Cambridge Studies in International Comparative Law, Cambridge University Press 2009) 123-125

¹⁸⁵ Owen McIntyre, *Environmental Protection of International Watercourses Under International Law* (Ashgate Publishing Limited 2007) 324-327 ; Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12(2) Michigan Journal of Law 420-435

¹⁸⁶ Agreement concerning the River Niger Commission and the Navigation and Transport on the River Niger, Niamey (adopted on 25 November 1964, entered into force on 12 April 1966) 587 UNTS 8507 (1964) Article 12

¹⁸⁷ Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) 2000 (adopted on 7 August 2000, entered into force on 22 September 2003) 40 ILM 321 (2000) Article 4

¹⁸⁸ Charter of Waters of the Senegal River 2002 (adopted on May 2002) Article 10 [No Official Citation] Document available online at: <<https://iea.uoregon.edu/treaty-text/2002-senegalriverwatercharterentxt>

previously in Section 1 of this Chapter).¹⁸⁹ Another case that can be referenced is Article 7(2) of the Indus Water Treaty 1960 between India and Pakistan, which stipulates that in the event that the State intends to implement any engineering projects on the watercourse that will have a material impact on different States, it is obliged to provide notification to these States of its intentions, and also give them all relevant data to advise them of the characteristics, size and impacts of the project.¹⁹⁰

In the Americas, Article 3 and 4 of the Boundary Waters Treaty 1909 between the United States and Canada¹⁹¹, Article 10(2) of the Great Lakes Water Quality Agreement 1978¹⁹², as well as Article 7 of the Statute of the River Uruguay 1975 can be mentioned.¹⁹³

Within Europe, the obligation to notify and consult is clearly stipulated in Article 6 of the Agreement between Poland and the USSR regarding the Use of Water Resources in Frontier Waters 1964¹⁹⁴, Articles 11 and 12 of the Convention on the Cooperation for the Protection and Sustainable Use of the Danube River 1994¹⁹⁵, and Article 14 of the Convention on the Protection of the Rhine 1999.¹⁹⁶

Two international watercourse agreements that are particularly renowned are the UNECE Water Convention and the UN Watercourses Convention.¹⁹⁷ According to Articles 6 and 10 of the UNECE Water Convention, States are obliged to facilitate the 'exchange of information'¹⁹⁸, in a timely manner on matters contained with the Convention provisions, in addition to consultations in an honest and proper way.¹⁹⁹ Likewise, Part III the UN Watercourses Convention stipulates comprehensive criteria regarding the responsibilities of the States in terms of notifying and consulting each other when proposing projects or

¹⁸⁹ 1995 Mekong Agreement, Article 5

¹⁹⁰ Indus Water Treaty 1960, Karachi (adopted on 19 September 1960, entered into force on 12 January 1961) 419 UNTS 125 (1960) Article 7(2)

¹⁹¹ Boundary Waters Treaty 1909, Washington (adopted on 11 January 1909, entered into force on 5 May 1910) 36 Stat. 2448 (1909) Article 3, Article 4

¹⁹² Great Lakes Water Quality Agreement 1978, Ottawa (adopted on 22 November 1978) UNTS 1153 (1978) Article 10(2)

¹⁹³ Statute of the River Uruguay 1975, Salto (adopted on 25 February 1975, entered into force on 18 September 1976) 1295 UNTS 340 (1975) Article 7

¹⁹⁴ Agreement Between the Government of the Polish People's Republic and the Government of the Union of Soviet Socialist Republics Concerning the Use of Water Resources in Frontier Waters 1964, Warsaw (adopted on 17 July 1964, entered into force on 16 February 1965) 552 UNTS 175 (1964) Article 6

¹⁹⁵ Convention on the Cooperation for the Protection and Sustainable Use of the Danube River 1994, Sofia (adopted on 29 June 1994, entered into force on 22 October 1998) OJL 342/19 (1994) Article 11, Article 12

¹⁹⁶ Convention on the Protection of the Rhine 1999, Bern (adopted on 12 April 1999, entered into force on 1 January 2003) OJL 2000/289 (1999) Article 14

¹⁹⁷ Remy Kinna and Alistair Rieu-Clarke, 'The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?' (2017) 2(1) Brill Research Perspectives in International Water Law 1-84

¹⁹⁸ UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (adopted on 17 March 1992, entered into force on 6 October 1996) 1936 UNTS 269 (1992) (UNECE Water Convention) Article 6

¹⁹⁹ UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (adopted on 17 March 1992, entered into force on 6 October 1996) 1936 UNTS 269 (1992) (UNECE Water Convention) Article 10

planning measures that have the potential to be significantly harmful to cross-border waterways.²⁰⁰ Information on the provisions as well as how the UN Watercourses Convention could assist with improving the process of notifying and giving advance consultation within the LMB will be provided in Section 4 of this chapter.

2.4.3 Case Law

The requirement to provide notification and consultation has been implemented in case law via both international arbitration and litigation. In the following section, the primary cases associated with cross-border waterways will be analysed and an explanation will also be provided regarding the manner in which the principle of harm prevention as well as the requirement to provide notification and consultation are implemented in such cases and *ratio decidendi* of the adjudications delivered by the courts.

In the case of the *Lac Lanoux* Arbitration in France, plans had been developed to implement a project in which a lake would be transformed via the construction of a dam for hydropower generation, which when operational would mean that the course of waterways flowing in the direction of Spain would be diverted.²⁰¹ When delivering its statement, the tribunal recognised the customary norm that a rule exists that prohibits the upstream riparian State from changing the nature of a waterway in a way that is predicted to cause ‘serious harm’ to the downstream riparian States²⁰²; adding that France was obliged to ensure that consultations and negotiations were conducted with Spain before the project was implemented— this requirement is grounded on the treaty law (Treaty of Bayonne 1886 and Arbitration Treaty between France and Spain, signed 10 July 1929) as well as customary law (advance consultation and negotiation).²⁰³ In its judgement, the tribunal ruled that it was not necessary to halt the dam construction as valid evidence was not presented suggesting that the proposed project would adversely affect Spain’s interests²⁰⁴; the requirement to provide notification and consultation in itself did not automatically afford the right for the project to be vetoed.²⁰⁵

In addition to the prevention of harm principle, reference was also made to the provision of notification and consultation in the *Indus Waters Kishenganga Arbitration* in

²⁰⁰ UN Convention on the Law of the Non-Navigational Use of International Watercourses (adopted on 21 May 1997, entered into force on 17 August 2014) 36 ILM 700 (1997) (UN Watercourses Convention) Part III

²⁰¹ *Lac Lanoux Arbitration (France v Spain)* (1957) UN Reports of International Arbitral Awards 12 (UN Adhoc Arbitral Tribunal) 194

²⁰² Ibid, p. 194-280; Elli Louka, *International Environmental Law: Fairness, Effectiveness, and World Order* (Cambridge University Press 2006) 41-43

²⁰³ *Lac Lanoux Arbitration (France v Spain)*, Supra Note 131, p. 197

²⁰⁴ Ibid, p. 308, 337

²⁰⁵ Ibid, p. 127-128

2013.²⁰⁶ The dispute that led to this arbitration was the proposed construction of a hydroelectric plant in India that would have a negative impact on the water flowing from Pakistan.²⁰⁷ When ruling on the case, the Permanent Court of Arbitration affirmed the customary norm of the responsible to prevent, or at a minimum, lessen substantial environmental impacts when engaging in large-scale construction projects.²⁰⁸ Furthermore, it emphasised the significance of the timeline of the notification process by determining the dates in addition to every stage in the communication process among riparian States²⁰⁹ as well as a “critical period” where an accumulation of factors – tenders, obtained funding, government authorisation in certain areas and construction proceeding – has reached a degree of certainty, suggesting that the project will definitely progress as planned.²¹⁰ Rieu-Clarke stated that both the “critical period” as well as “communication steps” implemented in the Kishenganga example could be beneficial to the States in determining various critical procedural steps that must be completed prior to implementing the project.²¹¹

With regard to the issue of whether a suspension should be applied to the proposed project or an interim order could be approved, the ruling made by the Court in the *Indus Waters Kishenganga* Arbitration was on the side of India as it was adjudicated that most of the project plans could continue as planned apart from the dam (as this would violate the other riparian States’ right and contravene the Treaty). However, based on the “proceed at your own risk” principle, India would be responsible for any financial risks resulting from the project continuance along with the consequences.²¹²

In another case, plans were developed to construct *Pulp Mills* on the Uruguay river, which flows through both Uruguay and Argentina. In this case, that ICJ was tasked with determining whether Uruguay was negligent in terms of meeting its procedural obligations to ensure that Argentina was notified and consulted (as stipulated in the Statute of the River Uruguay 1975) prior to authorising the pair of Pulp Mills.²¹³ When adjudicating on the case, the ICJ judged that Uruguay should have notified Argentina much sooner before it had authorised the Pulp Mills Project on the Uruguay River.²¹⁴ It is necessary for notification to occur at an appropriate time according to the targeted aim of

²⁰⁶ *Indus Waters Kishenganga Arbitration, Pakistan v India (Final Award)* ICGJ 478 (PCA 2013), 20th December 2013 (Permanent Court of Arbitration)

²⁰⁷ *Ibid*, Paragraph 3-16

²⁰⁸ *Ibid*, Paragraph 112

²⁰⁹ *Ibid*, Paragraph 623

²¹⁰ *Ibid*, Paragraph 429

²¹¹ Alistair Rieu-Clarke, 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases' -130, p. 25-27

²¹² *Indus Waters Kishenganga Arbitration (Pakistan v. India)* Permanent Court of Arbitration, Partial Award (18 February 2013). Paragraph 143

²¹³ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep (20 April 2010) International Court of Justice

²¹⁴ *Ibid*, Paragraph 99

notification.²¹⁵, while the other party must be notified before the relevant State determines whether the plan is environmentally viable based on a review of the findings of the environmental impact assessment.²¹⁶

Moreover, in the case of the *Pulp Mills*, the stance taken by the ICJ was that while the period of consultation and negotiation was ongoing, the State giving the notification should not proceed with the contested work - a suspension should be applied to all activities.²¹⁷ As stated by the ICJ, the primary work that had only been authorised by Uruguay did not comprise an exception. Indeed, such work constituted a fundamental aspect of the process of constructing the proposed mills²¹⁸ As it proceeded with conducting the primary work at the proposed Pulp Mills site despite the fact an agreement was not made, Uruguay continued to implement the scheduled work at its own risk.²¹⁹ Such an approach conforms with the rulings given both the *Passage through the Great Belt*²²⁰ as well as the *Indus Waters Kishenganga Arbitration*²²¹).

In conclusion, according to the international adjudications based on which case law is developed, States are obliged to provide notification and consult with adjoining States so that substantial cross-border damage that may happen due to the intended activity on cross-border waterways can be prevented.²²² It is necessary for the notification to occur early in the process prior to authorising and implementing the project.²²³ Additionally, there is a responsibility to temporarily halt contested proposed works while the process of consulting and negotiating is still ongoing.²²⁴ If notification is provided once preparatory work is complete or the infrastructure constructed, this could be perceived as a contravention of international law as it would limit cooperation.²²⁵ In the event that the State giving the notification proceeds with the project while not providing notification or consultation with other States that may be impacted, it has the risks of having to pay compensation costs (if harm does eventually occur) in addition to costs incurred from redesigning or shelving the plan.²²⁶

²¹⁵ Ibid, Paragraph 104(f)

²¹⁶ Ibid, Paragraph 120

²¹⁷ Ibid, Paragraph 143

²¹⁸ Ibid, Paragraph 143-148

²¹⁹ Ibid, Paragraph 33

²²⁰ Simon Marsden, *Protecting the Third Pole: Transplanting International Law* (Edward Elgar Publishing Company 2019), Paragraph 30-33

²²¹ *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Supra Note 142

²²² Stephen McCaffrey, *The Law of International Watercourses* 464-480

²²³ Laurence Boisson de Chazournes, Christina Leb and Mara Tignino, *International Law and Freshwater: The Multiple Challenges* (Edward Elgar Publishing 2013)252-255.

²²⁴ Alistair Rieu-Clarke, 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases' (2014) 24(1) Yearbook of International Environmental Law 102-130

²²⁵ Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) 129-131

²²⁶ Ibid

2.5 In What Way Can the UN Watercourses Convention Assist with Interpreting and Enhancing the Clarity Regarding the Obligation of States to Provide Notification and Consultation?

After UN General Assembly (UNGA) Resolution 1401(XIV) was adopted in 1959²²⁷, a report was prepared by the UN Secretary General regarding the *Legal Problem Relating to the Utilization and Use of International River*, which was subsequently delivered to the UNGA in 1963.²²⁸ After the report had been reviewed, the UNGA issued instructions for the International Law Commission (ILC) to perform a study to investigate how international waterways are used for non-navigational purposes in order to progressively develop and codify the international water treaty²²⁹

During the plenary session held between 1967 and 1994, the *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses* (the draft Articles), was prepared by the drafting committee of the ILC in conjunction with special rapporteurs, which the ILC adopted after it had been read for the second time in 1994.²³⁰ At a later point in that year, the ILC formed the UN Sixth Committee, which comprised as a 'Working Group of the Whole' for the purpose of negotiating and finalising the draft Articles such that the UNGA could adopt them in the form of a treaty.²³¹ After the Sixth Committee engaged in negotiations at the two sessions held in 1996 and 1997, the UNGA decided to adopt the UN Watercourses Convention on 23 May 1997.²³² After Vietnam signed the Convention 19 May 2014, becoming the 35th State to do so, the UN Watercourses Convention eventually came into effect on 17 August 2014, 90 days after it was ratified.²³³

²²⁷ UN General Assembly, *Preliminary Studies on the Legal Problems relating to the Utilization and Use of International River*, UNGA Res. 1401(XIV), UN Doc. A/RES/1401(XIV), 21 November 1959)

²²⁸ UN Secretary General, *Legal Problem Relating to the Utilization and Use of International River* (UN Doc. A/5409), 1963)

²²⁹ UN General Assembly, *Progressive Development and Codification of the Rules of International Watercourses*, UNGA Resolution 2669 (XXV), UN Doc. A/Res/2669(XXV), 8 December 1970); Alistair Rieu-Clarke and Flavia Rocha Loures, 'Still not in Force: Should States Support the 1997 UN Watercourses Convention?' (2009) 18(2) *Review of European, Comparative and International Environmental Law* 185-197

²³⁰ Stephen McCaffrey, 'An Assessment of the Work of the International Law Commission' (1996) 36(2) *Natural Resources Journal* 297-318; UN General Assembly Official Records, *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses in the Report of the ILC on the Work of its Forty -Sixth Session* (A/CN.4/SER.A/1994/Add.I (Part II), 1996)

²³¹ UN General Assembly, *Draft Article on the Law of the Non-Navigational Uses of International Watercourses*, UNGA Res. 49/52, UN Doc. A/Res/49/52, 9 December 1994)

²³² UN General Assembly Official Records, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNGA Res. 51/869, UN Doc. A/Res/51/869, 21 May 1997)

²³³ Gabriel Eckstein, 'Specially Invited Opinions and Research Report of the International Water Law Project: Global Perspectives on the Entry into Force of the UN Watercourses Convention 2014: Part One' (2014) 16(6) *Water Policy* 1198-1217; By resolution A/RES/51/229 of 21 May 1997, the General Assembly of the United Nations adopted at its 51 session, the said Convention. In accordance with its article 34, the Convention shall be open for signature at the Headquarters of the United Nations in New York, on 21 May 1997 and will remain open to all States and regional economic integration organizations for signature until 21 May 2000.

There are various reasons why the UN Watercourses Convention has been selected as the best practice in this study. First, all UN Member States²³⁴ and leading academics in the field of water law recognise the UN Watercourses Convention as the multilateral treaty based on which the customary law of international watercourses is codified, specifically in terms of preventing substantial cross-border damage, fair and appropriate usage, as well as the provision of advance notification and consultation regarding the proposed actions.²³⁵

Second, the UN Watercourses Convention was also referred to by the ICJ when making its rulings. For example, only four months after it was adopted by the United Nations General Assembly (UNGA) in May 1997, the UN Watercourses Convention was endorsed by the ICJ in the case of *Gabčíkovo-Nagymaros Case* only, even before it came into effect in 2014.²³⁶ Furthermore, the principle of fair and appropriate usage as well as the prevention of substantial damage (which are applied in conformity with the UN Watercourses Convention) were also applied in the *Pulp Mills Case* in 2010, despite the fact that neither Uruguay or Argentina had ratified the Convention by that point.²³⁷

Third, contained within the UN Watercourses Convention is a framework of rules and principles that can be customised to match the interests and needs of riparian States in addition to the attributes of transboundary waterways in specific regions.²³⁸ Put differently, the UN Watercourses Convention was intended to add to, enable current and future basin treaties²³⁹ and be supportive to different watercourse treaties by providing a template and resolving the coverage deficiencies, although not necessarily acting as a replacement.²⁴⁰ For instance, both the Revised Protocol on Shared Watercourses of the Southern African Development Community 2000 as well as the Nile River Basin

²³⁴ Patricia Wouters, 'The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond' (1999) 43 *German Yearbook of International Law* 293-336; UN General Assembly Official Records, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNGA Res. 51/869, UN Doc. A/Res/51/869

²³⁵ Salman Salman, 'Entry Into Force of the UN Watercourses Convention: Why Should It Matter?' (2015) 31(1) *International Journal of Water Resources Development* 4-16; Owen McIntyre and Mara Tignino, 'Reconciling the UN Watercourses Convention and Recent Developments in International Law' in Alistair Rieu-Clarke and Flavia Rocha Loures (eds), *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Governance* (The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Governance, Earth Scan 2013) 186-303; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention User's Guide* (IHP-HELP UNESCO Centre For Water Law Policy and Science 2012) 100-159

²³⁶ *Gabčíkovo-Nagymaros Dam Project (Hungary/Slovakia)* (1997) ICJ Report Judgments, Advisory Opinions and Orders, (September 25) (International Court of Justice), Paragraph 85.

²³⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Reports, (Judgment) General List No 135, 20 April 2010 (International Court of Justice), Paragraph 170-177.

²³⁸ Stephen McCaffrey, 'Convention on the Law of the Non-Navigational Uses of International Watercourses' (*UN Audio Visual Library of International Law*, 21 May 1997) <<https://legal.un.org/avl/ha/clnuiw/clnuiw.html#>> accessed 2 February 2020

²³⁹ Flavia Loures and others, 'Everything You Need to Know About the UN Watercourses Convention' (*World Wide Fund For Nature (WWF)*, January 2015) <<https://www.gcint.org/wp-content/uploads/2015/09/UNWC.pdf>> accessed 22 January 2020; Ariel Litke and Alistair Rieu-Clarke, 'The UN Watercourses Convention: A Milestone in the History of International Water Law' (*Global Water Forum*, 2 February 2015) <<https://globalwaterforum.org/2015/02/02/the-un-watercourses-convention-a-milestone-in-the-history-of-international-water-law/>> accessed 25 January 2020

²⁴⁰ *Ibid*; UN Watercourses Convention, Article 3

Cooperative Framework offer types of instruments that have implemented and conformed to the UN Watercourses Convention principles in their 'regional and basin-specific context.'²⁴¹

To assess how it is possible to use the UN Watercourses Convention as a reference point to assist with interpreting and enhancing the coherence of the 1995 Mekong Agreement and the PNPCA, the following section will be separated into nine subsections, namely: (i) Appropriate and fair usage; (ii) Significant damage; (iii) What are the proposed actions? (iv) What level of harm will trigger the need for a notification? (v) When should notification be made? (vi) What should the notification contain?; (vii) The response period; (viii) In the response period or if no response is received, can the State making the notification implement the proposed action? (ix) Negotiating and consulting. Within the aforementioned subsections, areas in which the PNPCA and the UN Watercourses Convention are similar, different and also complementary regarding the requirement of States to provide notification and consultation regarding planned large-scale dams on the LMB will be identified.

2.5.1 Appropriate and Fair Utilisation

Although Article 5 of the Mekong Agreement requires States to use the Mekong River waters in an appropriate and fair way based on specific factors and situations²⁴², there is no clarity regarding these factors and situations other than seasonal usage types.

On the other hand, in Article 6 of the UN Watercourses Convention, factors and situations that States are obliged to consider when seeking justification (reasoning) that their planned usage and development can be defined as being equitable are provided:

- (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The Social and economic needs of the watercourse in each watercourse State concerned;
- (c) The population dependent on the watercourse in each watercourse States;
- (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
- (e) Existing and potential uses of the watercourse;
- (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use.²⁴³

²⁴¹ Ibid

²⁴² 1995 Mekong Agreement, Article 5

²⁴³ 1995 Mekong Agreement, Article 6

In conclusion, appropriate and fair usage does not infer that it is necessary to divided watercourses equally among States, but rather that all States have the same right of sovereignty on the mutual watercourses; taking these factors into account, a reasonable balance must be established in a proportional manner.²⁴⁴ Therefore, the UN Watercourses Convention could assist with resolving the deficiencies of the 1995 Mekong Agreement by stipulating the social, environmental and economic factors that should be considered when determining what counts as appropriate and fair usage.

2.5.2 Significant Damage

According to Article 7 of the 1995 Mekong Agreement, States are required to apply all efforts for the purpose of avoiding, minimising and mitigating damaging environmental impacts.²⁴⁵ Likewise, in Article 7(1) of the UN Watercourses Convention, the requirement to ensure that significant damage does not occur is codified as it states that when they intend to use an international waterway within their borders, States must implement all suitable actions to prevent other States on the watercourse from significant adverse effect.²⁴⁶ In this regard, the requirement to ensure that significant harm does not occur is regarded as being a due diligence responsibility, as opposed to a complete proscription on cross-border harm, while the rule pertaining to harm is now constrained to situations involving significant harm to the environment.²⁴⁷ In order for the damage to be classed as significant, it was recommended by the ILC that it must be more extensive than trivial and observable but not to the extent that it severe or substantial.²⁴⁸ This type of harm could have the potential to have adverse effects on the health, industrial, property, environmental or agricultural sectors of other States.²⁴⁹

Furthermore, Article 7(2) of the UN Watercourses Conventions harmonises the principle of fair and appropriate usage with the requirement to ensure that other States are not significantly harmed.

Where significant harm is nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 5 and 6, in

²⁴⁴ Alistair Rieu-Clarke, Ruby Monihan and Bjorn Oliver Masig, 'UN Watercourses Convention: User's Guide Fact Sheet Series: Number 4: Equitable and Reasonable Utilisation ' 2012) <<https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf>> accessed 12 January 2020

²⁴⁵ 1995 Mekong Agreement, Article 7

²⁴⁶ The UN watercourses Convention, Article 7(1)

²⁴⁷ Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide* (IHP-HELP Centre for Water Law, Policy and Science (under the auspices of UNESCO) Dundee 2012) pp.120-126, Owen McIntyre, 'The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources'

²⁴⁸ Remy Kinna and Alistair Rieu-Clarke, *The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?* Supra note 22, p. 41

²⁴⁹ Ibid

consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.²⁵⁰

In his evaluation of the ILC's work in preparing Article 7, McCaffrey elucidated that if justification is provided demonstrating the fair and appropriate nature of the water usage, a State should be permitted to proceed with the usage even if this results in a different State being significantly harmed.²⁵¹ However, the State causing the harm is obligated to reduce such damage to the degree feasible and provide compensation for the impacted States for any harm that cannot be prevented.²⁵² Moreover, the phrase "[h]aving due regard to Articles 5 and 6..." is interpreted as meaning that fair and appropriate usage is regarded as having more importance than rule pertaining to preventing significant harm.²⁵³ Subject to mitigating and eliminating significant harm, Article 7 Of the UN Watercourses Convention additionally refers to the responsibility of the State causing the infringement to consult and compensate States who are impacted in situations where this harm cannot be prevented – they are required to engage in consultation with different riparian States to take mitigating measures and negotiate compensation.²⁵⁴

In conclusion, when subject to the requirement to ensure that other States are not significantly harmed, States are obliged to implement suitable actions with the aim of preventing other States being significantly harmed by projects launched within their territory. When implementing such measures, they have a duty to provide notification, share information and data, and consult with other riparian States with regard to their proposed actions that could cause significant cross-border damage.

2.5.3 What Are Planned Measures?

While Article 11 of the UN Watercourses Convention does not precisely define what "planned measures" are, the Convention's User Guide describes that it is intended to incorporate all proposed projects that could lead to a watercourse being either directly impacted within its own territory or indirectly affected in a different State in which the watercourse flows.²⁵⁵ Furthermore, it is recognised by the ILC that the work 'measures'

²⁵⁰ UN Watercourses Convention, Article 7(1)

²⁵¹ Stephen McCaffrey, 'An Assessment of the Work of the International Law Commission', *Supra* note 160, 309

²⁵² *Ibid*

²⁵³ Flavia Loures and Alistair Rieu-Clarke, *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Earthscan from Routledge 2013) 117

²⁵⁴ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water ' 1994) <http://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf> accessed 20 May 2015

²⁵⁵ Alistair Rieu-Clarke, Ruby Monihan and Bjorn Oliver Masig, 'UN Watercourses Convention: User's Guide Fact Sheet Series: Number 6: Notification Process for Planned Measures ' (*University of Dundee*, 2012) <<https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf>> accessed 12 January 2020

can be broadly interpreted to incorporate all new (large or small) programmes and/or projects, in addition to modifications to the current usage of international watercourses; this could take the form of hydropower plants, regulation of rivers, forest clearance next to an international watercourse, and construction of industrial facilities that will potentially impact a river's quantity or quality.²⁵⁶ Additionally, primary works at the site that are included within the construction project are also regarded as being elements of the proposed action (*Pulp Mills case*).²⁵⁷

When interpreted from this perspective, the term “planned measures” should cover the proposed dam project, in addition to the preliminary works, building the site access road, site clearance and the plan of evacuation. States have a duty to provide notification, share data, and engage in consultation and negotiation with each other on the proposed activities on their transboundary watercourses.²⁵⁸

2.5.4 What is the Threshold of Harm that Triggers Notification?

While Sections 7 and 8 of the Mekong Agreement do not stipulate a harm limit after which notification should be made, they oblige the States to ensure that damaging environmental impacts that could happen are avoided, minimised and mitigated,²⁵⁹ and if such damage does happen, the affected State is responsible for proving that they have been substantially harmed.²⁶⁰

On the other hand, the ILC's critique on Article 12 of the UN Watercourses Convention specifically states that the standard threshold beyond which States are required to notify is a “significant adverse effect”, which is fixed at or supposed to be inferior to “significant harm”.²⁶¹ The significant adverse effect concept is not limited to a specific formula; it is the characteristics of the resources that will be employed that represents the starting point.²⁶² Additionally, Principle 19 of the Rio Declaration necessitates the States to provide notification and consultation with States that may

²⁵⁶ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water ' pp. 111-113; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide* p.136

²⁵⁷ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010)*, Paragraph 143-148

²⁵⁸ UN watercourses convention, Article 11

²⁵⁹ 1995 Mekong Agreement, Article 7

²⁶⁰ 1995 Mekong Agreement, Article 8

²⁶¹ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water ' 111-113

²⁶² Phoebe Okowa, 'Procedural Obligations in International Environmental Agreements' (1996) 67(1) *The British Yearbook of International Law* 275-336

possibly be affected on works that could have significant adverse effects in a timely manner.²⁶³

This implies that the requirement to provide notification and consultation comes into effect when the State proposing the activities thinks that its proposed works could have “significant adverse effects” on different riparian States of the mutual waterway; in other words, a potential adverse impact that has yet to cause harm will necessitate notification even prior to any signs that the planned activities will cause legally significant harm.²⁶⁴

2.5.5 When to Notify

Discussions have been ongoing inside the ILC with regard to the appropriate time for notification to be made. Before, it was suggested by Evensen that States should provide notification “at the earliest possible date”, which was subsequently altered by McCaffrey to “timely notification.”²⁶⁵ Currently, it is stipulated in both Chapter II of the 1995 Mekong Agreement and Article 12 of the UN Watercourses Convention that notification should be given in a “timely” manner.

According to the definition of McCaffrey, ‘timely’ means a point that is early enough in the initial planning phases to allow constructive negotiation and consultation, where appropriate.²⁶⁶ Article 12 of the 1997 UN Watercourses Convention stipulates that a State should notify the other State(s) prior to implementing or permitting the implementation of proposed activities that could significantly negatively impact other riparian States, and such notification should be given in a timely manner²⁶⁷ When stating ‘allows or allows the implementation’, it was clarified by the ILC that Article 12 not only includes activities proposed by the State, but also those proposed by private organisations; in this case, the term ‘permit’ is intended to suggest “authorise” as well as “allow”.²⁶⁸ With reference to the *Pulp Mills case*, the ICJ also adopted the same stance when rule notification should have occurred at an extremely point in the process, before the project had been authorised.²⁶⁹

²⁶³ Principle 19 of the Rio Declaration provides that: ‘States shall provide *prior* and *timely* notification and relevant information to potentially affected States on activities that may have a “significant adverse transboundary environmental effect” and shall consult with those states at an early stage and in good faith.’

²⁶⁴ Stephen C. McCaffrey, *The Law of International Watercourses* (Chapter 13: Procedural Obligations, Oxford University Press 2007), *The Law of International Water Courses*, p.473

²⁶⁵ Stephen C. McCaffrey, *Second Report on the Law of the Non-Navigational Uses of International Watercourses* (UN Doc. A/CN.4/399 and Add.1 and 2), Vol. II(1) Yearbook of International Law Commission 1986) 198

²⁶⁶ Ibid

²⁶⁷ UN Watercourses Convention, Article 12

²⁶⁸ International Law Commission, ‘Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water’ p.111

²⁶⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* supra note 10, Paragraph 99

Additionally, if a State makes a notification subsequent to initiating preparatory works or building the required infrastructure, this could be perceived as a contravention of international law as it places severe restrictions on the ability to cooperate.²⁷⁰ If the State proposing the project continues with its activities without giving notification or disregarding the opposition of States that have the potential to be impacted, it has the risk of being responsible for all compensation costs if the other State is harmed (lack of prevention and mitigation of harm) in addition to costs incurred as a result of redesigning or creating a new plan.²⁷¹

2.5.6 What Should the Notification Include?

Chapter II of the 1995 Mekong Agreement obliges States to furnish information and data that would permit the other riparian States to scrutinise and review the effects of the planned usage on their own utilisation of the water as well other possible impacts.²⁷² As stipulated in Section 4.2 of the PNPCA, when submitting the notification, States must ensure that it includes a feasibility report, plan of implementation, timeline, as well as all other relevant information.²⁷³ Nevertheless, it is evident that “all other relevant” information is somewhat vague.

With regard to the UN Watercourses Convention, Article 12 states that when notifying, States should include all accessible technical information and data, which includes the findings of any “environmental impact assessment”, such that the States being notified can review the potential impacts of the proposed activities.²⁷⁴ The UN Watercourses does not explicitly state that the EIA is necessary; it is merely implied in Article 12 that when notifying, it should accompany the submission so that the other State can evaluate the potential impact of the planned measures. Nevertheless, the argument could be made that for the due diligence requirement to ensure that other States are not significantly harmed according to Article 7 of the UN Watercourses Convention to be effectively realised, EIA can be regarded as a suitable measure that can be implemented.²⁷⁵

The content that should be included in the convention is more clearly described in the Espoo Convention, as it offers a defined list of relevant information that should accompany the notification submission:

²⁷⁰ Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2013) p.131

²⁷¹ Ibid

²⁷² 1995 Mekong Agreement, Chapter II

²⁷³ PNPCA, Section 4.2

²⁷⁴ UN Watercourses Convention, Article 12

²⁷⁵ Flavia Loures and Alistair Rieu-Clarke, *The UN Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* 293

Information on the nature of the proposed activity: (i) whether the activity is listed in appendix I of the Convention; (ii) type of activity; (iii) scope of activity (e.g. the main activity and any/all peripheral activities requiring assessment); (iv) scale of activity (e.g. size, production capacity); (v) description of the activity (e.g. technology used); (vi) description of the purpose of the activity; rationale for proposed activity (e.g. socio-economic basis, physical-geographic basis); (b) Information on spatial and temporal boundaries of the proposed activity: (i) location and description of location; rationale for location of proposed activity; (iii) maps and other pictorial documents connected with the information on the proposed activity; (iv) time frame for proposed activity (e.g. start and duration of construction and operation ...²⁷⁶

In summary, the uncertainty surrounding which documents should be revealed and provided, in addition to the lack of information could lead to suspicion as well communicative failures among the parties that could subsequently result in failed consultations and negotiations. The LMB could turn to the Espoo Convention as a beneficial reference point as it offers specific details regarding the documentation and kinds of information that should accompany the notification.

2.5.7 The Period of Reply

Both the UN Watercourses Convention (Article 13)²⁷⁷ as well as the PNPCA (Section 5.5) stipulated that the period for responding to the notification is a maximum of six months.²⁷⁸ Within this six-month timeframe, the States receiving the notification are required to assess and scrutinise the potential impacts prior to replying to the notification.²⁷⁹ The rationale underlying the decision to limit the response period to six months is to ensure that the interests of all States on the Watercourses are considered.²⁸⁰ However, in the event that the Parties require additional time to evaluate the data and reach a decision, the States receiving the notification can request an extension of a further six months – when submitting this request, the State is required to explain the particularly challenges they are facing as justification for the extension.²⁸¹ As the clause starts with the phrase “unless otherwise agreed”, it is implied that States have the possibility of

²⁷⁶ United Nations Economic Commission for Europe, *Guidance on Notification According to the Espoo Convention (Doc. ECE/MP.EIA/12)*, 2009) pp. 12-13

²⁷⁷ UN Watercourses Convention, Article 13

²⁷⁸ PNPCA, Section 5.5

²⁷⁹ Alistair Rieu-Clarke, Ruby Monihan and Bjorn Oliver Masig, 'UN Watercourses Convention: User's Guide Fact Sheet Series: Number 6: Notification Process for Planned Measures' (*University of Dundee*, 2012) <<https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf>> accessed 20 February 2018

²⁸⁰ Hanqin Xue, *Transboundary Damage in International Law* (Cambridge University Press 2003) 171

²⁸¹ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water' p.114; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide* p.144-145

agreeing on a suitable timeline, as well as that the six-month response period and the extension are only applicable when they have not reached an alternative agreement.²⁸²

After they have been notified, the States could determine that the relevant data that has been provided with the submissions is insufficient; consequently, they may submit a request for additional information and/or explanations to assist the decision-making process. If the States receiving the notification identify that the proposed activities are not consistent with (in violation of) Articles 5 and 7, they have an obligation to inform the State making the notification of their conclusions finding “as early as possible” before the six-month period has ended (Article 15).²⁸³ Furthermore, when submitting their response, they are required to include a ‘documented explanation’ of their conclusions.

In summary, when responding to the notification, the States who have been notified have the right to express their opinions regarding the project, make suggestions regarding the work and submit a request for additional data. The following Chapter on the requirement to perform EIA will include a discussion on the response to the notification and the views of the public as it incorporates the matter of public consultation as well the cross-border EIA procedure.

2.5.8 When the Response Period is Ongoing or if no Response has been Provided, Can the State Making the Notification Implement the Planned Project?

According to Article 14, when the response period is ongoing, the State making the notification is required not to proceed with or allow the proposed project to proceed without the approval of the States being notified within the six-month response time.²⁸⁴ If the State proposing the measure continues its planned activities without providing notification or disregarding any protests from States that could possibly be impacted, it has the risk of being required to pay compensation costs as well as any costs incurred if the resulting harm means that the plan must be redesigned or a new plan adopted.²⁸⁵

When a response is not made or the States receiving the notification do not communicate, the State making the notification can continue with implementing the project, or allow the proposed activities to proceed conditional to two factors (Article 16).²⁸⁶ Firstly, the project must be conducted in line with the notification as well as all

²⁸² International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water '

²⁸³ Ibid p.115; UN watercourses Convention, Article 15

²⁸⁴ UN Watercourses Convention, Article 14; International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water '; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide*, Note 208 p.146

²⁸⁵ Christina Leb, *Cooperation in the Law of Transboundary Water Resources*, Supra note 155

²⁸⁶ UN Watercourses Convention, Article 16 ; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide*, Note 219 p.150

other information and data supplied or given to the State being notified.²⁸⁷ Secondly, when implementing the proposed actions, the State must ensure that they are in accordance with Articles 5 and 7: fair and appropriate usage and other States are not significantly harmed.²⁸⁸ The lack of response or no communication from the States being notified are perceived to be “tacit consent”.²⁸⁹

In conclusion, the States receiving the notification are not able to disregard the notification or not communicate as this will be interpreted as tacit consent; if they subsequently request compensation, this will be offset by the costs of the State making the notification when continuing with the plan implementation. With regard to the State making the notification, when the response period is ongoing or no response has been made, it could make the decision to proceed with the activities, although it must bear the consequences in terms of paying compensation for harm that may occur due to the project in the future. There seems to be a contradiction in the law as it states that the State receiving the notification should temporarily halt the project during the response period, although this leaves room for the State to proceed with the project if it chooses to pay for any future harm that may occur.

2.5.9 Consultation and Negotiation

Article 17 of the UN Watercourses Convention stipulates that, in cases where the States receiving the notification identify that the plan is not consistent with Articles 5 and 7, the notifying State and the State making the communication shall enter into consultation; negotiation is required with the State making the notification to resolve the problem in an equitable manner.²⁹⁰ Per the ILC, an “equitable solution” incorporates changes to the plans such that possible damaging impacts can be eliminated, the uses being made by either State can be adjusted, or the State making the notification can provide financial or another type of compensation that the State being notified deems to be acceptable.²⁹¹

In his clarification of the distinction between notifying and consulting, Rieu-Clarke elucidates that a notification is the starting point of the procedure that culminates in consultation to enable the States to jointly assess the risks of the planned action or proposed work and, if required, to negotiate with the aim of establishing a mutual

²⁸⁷ Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide*
²⁸⁸ Ibid

²⁸⁹ Lucius Catfish, 'Prior Notice and Related Issues' in Stephen McCaffrey, Christina Leb and Riley Denoon (eds), *Research Handbook on International Water Law* (Research Handbook on International Water Law, Edward Elgar Publishing Ltd. 2019)

²⁹⁰ UN Watercourses Convention, Article 17; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide*, Note 238 p.152

²⁹¹ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water' p.116

agreement and conclusion.²⁹² Scholars like McIntyre and Bourne simultaneously referred to negotiation and consultation in their writings on their association with cooperation.²⁹³ The objective of negotiating is to advance the process beyond consultation with the further aim of establishing an agreement.²⁹⁴

While negotiations and consultations are ongoing, the State making the notification is also obliged to temporarily halt and/or stop the implementation or not allow the planned activities to be implemented.²⁹⁵ This timeframe should be governed by the agreement reached between riparian States and should not exceed a realistic time period.²⁹⁶ Where no such agreement can be reached, the time period applicable should not exceed six months.²⁹⁷

In conclusion, if no agreement can be made between States regarding the proposed work, they are required to notify and consult each other for the purpose of adjusting the plan and ensuring that possible significant harm is reduced. As both processes require the Parties to communicate with each other, they are obliged to ensure that all communications and cooperation are conducted in good faith. If they are honest, transparent and flexible, this could assist with entering constructing consultation and negotiation.

2.6 Conclusion

In soft law instruments, treaties, as well as arbitral and judicial rulings, the requirement to provide notification and consultation has been recognised as a due diligence responsibility; in other words, suitable measures that should be implemented by a State if it intends to proceed with the proposed activities within its borders that have the potential to lead to significant cross-border impacts on other States.²⁹⁸ The aim of such obligations is to enable States that could possibly be impacted to assess and evaluate the planned measure, and to initiate a process of consultation and negotiation during which they have the opportunity to share pertinent information and data, to consider the

²⁹² 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from International Case-Law', pp.102-130

²⁹³ Owen McIntyre, *Environmental Protection of International Watercourses Under International Law* pp.337-344; Charles Bourne, 'Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate' (1972) 10 *Canadian Yearbook of International Law* 212-234

²⁹⁴ Christina Leb, *Cooperation in the Law of Transboundary Water Resources*, Supra note 155, p.143

²⁹⁵ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water ' p.116

²⁹⁶ Ibid

²⁹⁷ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water '

²⁹⁸ Owen McIntyre, 'The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources', Supra Note 223; Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy' (2015) 5(1) *Asian Journal of International Law* 143-175

opposing interests of the relevant Parties, and to identify any mitigation measures prior to implementing the project.²⁹⁹

In the example of the Xayaburi Project reviewed here, it was determined that there are certain deficiencies and a lack of clarity in the Mekong Agreement and the PNPCA (as mentioned in Section 2 of this Chapter), which presents challenges in terms of interpreting and implementing the procedural rules regarding notification and consultation on the planned large-scale hydropower plants between the LMB States. After the UN Watercourses Convention came into effect in 2014, the LMB States could take advantage by becoming signees to the Convention as it clarifies and offers specific provisions regarding the requirement of States to provide notification and consultation on the proposed project, including the schedule, terms and definitions, the list of documentation to be provided and shared, and measures to be implemented as part of the notification and consultation process.³⁰⁰ As the globally acknowledged set of customary international law is codified by the UN Watercourses Convention, it would support instead of substitute the existing practice in the region.³⁰¹ Hence, the UN Watercourses Convention could function concurrently to the 1995 Mekong Agreement and the PNPCA in reinforcing and providing clarity on the requirement of States to provide notification and consultation before it authorises and implements hydropower works within the LMB.³⁰²

²⁹⁹ Komlan Sangbana, 'Notification and Consultation Concerning Planned Measures' in Laurence Boisson de Chazournes and others (eds), *The UN Convention on the Law of the Non-navigational Uses of International Watercourses: A Commentary* (The UN Convention on the Law of the Non-navigational Uses of International Watercourses: A Commentary, Oxford University Press 2018) 159-190

³⁰⁰ Remy Kinna and Alistair rieu-Clarke, *The Governance Regime of the Mekong River Basin: Can the Global Water Conventions Strengthen the 1995 Mekong Agreement?*, *Supra* note 127

³⁰¹ IUCN, 'A Window of Opportunity for the Mekong Basin: The UN Watercourses Convention As A Basis for Cooperation: A Legal Analysis of How the UN Watercourses Convention Complements the Mekong Agreement' (*IUCN Asia Regional Office* 2016) <<https://www.iucn.org/sites/dev/files/mekong.pdf>> accessed 20 April 2018

³⁰² *Ibid*

Chapter 3

Obligation to Perform an EIA

3.1 Introduction

Before making decisions and commencing a development project, an assessment needs to be undertaken of the potential risks, harms, and benefits for both people and the environment. To achieve this, EIA is employed as a scientific legal and tool that considers the social, economic, and environmental impact.³⁰³ In conjunction with the views of the public, the results of an EIA enhance the quality and accuracy of information and provide a firm basis upon which the State can decide whether a project can proceed.³⁰⁴

EIA functions at two levels: national and international. Regarding the former, EIA emerged from the US National Environmental Policy Act 1969³⁰⁵ and has now been incorporated into the domestic laws of more than 100 States.³⁰⁶ In terms of international law, States are obligated to conduct an EIA to assess the possible risk of significant harm posed by a project with respect to its scale, characteristics, and overall effect on the environment.³⁰⁷

Although each LMB State in the Mekong region sets its own EIA law relating to projects; few consider the scale of any impact on other States.³⁰⁸ This creates problems when assessing large-scale hydropower projects whose impact is likely to extend across multiple states. For instance, just 234 people in Laos were permitted to take part in the EIA for the Xayaburi Project.³⁰⁹ This EIA considered the impact on areas 10 kilometres

³⁰³ Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (8th edn, Oxford University Press 2013) 444; Alan Boyle, 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention' (2011) 20(3) *Review of European, Comparative and International Environmental Law* 227-231

³⁰⁴ Jennifer Li, 'Environmental Impact Assessments in Developing Countries: An Opportunity for Greater Environmental Security? (Working Paper No. 4)' (*USAID and Foundation for Environmental Security and Sustainability*, 2008) <<http://fess-global.org/WorkingPapers/EIA.pdf>> accessed 20 July 2019

³⁰⁵ US National Environmental Act 1969 (NEPA) (approved on 1 January 1969) 42 U.S.C. §§ 4321

³⁰⁶ IISD, 'Environmental Impact Assessment Training Manual' (*International Institute for Sustainable Development*, 2016) <<https://www.iisd.org/learning/eia/wp-content/uploads/2016/06/EIA-Manual.pdf>> accessed 5 December 2019, Dan Tarlock, 'Ecosystems' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (The Oxford Handbook of International Environmental Law, Oxford University Press 2008) 574-596

³⁰⁷ Alistair Rieu-Clarke, 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases' (2014) 24(1) *Yearbook of International Environmental Law* 102-130; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010)* International Court of Justice

³⁰⁸ Ben Boer and others, *The Mekong: A Socio-Legal Approach to River Basin Development* (Earthscan Studies in Water Resource Management, Earthscan from Routledge 2016)

³⁰⁹ TEAM Consulting Engineering and Management Co.Ltd., 'Environmental Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR' (*Ch.Karnchang Public Company Limited*, August 2010) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-EIA-August-2010.pdf>> accessed 20 July 2019

downstream of the Xayaburi dam.³¹⁰ Little was said about any potential mitigation measures and the impact on the ecosystem, fisheries, and livelihoods of people from other countries who live along the Mekong River.³¹¹ Furthermore, no public disclosure of the EIA was forthcoming until a decision had already been made by Laos to go ahead with the project.³¹² Currently, no agreement has been reached by LMB States regarding the EIA. Consequently, to assess the “overall long-term” effects of mainstream dams on the LMB, the MRC has relied on the Strategic Environmental Assessment (SEA) performed by the ICEM (an agency of the MRC) for 12 large-scale hydropower projects.³¹³

To ensure transparency in the EIA process, and that the projected outcomes regarding large-scale dams are accurate, the Espoo Convention is drawn upon in this chapter as an example of best practice with respect to transboundary EIA procedures in the LMB. The chapter comprises the following six sections: (i) What status does the SEA have under the MRC? (ii) What were the findings of the SEA regarding Mainstream Dams? (iii) What gaps and weaknesses are there in Xayaburi’s EIA? (iv) What implications does the EIA in Laos have for hydropower development projects? (v) In what ways is EIA acknowledged under international environmental law? (vi) In what ways can the Espoo Convention be utilised as a reference source to enhance the implementation of EIA in the LMB?

3.2 What status does the SEA have under the MRC?

An initial discussion regarding the proposal to carry out a SEA for mainstream dams in the LMB took place in the MRC meeting in February 2009.³¹⁴ Even though the majority of LMB States have not conducted a SEA, in May 2009 the International Centre for Environmental Management (ICEM) was contracted by the MRC to carry out a SEA for all 12 of the proposed large-scale dams in the LMB; lasting 14 months, the SEA report was submitted in October 2010.³¹⁵ In contrast to the SEA Directive and Protocol, where

³¹⁰ Kirk Herbertson, 'Xayaburi Dam: A Closer Look at How Laos Got to “Go”' (*International Rivers*, 13 November 2012) <<https://www.internationalrivers.org/blogs/267/xayaburi-dam-a-closer-look-at-how-laos-got-to-go>> accessed 12 August 2019

³¹¹ Kirk Herbertson, 'Sidestepping Science: Review of Pöyry Report on the Xayaburi Dam' (*International Rivers*, November 2011) <https://www.internationalrivers.org/sites/default/files/attached-files/intl_rivers_analysis_of_poyry_xayaburi_report_nov_2011.pdf> accessed 17 August 2019

³¹² Ame Trandem, 'Fatally Flawed Xayaburi EIA Fails to Uphold International Standards: A Preliminary Review of the Environmental Impact Assessment (EIA) Report for the Xayaburi Hydropower Dam on the Mekong River Mainstream in Northern Lao PDR' (*International Rivers*, 14 March 2011) <https://www.banktrack.org/download/fatally_flawed_xayaburi_eia_fails_to_uphold_international_standards/110707_preliminary_review_of_xayaburi_eia_14_03_11_final.pdf> accessed 22 July 2019

³¹³ MRC, 'Strategic Environmental Assessment of Mainstream Dams' (*MRC*, 2015) <<http://www.mrcmekong.org/about-mrc/completion-of-strategic-cycle-2011-2015/initiative-on-sustainable-hydropower/strategic-environmental-assessment-of-mainstream-dams/>> accessed 2 August 2019

³¹⁴ ICEM, 'MRC SEA for Hydropower on the Mekong Mainstream: Inception Report' (*MRC*, 13 December 2009) <<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/IRVOL1final.pdf>> accessed 25 July 2019

³¹⁵ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report' (*MRC*, October 2010) <<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-FR-summary-13oct.pdf>> accessed 25 July 2019

States in which the proposed projects are located are obligated to consult with other States (and their citizens) who might be affected, the SEA performed by the ICEM was directed by the MRC with the assent of the JC and LMB States.³¹⁶

The ICEM reported that 40 NGOs and civil society organisations and 60-line agencies took part in the meetings and workshops that formed part of the public consultation relating to the SEA.³¹⁷ Annex II of the ICEM report states that cross boundary consultations with stakeholders and government agencies were also part of the SEA report.³¹⁸ Even though the MRC website encouraged comments and feedback from the public to ensure people's worries were incorporated into the SEA, the response largely came from international NGOs, leaving the public largely ignorant as to how they can take part in the SEA process and what this entails.³¹⁹

The reason for placing the SEA under the MRC's Initiative of Sustainable Hydropower (ISH) programme was to ensure it was viewed as an "independent assessment" and not a component of the Basin Development Plan (BDP), which was already responsible for implementing the CIA.³²⁰ Suhardiman, Giordano and Molle contended that had this been the case, the SEA would have been incorporated into the CIA as one element of an overarching overall basin protocol. The NMCs would then be responsible for approving and adhering to its recommendations and SEA outcomes.³²¹

The ISH is partly responsible for ensuring the SEA team and the MRC cooperate and for reporting to the SEA Working Group, which is chaired by the CEO of MRCs and whose members comprise senior programme staff.³²² Other responsibilities of the ISH are to assist NMCs in obtaining information on the EIA for each project and carrying out feasibility studies, and for holding meetings and arranging contacts between the NMCs, key stakeholders, and project developers.³²³ Consequently, the MRC views the ISH as an essential information source with respect to the wide-ranging initiatives it engages in and in its discussions on sustainable hydropower with MRC stakeholders. Such work

³¹⁶ MRC, 'Inception Report: The MRC SEA of Hydropower on the Mekong Mainstream' (13 December 2009) <http://www.icem.com.au/documents/envassessment/mrc_sea_hp/1.%20inception/reports/pdf/IR_VOL1_final.pdf> accessed 28 July 2019

³¹⁷ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report', 9, 37

³¹⁸ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream' (ICEM, October 2010) <http://icem.com.au/documents/envassessment/mrc_sea_hp/SEA_Final_Report_Oct_2010.pdf> accessed 20 July 2019, 152-156

³¹⁹ MRC, 'Strategic Environmental Assessment of Mainstream Dams'

³²⁰ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³²¹ Diana Suhardiman, Mark Giordano and Francois Molle, 'Between Interests and Worldviews: the Narrow Path of the Mekong River Commission' (2015) 33 *Environment and Planning C: Government and Policy* 199-217

³²² John Soussan (Stockholm Environmental Institute), 'Phase1: Background Scoping Paper For A Strategic Environmental Assessment of Proposed Hydropower Developments on the Mekong Mainstream in the Lower Mekong Basin' (MRC, <<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEAPhase1PaperFinal.pdf>> accessed 28 August 2019

³²³ Ibid

encompasses regulatory and policy options ranging from operating practices and design to the sharing of benefits.³²⁴

Thus, although the SEA performed by the ICEM is characterised as a technical process generating independent recommendations that LMB States are not legally obliged to adhere to, its proposal that additional research should be conducted on social impacts and the use of a transboundary EIA is supported by NGOs, donors, Vietnam, Cambodia, and indeed the MRC.³²⁵ Because it provides additional information on the possible transboundary impact of dams on the mainstream of the Mekong River,³²⁶ and supports national decisions regarding the proposal, the SEA is viewed as supporting the PNPCA process, which focuses more firmly on the nature of each project.³²⁷

3.3 What were the findings of the SEA regarding mainstream dams?

There were 4 distinct stages to the SEA: scoping; baseline assessment, an evaluation of risks and opportunities presented by the mainstream dams; and identifying suitable strategies for increasing the benefits and preventing and ameliorating the risks. Five core issues were highlighted by the SEA in its results: (i) power security and generation, which encompasses foreign investment, revenue, and trade; (ii) alleviating poverty and supporting economic development; (iii) protecting the diversity and integrity of ecosystems; (iv) food security and fisheries; and (v) social security, which refers to the livelihoods and cultures of affected communities.³²⁸

3.3.1 Power Security

It is estimated that the peak demand for electric power within LMB States could reach 130,366 megawatts, 11 per cent of the capacity for which could be met by large-

³²⁴ Ibid

³²⁵ Oliver Hensengerth, 'Where is the Power: Transnational Networks, Authority and the Dispute Over the Xayaburi Dam on the Lower Mekong Mainstream' (2015) 40(5)-(6) *Water International* 911-928, 918; Cambodia National Mekong Committee, 'MRC Procedures for Notification, Prior Consultation and Agreement: Cambodia Reply to Prior Consultation' (*MRC*, 13 April 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Cambodia-Reply-Form.pdf>> accessed 1 July 2019; Vietnam National Mekong Committee, 'MRC Procedures for Notification, Prior Consultation and Agreement: Vietnam Reply to Prior Consultation' (*MRC*, April 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Viet-Nam-Reply-Form.pdf>> accessed 1 July 2019; MRC, 'Joint Development Partner Statement: Donor Consultative Group 18th MRC Council Meeting, Joint Meeting with the MRC Donor Consultative Group' (*MRC Press Release*, 9 December 2011) <<http://www.mrcmekong.org/news-and-events/speeches/joint-development-partner-statement-donor-consultative-group-18th-mrc-council-meeting-joint-meeting-with-the-mrc-donor-consultative-group/>> accessed 7 July 2019

³²⁶ Diana Suhardiman, Mark Giordano and Francois Molle, 'Between Interests and Worldviews: the Narrow Path of the Mekong River Commission'-217

³²⁷ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report' (*ICEM*, 2010) <<http://icem.com.au/portfolio-items/sea-of-hydropower-on-the-mekong-mainstream-summary-of-the-final-report/>> accessed 25 June 2019, p.9

³²⁸ Jeremy Carew-Reid, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in An International River Basin' in Philip Hirsch (ed), *Routledge Handbook of Environment in Southeast Asia* (Routledge Handbook of Environment in Southeast Asia, Routledge 2018) 334-355

scale dams between 2015 and 2025.³²⁹ Described as “the battery of Asia”, Laos is the country that would derive the greatest benefit from exporting electricity to Vietnam and Thailand while ensuring sufficient energy was retained to meet its domestic requirements.³³⁰

3.3.2 Economic Security

With Cambodia receiving 30% of its export revenues (US\$1.2 billion) per annum and Laos receiving 70% (US\$ 2.6 billion), US\$ 25 billion of foreign direct investment would be generated by the large-scale dams.³³¹ However, the findings of the SEA indicate that these dams would have a substantial and adverse effect on agricultural sectors and fisheries, which are the primary income source for the local people; this means levels of poverty in both urban and rural areas are likely to increase.³³²

3.3.3 Ecosystem Security

The large-scale dams will have a deleterious effect on several species, such as the Gian Catfishes and Irrawaddy Dolphins, and harm the longitudinal network connectivity of the Mekong ecosystem, reducing productivity and causing immutable changes in biodiversity.³³³ In addition, the natural course of the river would be changed by the dams and 55% of the Lower Mekong River would be transformed into a succession of inert reservoirs interspersed with areas where the flow of water fluctuates rapidly.³³⁴ The wetlands are the section of the rivers that would be affected most severely as 40% are close to the mainstream dams and 17% would be irreversibly flooded.³³⁵ The future flow of water and sediment through the coastal and offshore zone of the LMB would also be negatively impacted by the basin-wide effects of the dams.³³⁶ For instance, the 12 dams would reduce the existing suspended sediment load within the Mekong River by 50%; 25% of which (~42million tonnes/year) would take place at Kratie, the area that will be affected the most.³³⁷ This will cause considerable instability in the floodplains, river channels, and coastline of the Mekong Delta, and have a negative impact on the supply

³²⁹ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³³⁰ Jeremy Carew-Reid, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in An International River Basin'

³³¹ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³³² Jeremy Carew-Reid, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in An International River Basin'

³³³ International Rivers, 'Foretelling the Mekong River's Fate: Key Findings of the MRC's Strategic Environmental Assessment on Mekong Mainstream Dams' (*International Rivers*, January 2011)

<https://www.internationalrivers.org/sites/default/files/attached-files/sea_factsheet_eng.pdf> accessed 19 July 2019

³³⁴ Ibid

³³⁵ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³³⁶ Ibid

³³⁷ Ibid

of nutrients needed to fertilise 23,000-28,000 square kilometres of floodplains in Vietnam and Cambodia as well as the Tonle Sap system.³³⁸

3.3.4 Food Security

The mainstream dam is also likely to result in an enormous loss of fisheries, severely impacting almost 30 million rural people who would lose their livelihoods and a vital source of nutrition.³³⁹ The estimated loss of fish resources per annum is approximately 340,000 tonnes. Moreover, if all the proposed dams are constructed, the projected loss by 2030 would total 800,000 tonnes, particularly affecting Cambodia and Laos.³⁴⁰ Finally, in excess of US\$ 21 million per annum of agricultural produce would be lost from the riverbank gardens.³⁴¹

3.3.5 Social and Human Security

The livelihoods of more than 2.1 million people will be negatively impacted by the construction of mainstream dams in the LMB.³⁴² The direct impact alone will result in 106,942 people losing their land and homes.³⁴³ They will then be forced to resettle, which would have damaging effects on their access to food along with subsequent loss of a sense of local community and reduced engagement with their original or former cultures and heritages.³⁴⁴

Set a deadline of October 2010, 14 months was allocated by the ICEM for SEA report to be completed and submitted to the MRC. Its recommendation was to suspend the construction of the dams for a further 10 years to allow further research to be conducted. To ensure vital activities during this period were carried out effectively, the process was reviewed every 3 years.³⁴⁵ On October 2011, the final SEA report was published on the MRC website and could be accessed by the public.³⁴⁶ Subsequent to its release, the formal notification and consultation process for the Xayaburi Project was submitted by Laos. However, debate surrounding the Xayaburi Project escalated. This was because several problems regarding the accuracy of the project effect of the project led Development Assistance Committee (DAC), donors, OECDs, NGOs, the MRC, and

³³⁸ Ibid

³³⁹ Jeremy Carew-Reid, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in An International River Basin'

³⁴⁰ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³⁴¹ Ibid

³⁴² Jeremy Carew-Reid, 'The Mekong: Strategic Environmental Assessment of Mainstream Hydropower Development in An International River Basin'

³⁴³ Ibid

³⁴⁴ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³⁴⁵ ICEM, 'Strategic Environmental Assessment of Hydropower on the Mekong Mainstream: Summary of the Final Report'

³⁴⁶ International Rivers, 'Foretelling the Mekong River's Fate: Key Findings of the MRC's Strategic Environmental Assessment on Mekong Mainstream Dams'

LMB States to heavily criticise the EIA for the Xayaburi project, which was performed by the Team Consulting Groups (as directed by Ch. Karnchang) in accordance with the EIA law and regulations of Laos.³⁴⁷

3.4 What gaps and weaknesses are there in Xayaburi's EIA?

Prior to the commencement of the PNPCA process in September 2010, the EIA of the Xayaburi Project was finalised and presented to the Government of Laos (GOL) for approval in February 2010. However, the public were unable to access the EIA until March 2011 (and it was only published in English). Thus, public access to the EIA documentation was only facilitated following approval of the project by the GOL.³⁴⁸

Furthermore, the EIA did not consider the effects of the Xayaburi on, or in combination with, other LMB dams, and did not refer to the SEA or any of the myriad technical reports published by MRC.³⁴⁹ Moreover, because the assessment was restricted to the area 10 kilometres downstream from the proposed site, no consideration was given to the basin-wide and transboundary effect of the Xayaburi Dam.³⁵⁰

When the process of public consultation was initiated by the Team Consulting group between January 2010 to April 2010, only 234 local people within the affected area were permitted to take part, which is even fewer than the 8% of people who would be affected directly by the dams.³⁵¹ This runs contrary to the belief that public participation and timing form a vital element of the EIA process.³⁵² Moreover, those taking part were given just one month to scrutinise the documentation prior to the GOL making its final decision.³⁵³

To ensure Laos complied with its responsibilities to its neighbouring countries, who had voiced their concerns, the consultancy company Pöyry was contracted by Laos'

³⁴⁷ MRC, 'Joint Development Partner Statement: Donor Consultative Group 18th MRC Council Meeting, Joint Meeting with the MRC Donor Consultative Group'

³⁴⁸ Ame Trandem, 'Fatally Flawed Xayaburi EIA Fails to Uphold International Standards: A Preliminary Review of the Environmental Impact Assessment (EIA) Report for the Xayaburi Hydropower Dam on the Mekong River Mainstream in Northern Lao PDR'

³⁴⁹ Philip Hirsch, 'Review of Xayaburi Dam EIA Incorporation Into Regional Consultation Impacts' (*International Rivers*, 2012) <https://www.internationalrivers.org/sites/default/files/attached-files/hirsch_xayabouri_dam_esia_consultation_process.pdf> accessed 15 July 2019

³⁵⁰ Pham Ngoc Bao, Bijon Kumar Mitra and Tetsuo Kuyama, 'Integrated Approach for Sustainable Hydropower Development in the Mekong River Basin' (2017) 7(1) *Environment and Natural Resources Research* 60-75

³⁵¹ TEAM Consulting Engineering and Management Co.Ltd., 'Environmental Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR'; Ame Trandem, 'Fatally Flawed Xayaburi EIA Fails to Uphold International Standards: A Preliminary Review of the Environmental Impact Assessment (EIA) Report for the Xayaburi Hydropower Dam on the Mekong River Mainstream in Northern Lao PDR'

³⁵² Nicola Hartley and Christopher Wood, 'Public Participation in Environmental Impact Assessment—Implementing the Aarhus Convention' (2005) 25(4) *Environmental Impact Assessment Review* 319-340

³⁵³ Lauren Campbell, 'The Use of Environmental Impact Assessment in Laos and Its Implications for the Mekong River Hydropower Debate' (*Duke University*, March 2011) <https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/3655/Final%20MP_LCampbell.pdf?sequence=1> accessed 22 June 2019

Ministry of Mines and Energy.³⁵⁴ Having reviewed the EIA, their conclusion was that the project generally complied with the standards set by the MRC but recommended additional impact studies and changes to the design of the project to enhance sustainability.³⁵⁵

The French company, Compagnie Nationale du Rhone (CNR), was contracted by the GOL to review Pöyry's findings in response to complaints made by Vietnam and Cambodia. The CNR concluded that the suggested changes were purely conceptual in nature.³⁵⁶ GOL failed to present the newly designed plan to the MRC, even though it asserted that alterations had been made to the dam to ameliorate its impact on downstream countries. This meant that documentation regarding these changes could not be reviewed by the MRC Secretariat and other LMB States, and the new plan for the review – the Review of the Design Changes Made for Xayaburi Hydropower Project – was only published in 2019, after the Xayaburi Dam had been built.³⁵⁷

A report by Cronin and Weatherby concluded that, despite the SEA's recommendation to carry out further research, no additional studies have been conducted and no official assessment of the potentially damaging transboundary or cumulative impact on downstream riparian States has been performed by the project developer and the GOL and made available to the public. Consequently, the actual impact of the Xayaburi Dam remains unknown.³⁵⁸

This has given rise to a great deal of criticism of the EIA by multiple stakeholders,³⁵⁹ including the MRC and LMB States, for failing to assess, fully and accurately, the cumulative cross-border impact of the project on local communities, fisheries, and ecosystems. They called for additional information, including further clarification as to the mitigation measures that would be needed.³⁶⁰

³⁵⁴ Siemenpuu Foundation Mekong Group, 'Specific Instance to OECD National Contact ' (*Business and Human Rights Resource Centre*, 11 June 2012) <[https://www.business-humanrights.org/sites/default/files/media/specific_instance_to_oecd_ncp_in_finland_180612_\(3\).pdf](https://www.business-humanrights.org/sites/default/files/media/specific_instance_to_oecd_ncp_in_finland_180612_(3).pdf)> accessed 25 July 2019

³⁵⁵ Pöyry Energy AG, 'Government of Laos: Xayaburi Hydroelectric Power Project Main Report: Xayaburi Hydroelectric Power Project Run-of-River Plant' (*Pöyry Energy AG*, August 2011) <<http://www.poweringprogress.org/download/Reports/2012/July/Compliance%20Report%20Xayaburi%20Main%20Final.pdf>> accessed 12 March 2019

³⁵⁶ Kirk Herbertson, 'As Consultant Distances Itself, Cracks Appear As Consultant Distances Itself, Cracks Appear ' (*International Rivers*, 8 September 2012) <<https://www.internationalrivers.org/blogs/267/as-consultant-distances-itself-cracks-appear-in-laos'-portrayal-of-xayaburi-dam>> accessed 20 July 2019

³⁵⁷ Mekong River Commission, 'Review of the Design Changes Made for Xayaburi Hydropower Project, Technical Reference Paper No. 65' (*Mekong River Commission*, January 2019) <http://www.mrcmekong.org/assets/Publications/Review-of-design-change-for-Xayaburi-hydropower-project_technical-ref-paper_2019_update-v2.pdf> accessed 21 July 2019

³⁵⁸ Richard Cronin and Courtney Weatherby, 'Letters from the Mekong: Time for A New Narrative on Mekong Hydropower' (*STIMSON*, October 2015) <https://www.files.ethz.ch/isn/194459/Letters_from_the_Mekong_Oct_2015.pdf> accessed 25 August 2019

³⁵⁹ Kurt Mørck Jensen and Rane Baadsgaard Lange, 'Transboundary Water Governance in A Shifting Development Context: New Development Finance, Development Space and Comittment Cooperation: A Comparative Study of The Mekong and the Zambezi River Basin (DIISS Report 2013:20)' (*Danish Institute for International Studies (DIIS)*, 2013) <https://www.diis.dk/files/media/publications/import/extra/rp2013-20-transboundary_water_governance-webversion_1.pdf> accessed 25 August 2019

³⁶⁰ MRC, 'Joint Development Partner Statement: Donor Consultative Group 18th MRC Council Meeting, Joint Meeting with the MRC Donor Consultative Group'; MRC Secretariat, 'Proposed Xayaburi Dam Project –

3.4.1 Cumulative Impact

Hydropower projects on the mainstream of the LMB can provide considerable advantages in terms of renewable energy and income, but they can also have negative environmental and socioeconomic impacts on a local transboundary scale. When combined with other hydropower projects on the Mekong River those impacts can have a cumulative character.³⁶¹ Cumulative impacts are the net result of environmental impact from a number of projects and activities, typically in conjunction with the impacts of other past, existing, and proposed actions. Although the EIA of the Xayaburi project focused solely on that one project, its impact may be amplified by several other proposed or actual projects taking place along the river.³⁶²

3.4.2 Impact on Fisheries

Only a limited amount of baseline data is provided with respect to the diversity, migration patterns, species, and anticipated impacts of the project on fisheries.³⁶³ The SEA carried out by the ICEM,³⁶⁴ the Fisheries Programme implemented by Ferguson, Healy, Dugan and Barlow, and The MRC Fisheries Expert Group³⁶⁵ collectively concluded that, due to the enormous variety of fish species present in LMB, the fishery problem cannot be resolved practically through the use of fish ladders.³⁶⁶ A report by Hogan and the MRC Fisheries Expert Group concluded that 23-100 species of fish could be affected by the Xayaburi dam, five of which are on the IUCN Red list of threatened species and two, the giant pangasius and Giant Mekong Catfish, are in danger of becoming extinct.³⁶⁷ Moreover, most of the Mekong fish migrate long distances but no consideration of the impact of the proposed dam on such migration was given in EIA.³⁶⁸ Perhaps unsurprisingly, MRC Technical Review Report therefore asserted that inadequate information on the biomass, number, and ability to pass the reservoir of migratory species of fish renders extremely uncertain the extent of the local and

Mekong River: Prior Consultation Project Review Report [hereinafter "MRC Technical Review Report"] (MRC, 24 March 2011) <<http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>> accessed 21 August 2019

³⁶¹ Mako Keskinen and Matti Kumm, 'Impact Assessment in the Mekong: Review of Strategic Environmental Impact Assessment (CIA)' (Water & Development Publications, Aalto University, Espoo Finland, 2010).

³⁶² Ibid.

³⁶³ Lauren Campbell, 'The Use of Environmental Impact Assessment in Laos and Its Implications for the Mekong River Hydropower Debate'

³⁶⁴ ICEM, 'MRC SEA for Hydropower on the Mekong Mainstream: Inception Report'

³⁶⁵ MRC Fisheries Expert Group, 'Annex 4: Fisheries Expert Group Report' (MRC, 2010) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Annex4-Fisheries-Expert-Group-Report.pdf>> accessed 22 August 2019

³⁶⁶ John Ferguson and others, 'Potential Effects of Dams on Migratory Fish in the Mekong River: Lessons from Salmon in the Fraser and Columbia Rivers' (2010) 47(1) *Environmental Management* 141-159

³⁶⁷ Zeb Hogan, 'Imperiled Giant fish and Mainstream Dams in the Lower Mekong Basin: Assessment of Current Status, Threats and Mitigation' (*International Rivers*, 15 April 2011)

<https://www.internationalrivers.org/sites/default/files/attached-files/hogan_fisheries_eia_review.pdf> accessed 20 August 2019; MRC Fisheries Expert Group, 'Annex 4: Fisheries Expert Group Report'

³⁶⁸ Ibid.

transboundary impact of the proposed dam on fisheries and the livelihoods of those who depend on them.³⁶⁹

3.4.3 Impact on Ecosystem

A review of the EIA for the Xayaburi by the MRC concluded that its effects would be felt up to 200 kilometres downstream and upstream. Such effects include slowing the river flow, which would create a reservoir and impact the transportation of sediment.³⁷⁰ Only the impacts of sediment deposits in the study area were considered in the EIA report, yet the flow of sediment nutrient is vital for enhancing soil fertility and the agro-ecosystem productivity required to ensure satisfactory crop and rice yields in the Mekong Delta.³⁷¹

Also absent from the EIA report was essential information on how the dam would operate and the impact this would have on the temperature, volume, and velocity of the river flow. Seasonal fluctuations in water level cannot be managed effectively without such information.³⁷² Moreover, perpetual impoundment of the deep pools, riverbanks, and sand bars arising from fluctuations in the rapidity, temperature, and water quality of the flow will negatively affect the productivity of the river and its flora, fauna, and overall ecosystem.³⁷³ Also missing in the EIA of the Xayaburi is an assessment of the impact on numerous other aquatic flora and fauna within the river, including amphibians, crustaceans, and plant species such as *Kai* (edible Mekong freshwater algae).³⁷⁴

3.4.4 Impact on Local Communities

In addition to affecting the livelihoods of those living in Laos, it is clear that the Xayaburi Dam will also affect people living across the border along with downstream communities' people living by the river in Cambodia, Vietnam, and Thailand. However, as

³⁶⁹ MRC Secretariat, 'Proposed Xayaburi Dam Project – Mekong River: Prior Consultation Project Review Report [hereinafter "MRC Technical Review Report"]' p.ii

³⁷⁰ Ibid

³⁷¹ Tuyet Cosslett and Patrick Cosslett, *Sustainable Development of Rice and Water Resources in Mainland Southeast Asia and Mekong River Basin* (Springer 2018) 85-112; David Blake, 'Comments Concerning the environmental Impact Assessment and Social Impact Assessment Documents Provided for the Xayaburi Hydroelectric Power Project, Lao PDR' (*International Rivers*, August 2010) <https://www.internationalrivers.org/sites/default/files/attached-files/blake_livelihoods_review_final.pdf> accessed 25 August 2019

³⁷² Guy Lanza, 'Review of Ch.Karnchang Public Company Limited Environmental Impact Assessment (EIA): Xayaburi Hydroelectric Power Project, Lao PDR' (*International Rivers*, August 2010) <https://www.internationalrivers.org/sites/default/files/attached-files/lanza_water_quality_final.pdf> accessed 20 August 2019

³⁷³ Eric Baran, Eric Guerin and Joshua Nasielski, 'Fish, Sediment and Dams in the Mekong' (*Greater Mekong and Consultative Group for International Agricultural Research (CGIAR)*, 2015) <[file:///C:/Users/khanh/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Baran%20et%20al%20%202015%20Fish%20sediment%20and%20dams%20in%20the%20Mekong%20\(7%20Mo\)%20\(1\).pdf](file:///C:/Users/khanh/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Baran%20et%20al%20%202015%20Fish%20sediment%20and%20dams%20in%20the%20Mekong%20(7%20Mo)%20(1).pdf)> accessed 15 August 2019; Kirk Herbertson, 'How the Next 12 Months of Xayaburi Dam Construction Will Affect the Mekong River' (*International Rivers*, 26 July 2012) <<https://www.internationalrivers.org/blogs/267/how-the-next-12-months-of-xayaburi-dam-construction-will-affect-the-mekong-river>> accessed 16 July 2019

³⁷⁴ David Blake, 'Comments Concerning the environmental Impact Assessment and Social Impact Assessment Documents Provided for the Xayaburi Hydroelectric Power Project, Lao PDR'

reported earlier, only 234 local people took part in the EIA consultation, less than half of whom were aware of the EIA report and documentation beforehand,³⁷⁵ and a small window of one month was available in which to view the documentation prior to the final decision being made in April.³⁷⁶ This contravenes international practice regarding EIA, where there is an emphasis on transparency and timely disclosure. In the case of the EIA for the Xayaburi, disclosure only took place once approval had been given.

According to Middleton, more than 200,000 people living close to the project will be directly impacted by a loss of agricultural lands, riverbank gardens, and fisheries while there will be a direct cultural and economic impact on approximately 2,130 people from 10 villages who will be forced to resettle.³⁷⁷ Vannarith also asserts that because Mekong fish is the primary food source for 80% of Cambodians, the livelihoods of those living in Tonle Sap will be greatly affected by the construction of the Xayaburi dam.³⁷⁸ An MRC Technical Review also reported that for communities whose primary sources of food and income are fish and agricultural produce, insufficient compensation measures were provided due to a poor understanding of the extent to which they would be affected.³⁷⁹ A request has therefore been made by the MRC for an in-depth baseline study on the social and economic impacts of the Xayaburi on both the immediate upstream and downstream area, where impoundment will be an issue, and any transboundary areas. The MRC has also recommended additional research on the ability of local communities to respond to the changes taking place.³⁸⁰

3.5 What implications does the EIA in Laos have for the development of hydropower projects?

The Xayaburi Dam is situated and functions within the territorial jurisdiction of Laos, therefore the EIA was based on the national legal requirements of this country, despite the project being built on the transboundary river basin.³⁸¹ Because EIA law in

³⁷⁵ TEAM Consulting Engineering and Management Co.Ltd., 'Environmental Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR'; Ch.Karnchang public Company Ltd, 'Social Impact Assessment: Xayaburi Hydroelectric Power Project Lao PDR' (MRC, August 2010) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-SIA-August-2010.pdf>> accessed 26 August 2019

³⁷⁶ Lauren Campbell, 'The Use of Environmental Impact Assessment in Laos and Its Implications for the Mekong River Hydropower Debate'

³⁷⁷ Carl Middleton, 'Thai Foreign Direct Investment and Human Security Implications: A Case Study of the Xayaburi Dam in Lao PDR' (2012) 25 Asian Review 91-117

³⁷⁸ Chheang Vannarith, 'A Cambodian Perspective on Mekong River Water Security' (STIMSON, 4 April 2012) <<https://www.stimson.org/content/cambodian-perspective-mekong-river-water-security>> accessed 12 August 2019

³⁷⁹ Kirk Herbertson, 'Sidestepping Science: Review of Pöyry Report on the Xayaburi Dam'

³⁸⁰ MRC Secretariat, 'Proposed Xayaburi Dam Project – Mekong River: Prior Consultation Project Review Report [hereinafter "MRC Technical Review Report"]' Supra note, p. 32-41: In essence, this should include further information on socio-economics and water-resources-related livelihood of people who live within the corridor of 15 kilometres of both sides along Lower Mekong River near the project areas: Southern Province of Champasak in Laos; Chiang Rai, Lei and Nong Khai Provinces in Thailand; Tonle Sap in Cambodia; and Mekong Delta in Vietnam.

³⁸¹ Xayaburi Power Company Limited (Official Website), 'Environmental Safeguards' (*Xayaburi Power Company Limited*, 2014) <http://www.xayaburi.com/Environment_SG_eng.aspx> accessed 25 August 2019

Laos does not necessitate any consideration of the transboundary impacts on Thailand, Vietnam, and Cambodia,³⁸² the EIA only considered the area from the dam site up to 10 kilometres downstream.³⁸³ This section of the Chapter therefore considers EIA law and regulations in Laos³⁸⁴ and the implications of this for the development of large infrastructures such as hydropower projects.

Under the governance of the Science Technology and Environmental Agency (STEA) in Laos, the EIA was initially developed in 1993 by the Swedish International Development Agency (SIDA).³⁸⁵ The Law on Water and Water Resources 1996 was established by the GOL to govern the measures, regulations, and principles pertaining to the development and usage of water resources. Its purpose is to ensure such resources are of a sufficient volume, quality, and level of sustainability to support everyday standards of living.³⁸⁶ Prior to becoming the Ministry of Natural Resources and Environment (MONRE) in 2010, in 2007 the STEA first became known as the Water Resources and Environmental Administration (WREA).³⁸⁷ Upon successful completion of the EIA process, project developers are issued with an Environmental Compliance Certificate (ECC) by the MONRE. Guided by their Environmental Management and Monitoring Plans (EMMPs), they are obligated to submit frequent monitoring reports to MONRE.³⁸⁸ With a remit to review EIAs and SIAs, in 2008 the Department of Environmental and Social Impact Assessment (DESIA) was set up within the MONRE (then the WREA). From this point onwards, EIAs have been required to fulfil the requirements of the GOL regarding the construction and operation of hydropower projects.³⁸⁹

All investment projects (including hydropower development projects) are now required to carry out an environmental and social impact assessment (ESIA) in accordance with the Lao People's Democratic Republic, Decree of Environmental Impact

³⁸² Andrew Wells-Dang and others, 'A Political Economy of Environmental Impact Assessment in the Mekong Region' (2016) 9(1) *Water Alternatives* 33-55

³⁸³ International Rivers, 'Xayaburi Dam' (*International Rivers*, 2014)

<<https://www.internationalrivers.org/campaigns/xayaburi-dam>> accessed 15 July 2019

³⁸⁴ Sari Jusi, 'Challenges in Developing Sustainable Hydropower in Lao PDR' (2011) 10(3) *International Journal of Development Issues* 251-267

³⁸⁵ Lauren Campbell, 'The Use of Environmental Impact Assessment in Laos and Its Implications for the Mekong River Hydropower Debate'

³⁸⁶ Souphasay Komany, 'Lao PDR Country Review: Water Sector and Sustainable Development in Lao PDR: Mainstreaming Water Resources Development Management towards the More Integrated Manner and Sector-based Approach' (*Economic Research Institute of ASEAN and East Asia (ERIA)*, March 2009)

<http://www.eria.org/uploads/media/Research-Project-Report/RPR_FY2008_6-2_Appendix_5.pdf> accessed 30 August 2019; Water Environment Partnership in Asia (WEPA), 'Water and Water Resources Law 1996' (*WEPA*, 2008) <<http://www.wepa-db.net/policies/law/laos/wwrl.htm>> accessed 30 August 2019;

³⁸⁷ Lauren Campbell, 'The Use of Environmental Impact Assessment in Laos and Its Implications for the Mekong River Hydropower Debate'

³⁸⁸ Sengdeuane Wayakone and Inoue Makoto, 'Evaluation of the Environmental Impacts Assessment (EIA) System in Lao PDR' (2012) 3 *Journal of Environmental Protection* 1655-1670

³⁸⁹ Sengdeuane Wayakone, Inoue Makoto and Sachihiko Harashima, 'Environmental Impact Assessment in Lao PDR: A Comparative Study on the Gaps between Procedures and Practice with Reference to Japan' (2013) 3(6) *International Journal of Environmental Sciences* 2080 -2112

assessment 2010 (EIA Decree 2010) These are divided into two categories based on their impact: the first includes small investment projects requiring initial environmental examinations (IEEs) while the second includes large-scale and more complex Investment projects requiring environmental impact assessments (EIAs).³⁹⁰

The types and sizes of projects included within Category 1 and 2 were listed in the Ministerial Agreement on the Endorsement and Promulgation of the List of Investment Projects and Activities Requiring for Conducting the Initial Environmental Examination or Environmental and Social Impact Assessment 2013, which was published by the MONRE.³⁹¹ An ESIA is required for large-scale hydropower projects greater than 15 mW and all other projects where resettlement and compensation will be needed, as stated in the Prime Minister's Decree on Compensation and Resettlement of People Affected by the Development Project 2005 (No.192/PM).³⁹²

The framework within which environmental resources are managed to ensure their sustainability and conservation in Laos was set out in the Environmental Protection Law 1999, which was later modified to become the Environmental Protection law 2012.³⁹³ To accommodate and enact Articles 21 and 22 of the Law on Environmental Protection 2012, the Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities (No 8029/MONRE)³⁹⁴ along with the Ministerial Process of Environmental and Social Impact Assessment and Activities (No.8030/MONRE)³⁹⁵ was passed by the National Assembly in December 2013.³⁹⁶

With respect to EIA procedure, the vital stages in the EIA process of Laos are set out in Chapter 2.1 of Lao's EIA Guidelines 2015, which was developed by the MONRE. It can be summarised as follows.

³⁹⁰ Lao People's Democratic Republic, Decree of Environmental Impact assessment 2010 (EIA Decree 2010), No.112/PM, (entered into force on 10 February 2010), Article 6(2)

³⁹¹ Ministry of Natural Resource and Environment (MONRE), *Ministerial Agreement on the Endorsement and Promulgation of the List of Investment Projects and Activities Requiring for Conducting the Initial Environmental Examination or Environmental and Social Impact Assessment 2013 (No.8056)* (Lao People's Democratic Republic Peace Independence Democracy Unity Prosperity 17 December 2013)

³⁹² Prime Minister's Office Science Technology and Environment Agency (STEA), *Regulations for Implementing Decree 192/PM on Compensation and Resettlement of People Affected by Development Projects (entered into force on 11 November 2005)* (Lao people's Democratic Republic Peace Independence Democracy Unity Prosperity 2005)

³⁹³ Earthrights International, 'Manual of Environmental Impact Assessment in the Mekong Region: Commentary & Materials (First Edition)' (*Earthrights International*, September 2016) <https://earthrights.org/wp-content/uploads/eia_manual_final_0.pdf> accessed 30 August 2019

³⁹⁴ MONRE, *Ministerial Instruction on the Process of Initial Environmental Examination of the Investment Projects and Activities (No 8029/MONRE)*, entered into force on 17 December 2013 (Lao People's Democratic Republic Peace Independence Democracy Unity Prosperity 17 December 2013)

³⁹⁵ MONRE, *Ministerial Process of Environmental and Social Impact Assessment and Activities (No.8030/MONRE)*, entered into force on 17 December 2013 (Lao People's Democratic Republic Peace Independence Democracy Unity Prosperity 17 December 2013)

³⁹⁶ National Assembly, *Environmental Protection Law 2012 (No.29/NA)*, entered into force on 18 December 2012, Article 21 and 22 (Lao People's Democratic Republic Peace Independence Democracy Unity Prosperity 18 December 2012)



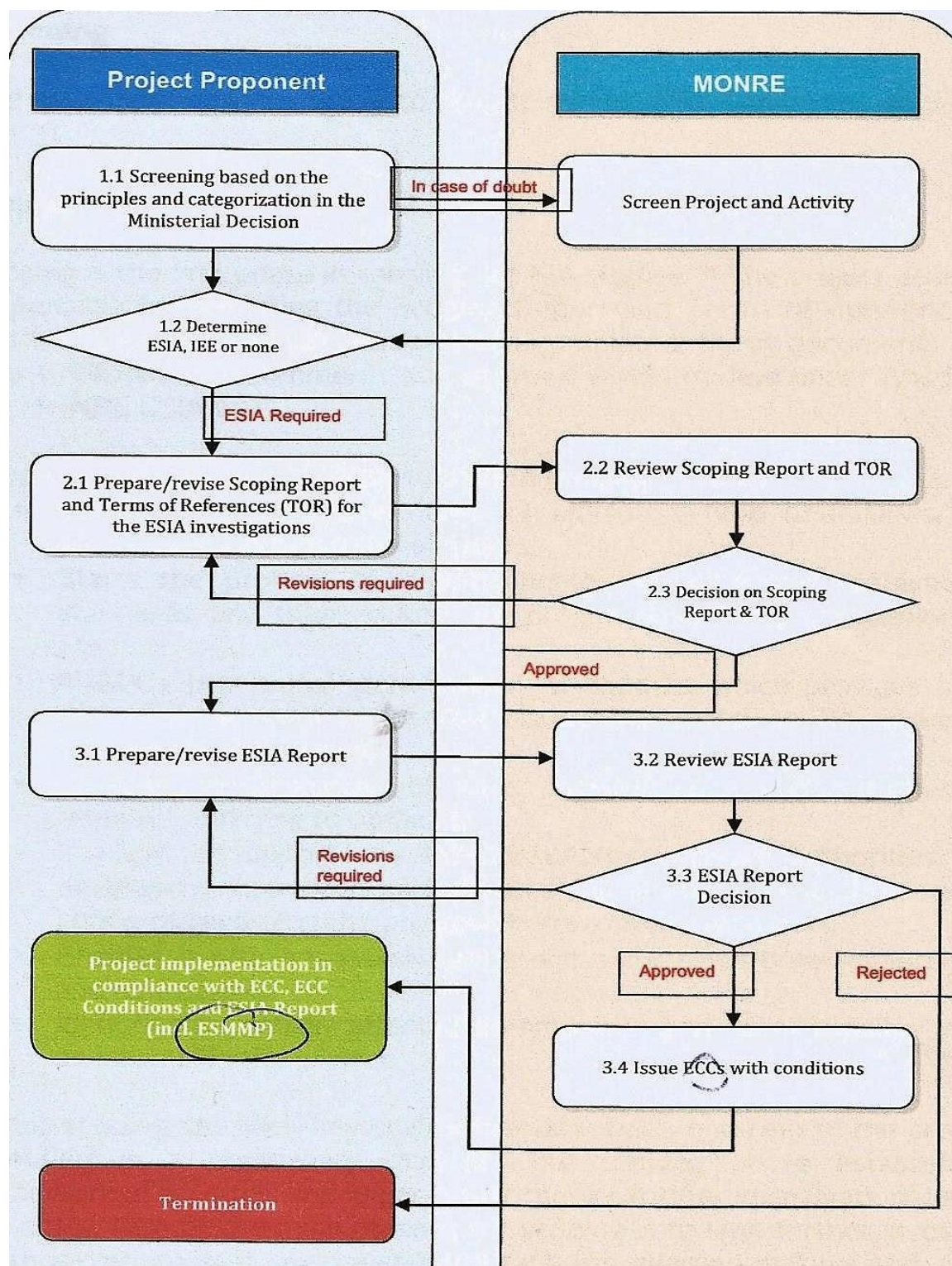


Figure 2: The ESIA Process for the Phases During Project Development Until the Issuance of ECC (Environmental Compliance Certificate) for the ESIA (Environmental and Social Impact Assessment) and the ESMMP (Environmental and Social Management and Monitoring Plan)

Source: Laos's Draft ESIA Procedure 2015, Chapter 2.1 (Page 15)

As indicated in the diagram, the laws and regulations pertaining to the EIA in Laos are strong but there are deficiencies in how it is being enforced. Campbell, Suhardiman, Giordano, and McCornick conducted a series of interviews with 38 government officials from the Ministry of Energy and Mines (MEM), the Ministry of Natural Resources and Environment (MONRE), who are charged with reviewing EIAs for hydropower projects in Laos, and the Ministry of Planning and Investment (MPI), along with several regional NGOs³⁹⁷ and MRC donors.³⁹⁸ The findings indicated that the EIA is heavily dependent on the knowledge of the private body responsible for conducting the assessment.³⁹⁹ However, the technical and local knowledge needed to perform a critical review of the EIA appears to be lacking – the EIA was unable to assess the overall impact and implement efficacious measures to ameliorate harm because it did not consider all the areas likely to be affected.⁴⁰⁰

Matthews asserts that difficulties with the process of assessment are not attributable to the laws and regulations but the haphazard way in which they have been implemented and enforced, which is compounded by the clandestine nature of States and the degree of corruption inherent within.⁴⁰¹ The Laos government's inability to enact effective measures to conduct and assess a large body of EIAs was also highlighted by Foran, Wong, and Kelley. They attributed this to the rapid growth in foreign investments in hydropower development projects, despite the existing legal mandate for EIAs in Laos.⁴⁰²

In the process of approving projects, there are also considerable weaknesses in the degree of collaboration between local authorities and central government. This was exemplified by the fact that the Xayaburi Project was approved by the GOL prior to disclosure of the EIA, which is by no means an unusual outcome.⁴⁰³ Well-Dangs and other scholars note that several projects are centrally approved before being transferred to local authorities who are likely to abide by the decision. For instance, large-scale investment projects such as dams and mines are often approved by the National Assembly of Laos, which is guided by its ministries.⁴⁰⁴ In a report by the World Bank,

³⁹⁷ The IUCN, the WWF, the Helevetus and the Village Focus International

³⁹⁸ The Asian Development Bank (ADB), the Australian Aid (AUS), the Danish International Development Agency (DANIDA), the SIDA, the European Union, the Swiss Development Cooperation (SDC) and the World Bank

³⁹⁹ Lauren Campbell and others, 'Environmental Impact Assessment: Theory, Practice and Its Implications for the Mekong Hydropower Debate' (2015) 4 *International Journal of Water Governance* 93-116

⁴⁰⁰ *Ibid*

⁴⁰¹ Nathaniel Matthews, 'Water Grabbing in the Mekong Basin -An Analysis of the Winners and Losers of Thailand's Hydropower Development in Lao PDR' (2012) 5(2) *Water Alternatives* 392-411

⁴⁰² Tira Foran, Timothy Wong and Shawn Kelley, 'Mekong Hydropower Development: A Review of Governance and Sustainability. Working Paper. M-POWER Research Network ' (*European Project EUWI-ERANET funded by Ministry for Foreign Affairs of Finland*, 11 October 2010) <https://splash-era.net/downloads/mekong_report_part3.pdf> accessed 29 August 2019

⁴⁰³ *Ibid*

⁴⁰⁴ Andrew Wells-Dang and others, 'A Political Economy of Environmental Impact Assessment in the Mekong Region'

Dusik and Xie found that EIAs in several countries in the region, including Laos and its neighbours, were often carried out after final approval for a project had been granted, and in some cases when construction had already begun.⁴⁰⁵

Furthermore, even though it is a legal requirement under Lao's Environmental Protection Law 1999, the IUCN asserted that there has been minimal public disclosure of the EIA process for a multitude of proposed projects.⁴⁰⁶ This severely impedes the ability of the public to assess relevant information and make informed decisions on the projects that are likely to impact them.

As a result of Laos signing the International Covenant on Civil and Political Rights in 2009, international NGOs can now be granted a (revocable) license by the GOL to work within Laos.⁴⁰⁷ However, they are governed by a rigid set of regulations which forbids them from travelling or interacting with the public unless they are monitored by the authorities, and must submit information intended for public consumption to the authorities beforehand.⁴⁰⁸

Hirsch, Miramuchi, and Torriti reported that in Laos there has been little involvement by the public and NGOs in the EIA process, despite its stated aim to enhance transparency and accountability;⁴⁰⁹ it is left to the instructed agency and the developer to define the level of participation and the scope of the EIA.⁴¹⁰ It is often the case that EIA reports are quickly approved by the GOL and the MONRE to accelerate the investment process. In this sense, it constitutes a "rubber stamp procedure" to ensure the legal requirements prior to the approval of proposed projects are met.⁴¹¹

3.6 In what ways is the EIA acknowledged under International Law?

3.6.1 Soft Law

With respect to laws that are not legally binding, the EIA was first referred to in UN instruments concerning the development of shared resources and transboundary harm,

⁴⁰⁵ Jiri Dusik and Jian Xie, 'Sustainable Development—East Asia and Pacific Region (Discussion Papers): Strategic Environmental Assessment in East and South East Asia: A Progressive Review and Comparison of Country Systems and Cases' (*World Bank*, June 2009) <<https://www.integracons.com/wp-content/uploads/2016/05/WB-Progress-Review-of-SEA-in-South-East-Asia.pdf>> accessed 22 August 2019

⁴⁰⁶ IUCN, 'Mekong Region Water Resources Decision Making: National Policy and Legal Frameworks vis-à-vis World Commission on Dams Strategic Priorities' (*IUCN*, 2006) <http://cmsdata.iucn.org/downloads/mekong_region_water_resources_decision_making.pdf> accessed 15 August 2019

⁴⁰⁷ William Case, 'Laos in 2010: Political Stasis, Rabid Development, and Regional Counter-weighting' (2011) 51(1) *Asian Survey* 202-207

⁴⁰⁸ *Ibid*

⁴⁰⁹ Philip Hirsch, 'Water Governance Reform and Catchment Management in the Mekong Region' (2006) 15(2) *The Journal of Environment & Development* 184-201

⁴¹⁰ Naho Mirumachi and Jacopo Torriti, 'The Use of Public Participation and Economic Appraisal for Public Involvement in Large-Scale Hydropower Projects: Case Study of the Nam Theun 2 Hydropower Project' (2012) 47 *Energy Policy* 125-132

⁴¹¹ *Ibid*; Philip Hirsch, 'Water Governance Reform and Catchment Management in the Mekong Region'

two notable examples are the UNEP Goals and Principles of Environmental Impact Assessment 1987, the aim of which was to motivate States to establish a national EIA procedure and directly link this to the requirement of States to consult with and notify others regarding harmful activities that may potentially affect them,⁴¹² and UNGA resolution 2995 which recognised the importance of sharing technical data relating to activities that may cause harm.⁴¹³

Despite its non-binding force, when soft law is embraced and practised by most States, it may emerge into a new norm that is recognized by States leading to the creation of a new customary norm or an emerging norm.⁴¹⁴ Whereas Principle 17 and 18 of the Rio Declarations are not legally binding, they help in the progressive development of the emergence of a binding norm of the EIA obligation under international law.⁴¹⁵ Throughout the 1990s, the Principles have influenced many international treaties and international organizations in adopting the practice of EIA in several fields of international environmental law, including water law.⁴¹⁶

3.6.2 Treaty Law

A wide array of Multilateral Environmental Agreements (MEAs) also promotes the practice of EIA. For instance, the provisions in Article 4 of the UN Framework Convention on Climate Change 1992⁴¹⁷, Article 14 of the Convention on Biological Diversity 1992⁴¹⁸, and Article 206 of the UN Convention on the Law of the Sea 1982⁴¹⁹ all oblige States to perform EIA for activities that are likely to have harmful effects that transcend boundaries.

To avoid, manage, and limit such transboundary impacts, Article 3(1)(h) of the UNECE Water Convention stipulates that, with regard to water law, States have an obligation to devise, adopt, and enact technical, economic, administrative, legal, and financial measures to guarantee the application of EIAs and other relevant forms of

⁴¹² Goals and Principles of Environmental Impact Assessment 1987 UNEP Res. GC14/25, 14th Sess. (1987), endorsed by GA Res. 42/184, UN GAOR, 42nd sess., UN Doc. A/Res/42/184 (1987), Goal 2, Goal 3 and Principle 4

⁴¹³ Co-operation between States in Field of the Environment. UNGA Res. 2995 (XXVII), UN Sess., UN Doc A/Res/37/7 (1982)

⁴¹⁴ Alexander Anile, 'Law or Not?: Considering the Value of International Soft Law in Addressing Environmental Problem' (2019) 4 Perth International Law Journal 21

⁴¹⁵ Foo Kim Boon, 'The Rio Declaration and Its Influence on International Environmental Law' (December 1992) Singapore Journal of Legal Studies 347-364

⁴¹⁶ Roger Matella and Kim Smaczniak, 'Introduction to Rio+20: A Reflection on Progress Since the First Earth Summit and the Opportunities that Lie Ahead' (2012) 12(3) Sustainable Development Law & Policy 4

⁴¹⁷ UN Framework Convention on Climate Change 1992 (adopted on 9 May 1992, entered into force on 21 March 1994) 1771 UNTS 107; 31 ILM 849 (1992) Article 4

⁴¹⁸ UNEP Convention on Biological Diversity 1992 (adopted on 5 June 1992, entered into force on 29 December 1993) 1760 UNTS 79; 31 ILM 818 (1992) Article 14

⁴¹⁹ UN Convention on the Law of the Sea 1982 (adopted on 10 December 1982, entered into force on 16 November 1994) 1833 UNTS 3; 21 ILM 1261 (1982) Article 206

assessment.⁴²⁰ Drawing on the *UNECE Water Convention Implementation Guide*⁴²¹, McIntyre asserts that the implementation of an EIA functions as a precautionary measure to avert or reduce any potential harm that may occur as a consequence of a proposed project. This implies that the environmental effects of any proposed activities need to be addressed at an early stage.⁴²²

In accordance with Article 12 of the UN Watercourses Convention, all available technical data and information, which includes the EIA, must accompany any notifications or proposed projects whose effects may spread across multiple states.⁴²³ This makes it clear that this is a recommendation and not an explicit requirement.⁴²⁴ As such, the EIA is arguably a measure that complies with the “due diligence obligation” to avoid inflicting significant harm set out under Article 7 of the UN Watercourses convention.⁴²⁵

The Espoo Convention is the first multilateral agreement to set out bilateral practices, procedures, and regulations pertaining to transboundary EIA.⁴²⁶ For instance, Article 2 stipulates that each State must ensure an EIA is carried out before any approval is granted to a proposed activity listed in Appendix I as likely to have a significant transboundary impact.⁴²⁷

When deciding whether to take part in EIA, States likely to be affected will find it helpful to be given information on the likely transboundary impact at an early stage.⁴²⁸ To initiate early discussion, the information passed on by the State of origin could include

⁴²⁰ UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (adopted on 17 March 1992, entered into force on 6 October 1996) 1936 UNTS 269; 31 ILM 1312 (1992) (UNECE Water Convention) Article 3(1)(h)

⁴²¹ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 2

⁴²² Owen McIntyre, 'The Water Convention: Other UNECE Treaties' in Atilia Tanzi and others (eds), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Brill Nijhoff 2015) 76

⁴²³ UN Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (adopted on 21 May 1997, entered into force on 17 August 2014) 36 ILM 700 (1997) (UN Watercourses Convention) Article 12

⁴²⁴ Alistair Rieu-Clarke, 'UN Watercourses Convention: Online's User's Guide' 2016)

<<https://www.unwatercoursesconvention.org/the-convention/part-iii-planned-measures/article-12-notification-concerning-planned-measures-with-possible-adverse-effects/12-1-5-environmental-impact-assessment/>> accessed 2 July 2019

⁴²⁵ Owen McIntyre, *Environmental Protection of International Watercourses Under International Law* (Ashgate Publishing Limited 2007) 233-234

⁴²⁶ Mari Koyano, 'The Significance of the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) in International Environmental Law: Examining the Implications of the Danube Delta Case' (2008) 26(4) *Impact Assessment and Project Appraisal* 299-314; Owen McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources' (2006) 46(1) *Natural Resources Journal* 157

⁴²⁷ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 2

⁴²⁸ United Nations Economic Commission for Europe, *Guidance on Notification According to the Espoo Convention* (Doc. ECE/MP.EIA/12), 2009)

useful details surrounding the EIA process, such as its scope, time frame, procedures, and the dissemination of comments and contact details.⁴²⁹

3.6.3 Case Law

The judiciary element set out by the ICJ under general customary international law when making its judgment in the *Pulp Mills* case stipulated that an EIA is now a legal requirement in cases where proposed activities are likely to have a substantial effect on a shared resource across boundaries. Failure to carry out an EIA also means that requirements with respect to due diligence, as well as prevention and vigilance, will not have been met.⁴³⁰ In addition, the ICJ also stipulated that notification should be given prior to States making a decision about a project based on the EIA it has received.⁴³¹ This should be carried out before the project begins and then continue as the project progresses.⁴³² Endorsing the opinion expressed by Judge Weeramantry, Boyle also supported the implementation of an ongoing EIA on the basis that a considerable amount of time may elapse between initial approval and subsequent implementation of the project.⁴³³

Although the ICJ did not apply the Espoo Convention to the *Pulp Mills* case because neither State was party to it, it explained that to define the content and range of their EIA, States must consider the type and size of the proposed project, its potentially harmful effects on the environment, and exert due diligence while doing so.⁴³⁴ However, closer scrutiny indicates that the ICJ supported the implementation of transboundary EIA. Thus, this case shows that according to customary law, it is up to the States to delineate the content of domestic EIA, but consideration should always be given to the transboundary impact.⁴³⁵

In *San Juan River Jointed (Costa Rica v Nicaragua; and Nicaragua v Costa Rica) Case*,⁴³⁶ the ruling of the ICJ was that, for all activities, the obligation to exercise due diligence and avoid significant transboundary harm initiates responsibilities to implement to an EIA and carry out appropriate notification and consultation.⁴³⁷ Thus, the ICJ's

⁴²⁹ Ibid pp. 8-13

⁴³⁰ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010)*, Paragraph 204

⁴³¹ Ibid, Paragraph 120

⁴³² Ibid, Paragraph 205

⁴³³ Alan Boyle, 'Developments in International Law of EIA and their Relation to the Espoo Convention' (2011) 20(3) *Review of European Community and International Environmental Law* 227 (Note 5) pp.227-231

⁴³⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ Reports, (Judgment) General List No 135, 20 April 2010 (International Court of Justice)*, Note 6, Paragraph 205

⁴³⁵ Alan Boyle, 'Developments in International Law of Environmental Impact Assessment and their Relation to the Espoo Convention' (2011) 20(3) *Review of European Community and International Environmental Law* 227

⁴³⁶ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Construction of a Road in Coata Rica along the San Juan River (Nicaragua v Costa Rica) (Joinder of Proceedings) [2015] ICJ Rep 665*

⁴³⁷ Ibid, Paragraph 104. In its effort to characterize and articulate the threshold, the ILC stated that significant harm means "something more than measurable", but less than "serious" or "substantial." *Summary Records of*

acknowledgement of the need to conduct an ongoing EIA prior to the commencement of a project,⁴³⁸ incorporates the fact that these obligations are triggered by a specific set of requirements.⁴³⁹

Firstly, before an EIA is performed a State must initially assess whether significant transboundary harm is likely to be inflicted on the environment of another State.^{440,441} This imposes on the State an obligation to initially assess the risk of any project they are proposing to implement.⁴⁴²

Secondly, the obligation to carry out an EIA is then initiated if an objective assessment of all pertinent factors suggests such a risk exists.⁴⁴³ If there is no evidence of a risk, no obligation is imposed on the State to perform an EIA.⁴⁴⁴

Thirdly, if the risk of significant transboundary harm is confirmed by the EIA, the proposing State must notify and consult with other States likely to be affected in order to ascertain the measures that need to be undertaken to avoid or ameliorate the risk.⁴⁴⁵

For instance, environmental studies, reports, and a wide range of expert evidence reviewed in the case of *Costa Rica v. Nicaragua* (Dredging of the Channel) resulted in the ICJ ruling out the risk of significant transboundary harm; this meant Nicaragua was under no obligation to carry out an EIA.⁴⁴⁶ As such, it had not contravened its obligation to exercise due diligence and did not need to consult or notify Costa Rica.⁴⁴⁷

By contrast, in *Nicaragua v. Costa Rica* (the Road case), the ICJ exerted its own judicial authority to assess the risk by consulting the legal criteria in the *Pulp Mills* case (type, size, and context of the proposed project). The Court then ruled that the risk of significant transboundary harm in constructing the road was enough to warrant

the 2322nd Meeting, The Law of the Non-Navigational Uses of International Watercourses, U.N. Doc. A/CN.4/L.489 reprinted in [1993] 1 Y.B. INT'L L. COMM'N 169, 4, U.N. Doc. A/CN.4/SER.A/1993. In the *Report of the Commission to the General Assembly on the Work of its Thirty- Second Session, The Law of the Non-Navigational Uses of International Watercourses*, A/CN.4/SER.A/1993/Add.1 (Part 2), reprinted in [1993]2 Y.B. INTL L. COMM'N 89, the ILC also asserted that an adverse effect or harm that is "not negligible but which yet did not necessarily rise to the level of 'substantial' or 'important'" is considered "significant."

⁴³⁸ Ibid, Paragraph 161

⁴³⁹ Romiana Yotova, 'Case and Comment: The Principles of Due Diligence and Prevention in International Environmental Law' (2016) (2016) 75(3) Cambridge Law Journal 445

⁴⁴⁰ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Construction of a Road in Coata Rica along the San Juan River (Nicaragua v Costa Rica) (Joinder of Proceedings)*, Paragraph 104, 153

⁴⁴¹ Ibid, Paragraph 161

⁴⁴² Ibid, Paragraph 153, 168

⁴⁴³ Ibid, Paragraph 105, 153; Jacob Katz Cogan, 'Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)' (2016) (2016) 110(2) The American Journal of International Law 320

⁴⁴⁴ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Construction of a Road in Coata Rica along the San Juan River (Nicaragua v Costa Rica) (Joinder of Proceedings)*, Paragraph 108. In the absence of the risk of transboundary harm, Nicaragua was not required to conduct an EIA.

⁴⁴⁵ Ibid, Paragraph 104, 168. The duty to notify and consult does not call for examination by the Court in the present case, since the Court has established that Costa Rica has not complied with its obligation under general international law to perform an EIA prior to the construction of the road.

⁴⁴⁶ Ibid, Paragraph 120

⁴⁴⁷ Ibid, Paragraph 105

performing an EIA, which Costa Rica then failed to do.⁴⁴⁸ This should not be viewed as implying that the discretion of the Court is required in such cases, as the responsibility should remain with the State proposing to implement a project.⁴⁴⁹ It is generally extremely challenging for a judicial Court to assess scientific evidence and draw a conclusion on the potential risk of harm. Should it be required to do so, Article 50 of the Statute enables the ICJ to recruit scientific experts to provide them with valuable information that will support them in their investigation.⁴⁵⁰

In sum, although a State is allowed to implement activities within its borders, it also bears a due diligence obligation to ensure it takes all suitable measures to avoid such activities inflicting serious harm on the environments of other States.⁴⁵¹ With the emphasis on conduct rather than outcomes, if a potential risk of significant harm is later identified, the State can be held liable for failing to act, even if no harm has actually been inflicted.⁴⁵² According to customary international law, it is up to the State to shape its own domestic legislation, including the breadth, content, and protocol of any EIA that may be applied.⁴⁵³ The ICJ has nevertheless issued a strong recommendation that a domestic EIA must consider the type and scale of any proposed project, including any damaging effects it may have on the environment, and exercise due diligence in so doing.⁴⁵⁴

3.6.4 EIA in a Transboundary Context

To extend domestic obligations whilst avoiding extraterritorial-discrimination, Knox proposed taking the transboundary impact into account as part of an overall assessment.⁴⁵⁵ The theory of EIA “in a transboundary context” suggests that transboundary EIA comprises two mutually supportive legal principles.⁴⁵⁶

⁴⁴⁸ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua), Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica) (Joinder of Proceedings)*, Paragraph 104

⁴⁴⁹ Yoshifumi Tanaka, 'Costa Rica v. Nicaragua and Nicaragua v. Costa Rica: Some Reflections on the Obligation to Conduct an Environmental Impact Assessment' (2017) 26(1) *Review of European, Comparative and International Environmental Law* 91-97

⁴⁵⁰ Statute of International Court of Justice (set up in 1945 under the Charter of the United Nations to be the principal judicial organ of the Organization, and its basic instrument, the Statute of the Court, forms an integral part of the Charter (Chapter XIV). It entered into force on 24 October 1945, Article 50; Yoshifumi Tanaka, 'Case Note: Costa Rica v. Nicaragua and Nicaragua v. Costa Rica: Some Reflections on the Obligation to Conduct an Environmental Impact Assessment' (2017) (2017) 26(1) *Review of European, Comparative and International Environmental Law* 91

⁴⁵¹ Jutta Brunnée, 'Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level?' (*European Society of International Law*, 2016) <https://esil-sedi.eu/post_name-123/> accessed 12 August 2019

⁴⁵² Owen McIntyre, 'The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay' (2011) 4(2) *Water Alternatives* 124-169

⁴⁵³ Justine Bendel and James Harrison, 'Determining the Legal Nature and Content of EIAs in International Environmental Law: What Does the ICJ Decision in the Joined Costa Rica v Nicaragua/Nicaragua v Costa Rica Cases Tell Us?' 30 September 2017) <<http://www.qil-qdi.org/determining-legal-nature-content-eias-international-environmental-law-icj-decision-joined-costa-rica-v-nicaraguanicaragua-v-costa-rica-cases-tell-us/>> accessed

⁴⁵⁴ Alan Boyle, 'Developments in International Law of EIA and their Relation to the Espoo Convention' (Note 11)

⁴⁵⁵ John Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' (2002) 96(2) *The American Journal of International Law* 291-319

⁴⁵⁶ *Ibid*

The first is the “prevention of harm” whereupon a State must implement appropriate measures to prevent activities conducted within its border from inflicting significant harm on other States.⁴⁵⁷ Based on this principle, EIA is perceived by customary international law as means by which State can obtain knowledge, identify the potential consequences, and evaluate the overall effects of any proposed project.⁴⁵⁸ As noted previously, the obligation of a State is to take reasonable measures to prevent harm, and therefore pertains to conduct rather than outcomes.⁴⁵⁹ This can render international law somewhat imprecise because a State cannot be held liable for unforeseen or unknown harm when it has exercised due diligence, even though actual harm may have been caused.⁴⁶⁰

The second principle is that of “non-discrimination”, which holds that a State must apply forms of protection identical to those it applies in its own territory to other States to avoid potential harm.⁴⁶¹ A slight flaw exists in this principle, however, in that the State of origin is only obliged to apply ‘procedural rights’ to the public in other States to the extent that it does so in its own jurisdiction.⁴⁶² Thus, if major projects are not subject to public consultation and an EIA, then, in accordance with the “non-discrimination” principle, the same rule applies to the affected States and their public.⁴⁶³

To ensure environmental effects on other States are considered at a domestic level, Marsden, Albrecht and Knox suggested that States could agree to establish bilateral and multilateral agreements that bind all Parties to precise obligations regarding the standard procedures that need to be followed when implementing a domestic EIA process, which includes consideration of the impact on other States.⁴⁶⁴ The development of mechanisms that facilitate and enhance the role played by domestic EIA law has been led by The Espoo Convention, and this has included a consideration of how EIA can be of use with respect to transboundary harm.

⁴⁵⁷ Ibid. 292,312

⁴⁵⁸ Alan Boyle, 'Developments in International Law of EIA and their Relation to the Espoo Convention' (UNECE, <https://www.unece.org/fileadmin/DAM/env/eia/documents/mop5/Seminar_Boyle.pdf> accessed 10 July 2019

⁴⁵⁹ Owen McIntyre, 'The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources' (*European Society of International Law*, April 2018) <<https://esil-sedi.eu/wp-content/uploads/2018/04/McIntyre.pdf>> accessed 27 July 2019

⁴⁶⁰ Neil Craik, *The International Law of Environmental Impact Assessment* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2009) 62; Xue Hanqin, *Transboundary Damage in International Law* (Cambridge University Press 2003) 99-105; Alan Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?' (1990) 39(1) *The International and Comparative Law Quarterly* 1-26

⁴⁶¹ John Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' *Supra* Note 9, 311

⁴⁶² Neil Craik, *The International Law of Environmental Impact Assessment*, Note 14, 55-65

⁴⁶³ Ibid

⁴⁶⁴ Simon Marsden, 'Enforcing Non-Discrimination in Transboundary Environmental Impact Assessment: Advantages for EU Citizens from the Transposition of the Espoo and Aarhus Convention?' (2009) 6(4) *Journal for European Environmental & Planning Law* 437-460; Eike Albrecht, 'Implementing the Espoo Convention in transboundary EIA between Germany and Poland' (2008) 28(6) *Environmental Impact Assessment Review* 359-365; John Knox, 'The Myth and Reality of Transboundary Environmental Impact Assessment' *Supra* note. 160

3.7 In what ways can the Espoo Convention be utilised as a reference source to enhance the current implementation of EIA within the LMB?

There are several reasons why The Convention on Environmental Impact Assessment in A Transboundary Context 1991 (Espoo Convention) has been selected as an example of best practice in this study. Firstly, the Espoo Convention was created and operates in accordance with the principles of the UNECE. It is predicated on essential non-binding customary law under Principles 17 and 18 of the Rio Declaration.⁴⁶⁵ Furthermore, if a possible risk of transboundary harm is identified, the practice of the Espoo Convention ensures that foreign impacts and actors are considered part of the domestic EIA process.⁴⁶⁶ Entering into force on 27 June 1997, the Espoo Convention is the first international treaty to establish in depth the procedural responsibilities of States performing a transboundary EIA early on in the planning of projects.⁴⁶⁷

Secondly, with the aim of becoming a 'global instrument', all members of the UN beyond the UNECE region can be parties to the Espoo Convention, even though it is a European legal instrument.⁴⁶⁸ Christian Friis Bach (UNECE Executive Secretary at the time) asserted that this will further promote the EIA as a crucial tool for ensuring sustainable development and would help to close a vital gap in international law.⁴⁶⁹ Among those countries that have been enthusiastic about the prospect of adopting or developing transboundary EIA in accordance with the Espoo Convention are Asian States such as Vietnam, Indonesia, Japan, Korea, and Mongolia, along with Middle Eastern States such as Iran and Iraq.⁴⁷⁰ By the end of 2019, the 45 Parties to the Espoo Convention included UNECE Member States, the EU, and the Central Asian States of Armenia, Azerbaijan, Kyrgyzstan, and Kazakhstan. In addition, Russia, the US, and Canada are signatories to the Convention but are awaiting ratification. In line with its stated global ambition, Parties to the Espoo Convention therefore originate from the continents of Europe, Asia, and North America.⁴⁷¹

⁴⁶⁵ Tseming Yang, 'The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law' (2019) 70(525) *Hasting Law Journal* 525-572

⁴⁶⁶ Timo Koivurova, 'Could the Espoo Convention Become a Global Regime for Environmental Impact Assessment and Strategic Environmental Assessment?' in Robin Warner and Simon Marsden (eds), *Transboundary Environmental Governance: Island, Coastal and Marine Perspective* (Transboundary Environmental Governance: Island, Coastal and Marine Perspective, Ashgate 2012) 323-342

⁴⁶⁷ UNECE, 'Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, 1991) - the 'Espoo (EIA) Convention'' (UNECE, <<https://www.unece.org/fileadmin/DAM/env/eia/eia.htm>> accessed 20 September 2019)

⁴⁶⁸ UNECE, 'UNECE Espoo Convention on Environmental Impact Assessment Become a Global Instrument' (UNECE, 27 August 2014) <<http://www.unece.org/index.php?id=36354>> accessed 20 September 2019

⁴⁶⁹ Ibid

⁴⁷⁰ Korea Environment Institute, 'Workshop on Environmental Impact Assessment in a Transboundary Context in Eastern Asia, Seoul, Republic of Korea, 13–15 June 2012' (UNECE, May 2013)

<https://www.unece.org/fileadmin/DAM/env/eia/documents/Events/SeoulJun12/2012TEIA_Workshop_report_final.pdf> accessed 2 October 2019; Nicholas Bremer, 'Transboundary Environmental Impact Assessment of Large-Dams in the Euphrates-Tigris Region: An Analysis of International Law Binding Iran, Iraq, Syria and Turkey' (2016) 25(1) *Review of European, Comparative and International Environmental Law*, 92-106

⁴⁷¹ Simon Marsden, *Protecting the Third Pole: Transplanting International Law* (Edward Elgar Publishing Company 2019) 133

Thirdly, the UNECE Espoo Secretariat has supported the development of future transboundary EIA within the Mekong region.⁴⁷² Whilst attending the Mekong2Rio: International Conference on Transboundary River Basin Management 2012 in Phuket, Thailand⁴⁷³, a recommendation was made by Koivurova and Nguyen Van Duyen (the specialist on environmental governance for the MRC) that transboundary EIAs should be adopted by LMB States in line with the Espoo Convention to supplement the MRC PNPCA protocol.⁴⁷⁴

This part of the chapter provides a legal analysis of how essential processes within the Espoo Convention can be utilised to support and enhance this process. It comprises eight sub-sections: (i) screening, (ii) scoping, (3) notification, (iv) public participation, (v) conducting the EIA, (vi) consultation between States, and (vii) final decisions.

3.7.1 Screening

Screening refers to the decision made by a State regarding whether an EIA needs to be carried out for the proposed project. In accordance with the threshold of harm under international law, national EIA law in Laos, Cambodia, and Thailand holds that an EIA only needs to be performed when there is potential for significant transboundary harm. Less severe harm to the environment can be addressed by conducting an IEE.⁴⁷⁵ The situation in Vietnam is a little different as it outlines the activities requiring an EIA without using the term significant, although details on actual practice are lacking.⁴⁷⁶

Similarly, Article 2(3) of the Espoo Convention⁴⁷⁷ provides a list of activities deemed to have a significant and negative transboundary impact and thus in need of an EIA, including large-scale dams.⁴⁷⁸ This helps avoid any complex disputes regarding the

⁴⁷² UNECE, 'Information on the Workshop on the Globalization of the Espoo Convention and the Protocol on SEA, and the Role of International Financial Institutions (UN Doc. ECE/MP/EIA/WG.2/2016/6/INF.11' 21 October 2016)

<https://www.unece.org/fileadmin/DAM/env/eia/documents/WG2.6_Nov2016/ece.mp.eia.2016.6.INF.11_global_workshop_FINAL.pdf> accessed 25 September 2019

⁴⁷³ MRC, 'A Conference Booklet and Mekong2Rio Programmes and Presentations' (MRC, 1-3 May 2012) <<http://www.mrcmekong.org/news-and-events/events/mekong2rio/mekong2rio-presentations/>> accessed 12 August 2019

⁴⁷⁴ Nguyen Van Duyen, 'Development of Framework for Transboundary Environment Impact Assessment (TbEIA) in the Lower Mekong Basin' 1-3 May 2012, Mekong2Rio: International Conference on Transboundary River Basin Management 2012, Phuket) <<http://www.mrcmekong.org/assets/Events/Mekong2Rio/4.1b-Transboundary-EIA-in-the-Mekong-Van-Duyen.pdf>> accessed 12 August 2019; Timo Koivurova, 'The Espoo Regime and Why It is Relevant for River Basins, Including that of the Mekong River Basin (MRB), Mekong2Rio: International Conference on Transboundary River Basin Management 2012, Phuket' (MRC, 1-3 May 2012) <<http://www.mrcmekong.org/assets/Events/Mekong2Rio/4.1a-The-Espoo-regime-Koivurova.pdf>> accessed 12 August 2019

⁴⁷⁵ Earthrights International, 'Manual of Environmental Impact Assessment in the Mekong Region: Commentary & Materials (First Edition)'

⁴⁷⁶ Ibid

⁴⁷⁷ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 2(3)

⁴⁷⁸ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Appendix I

threshold of harm. Inclusion of activities currently outside the list is based on factors such as the location, size, and nature of any potential project.⁴⁷⁹

This process along with the criteria listed in Article 2(3) of the Espoo Convention will assist LMB States in determining whether an EIA should be conducted for proposed projects such as large-scale dams based on their transboundary impact.

3.7.2 Scoping

At the moment, the extent and content of the EIA report and the information it includes are not provided within the practice of EIA in LMB States. For instance, the EIA for the Xayaburi Project only evaluated an area 10 kilometres downstream. There was a lack of information on sediment flow, fisheries, and the effect on people living in the neighbouring countries along the river and the ecosystem. This gave rise to arguments regarding the size of the geographical area covered and the content of EIA documents.

Appendix II of the Espoo Convention lists the issues that should be addressed in this documentation. This includes a description of the proposed activity and its primary objective; suitable alternatives with respect to location, technology, and so on; possible impact on the environment; mitigation measures; key methods, environmental data, and underlying assumptions; gaps in knowledge; information on how to monitor and manage projects: proposals for a post-project analysis; and a non-technical summary.⁴⁸⁰

This will assist LMB States in delineating which areas have to be covered and what information must be contained in the EIA.

3.7.3 Notification

The non-discrimination principle is applied in Article 3(1) of the Espoo Convention by stipulating that the State proposing to implement an activity likely to have a significant and adverse transboundary impact must inform other States likely to be affected as soon as possible.⁴⁸¹ Specifically, this means the point at which the EIA procedure starts⁴⁸² and is more exact than the use of the term “timely” within the PNPCA.

The specific content of such a notification is also set out in The Espoo convention. This includes information on the proposed project, its potential impact on other countries, the plan and schedule for the EIA, what a particular decision means, and the timeframe

⁴⁷⁹ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Appendix III:

⁴⁸⁰ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Appendix II

⁴⁸¹ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 3(1)

⁴⁸² United Nations Economic Commission for Europe, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN.Doc.ECE/MP.EIA/7)*, 2006), p.18

for providing a response.⁴⁸³ In the unusual instance where the national legislation of a State of origin permits its citizens to participate in the EIA process at an extremely early stage, then a simultaneous 'early notification' should be sent to other States (and their citizens) likely to be affected by any proposed activities.⁴⁸⁴

Thus, the Espoo Convention differs from the PNCPA in requiring all those affected to be informed and for a joint notification to be made before the EIA is performed.

3.7.4 Public Participation

As such, the rights of the public of States likely to be affected by proposed activities are deemed equivalent to those of the State of origin⁴⁸⁵; which has an obligation to notify such Parties of any potential impact and ensure they are able to express their views through the relevant 'competent authority'.⁴⁸⁶

Within the Espoo Convention, the term 'public' in Article 1(x) was extended to encompass NGOs, other associations, non-State actors, and people of ethnic minority groups in line with national practice and legislation. The comments and views of the public in both the State of origin and the public of affected States are thus given equal weighting in any final decision made on a project.

Although no details are provided as to what information the public should receive, Article 3(5) asserts that it should encompass details on the EIA process, such as the timeframe for submitting comments, details on the proposed project, and the potential for a significant and adverse transboundary impact.⁴⁸⁷ Such information should be written in the native language of recipients and be non-technical in nature.⁴⁸⁸ Legislative and

⁴⁸³UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 3(2);
UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 3(5)

⁴⁸⁴ United Nations Economic Commission for Europe, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN.Doc.ECE/MP.EIA/7)*

⁴⁸⁵ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 2(6)

⁴⁸⁶ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 3(8)

⁴⁸⁷ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 3(5). To be more precise, the State of origin may include additional information on: mitigation measures; indication of methods, assumptions and data used, gaps in knowledge; outline for monitoring programmes; and non-technical summary, such as maps and graphs)

⁴⁸⁸ United Nations Economic Commission for Europe, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN.Doc.ECE/MP.EIA/7)*, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN. Doc. ECE/MP.EIA/7)* p.20

scientific expertise should also be called upon as required, along with NGOs and members of the public who have particular skills or knowledge.⁴⁸⁹

Participation can be interactive (e.g., negotiations, mediation workshops, monitoring and co-managing the project), consultative (e.g., public hearings and open-houses), or passive (receiving information).⁴⁹⁰ Methods of participation may therefore include sending feedback and opinions via e-mails and letters to designated contacts, giving interviews, answering questionnaires, attending public hearings, voting to make a decision, and monitoring both the risk and impact of the activity.

To prevent misunderstandings and avoid conflict between Parties, open communication should be promoted from the outset. Following their participation, the views and opinions of the public should be collected and passed to the relevant authority prior to the final decision being made (Article 4(2)).⁴⁹¹ To ensure the process of participation is both transparent and accurate, the competent authorities of affected States should also be sent copies of all the relevant information.⁴⁹²

Through the transboundary EIA process, the Espoo Convention promotes engagement between the State and public of another State. Through its cross-border power, the Espoo Convention thus operates on both State-to-individual both and State-to-State levels.

3.7.5 Conducting an EIA

To accurately address the full impact of projects on other States, the transboundary EIA needs to be extremely comprehensive. This entails providing the environmental agencies and the instructed developer with all the materials needed to perform an assessment of the impact on both the State of origin and affected States, and to include both scientific evidence and public views and comments.

⁴⁸⁹ Ibid, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context* (UN. Doc. ECE/MP.EIA/7) p.25

⁴⁹⁰ Pierre André and others, 'Public Participation: International Best Practice Principles. Special Publication Series No. 4.' (*International Association for Impact Assessment (IAIA)*, 2008) <<https://www.iaia.org/uploads/pdf/SP4.pdf>> accessed 18 March 2017 p.1; Patrick Bishop and Glyn Davis, 'Mapping Public Participation in Policy Choices' (2002) *Australian Journal of Public Administration* 61(1) (2002) p.14-29

⁴⁹¹ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 4(2): "The concerned Parties (the Party of origin and the affected Party) shall arrange for: (b) the submission of comments to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin, within a reasonable time before the final decision is taken on the proposed activity."

⁴⁹² United Nations Economic Commission for Europe, *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context* (UN.Doc.ECE/MP.EIA/7), *Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context* (UN. Doc. ECE/MP.EIA/7) p.21

Given the potential size of a transboundary project, a joint EIA may be performed by the environmental agency and the developer. This involves preparing a joint environmental report on the overall impact of the entire project and a separate national report that is passed to each State at a later stage. The legal basis for States to carry out a joint EIA through current or new bilateral or multilateral agreements is set out in Article 8 and Appendix VI (2)(g) of the Espoo convention.⁴⁹³

3.7.6 Consultation Between States

Once the EIA documentation is complete, an obligation is placed on the State of origin to consult with the affected States regarding the possible impact of any proposed project and the measures that can be taken to ameliorate this.⁴⁹⁴ The outcomes and any additional conditions that arise from such consultations should be considered when making the final decision and with respect to any obligations set out in the future.⁴⁹⁵ To ensure such consultations are productive, consideration should be given to the monitoring of the project before and after construction, and the nature of a post-project analysis.⁴⁹⁶ All concerned States should then be sent details regarding the outcomes of the consultations and the agreements made. These should then be made available to the public as part of the final EIA documentation.

3.7.7 Final Decision

When making a final decision as to whether to proceed with the project, the State of origin takes into consideration the EIA result and the comments submitted by the affected States and their respective publics (Article 6(1)).⁴⁹⁷ However, even if both public

⁴⁹³ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 8:

“The parties may continue existing or enter into new bilateral or multilateral agreements or other arrangements in order to implement their obligations under this convention and under any of its protocols to which they are a Party. Such agreements or arrangements may be based on the elements listed in Appendix VI.”

UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Appendix VI 2(g):

“Concerned Parties may set up, where appropriate, institutional arrangements or enlarge the mandate of existing institutional arrangements within the framework of bilateral and multilateral agreements in order to give full effect to this Convention Bilateral and multilateral agreements or other arrangements may include Undertaking, where appropriate, joint environmental impact assessment, development of joint monitoring programmes, intercalibration of monitoring devices and harmonization of methodologies with a view to rendering the data and information obtained compatible.”

⁴⁹⁴ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 5

⁴⁹⁵ Finnish Environment Institute and others, 'Guidance of the Practical Application of the Espoo Convention' (Finnish Environment Institute 2011) <http://enviroportal.sk/uploads/2011/05/page/environmentalne-temy/star_6/GUIDANCE_ON_THE_PRACTICAL_APPLICATION_OF_THE_ESPOO_CONVENTION.PDF> accessed 10 March 2017, p.24

⁴⁹⁶ Neil Craik, *The International Law of Environmental Impact Assessment* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2008) (Note 18), pp.153-155

⁴⁹⁷ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 6(1):

“The Parties shall ensure that, in the final decision on the proposed activity, due account is taken of the outcome of the environmental impact assessment documentation, as well as the comments thereon received

comments and the EIA are negative, the State of origin is not obligated to cancel a project; it can still proceed if it wishes.⁴⁹⁸ To strengthen trust between Parties and ensure the process is suitably transparent, details on the final decision, along with an explanation as to how it was reached, should be sent to the affected States and their publics.⁴⁹⁹

Thus, to enhance EIA practice in the LMB, the Espoo Convention plays an essential role in explicitly detailing the procedural obligations under which the EIA should be performed. This entails addressing the overall effect of the project through processes of public participation and consultation with all relevant Parties. LMB States are assisted in delineating the breadth and content of the EIA through the criteria for activities deemed at potential risk of significant transboundary harm and the listing system contained within the Espoo Convention. Also listed are the information and data that need to be included in EIA documentation that will be simultaneously sent to the public of the State of origin and the public of the affected States as part of the process of notification and consultation.

3.8 Conclusion

Where a risk exists that a proposed project may exert a significant and adverse transboundary impact, international law stipulates that States are obliged to carry out an EIA. States have the power to shape their own domestic legislation under general customary international law, which includes delineating the exact content, scope, and procedures of an EIA.⁵⁰⁰ Nevertheless, the ICJ stipulates that such an EIA should consider the size, nature, location, and extent of any proposed project with a view to ascertaining its transboundary impact and potential effect on the environment⁵⁰¹ while exercising due diligence.⁵⁰²

No formal agreement for a transboundary EIA currently exists in the LMB, even though the expansion in the number of large-scale hydropower projects taking place means there is little doubt such projects will increasingly have transboundary impacts.⁵⁰³ Nevertheless, certain components of a transboundary EIA have been established as the

pursuant to Article 3, Paragraph 8 and Article 3, Paragraph 2, and the outcome of the consultations as referred to in Article 5.”

⁴⁹⁸ Neil Craik, *The International Law of Environmental Impact Assessment* (Note 95)

⁴⁹⁹ UNECE Convention on Environmental Impact Assessment in a Transboundary Context 1991 (adopted on 25 February 1991, entered into force on 10 September 1997, second amendment entered into force on 23 October 2017) 1989 UNTS 309, 30 ILM 800 (1991) (Espoo Convention) Article 6(2)

⁵⁰⁰ Justine Bendel and James Harrison, 'Determining the Legal Nature and Content of EIAs in International Environmental Law: What Does the ICJ Decision in the Joined Costa Rica v Nicaragua/Nicaragua v Costa Rica Cases Tell Us?'

⁵⁰¹ Alan Boyle, 'Developments in the International Law of Environmental Impact Assessments and their Relation to the Espoo Convention', Note;

⁵⁰² Owen McIntyre, 'The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay'

⁵⁰³ Peter King, 'Transboundary EIAs Could Reduce Conflict over River Projects' (*The Third Pole*, 3 July 2018) <<https://www.thethirdpole.net/en/2018/07/03/transboundary-eias-could-reduce-conflict-over-river-projects/>> accessed 5 December 2019

PNPCA initiates notification and consultation between States.⁵⁰⁴ However, some LMB States have their own EIA law and do not need transboundary EIA. Consequently, the disparate range of domestic EIA laws in LMB States makes it challenging for them to reach agreement on the areas that need to be covered in an EIA, what should be included, and how it should be implemented with respect to large-scale hydropower projects.

The adverse effects of such projects in the LMB can, however, be addressed by drawing on best practice under the Espoo Convention. In this respect, the development of a transboundary EIA in the Mekong Basin is a process in which potentially affected States are involved in both decision-making and the EIA. Furthermore, fully taking into consideration areas across the border that are potentially affected enhances the accuracy of the anticipated outcomes projected by the EIA. In response to the 2003 recommendations made by the JC to adopt and apply a transboundary EIA within the LMB, the MRC set to work drafting a transboundary EIA. Thus, in 2009, the Environmental Law Institute of the MRC developed its *Draft of transboundary EIA Framework*.⁵⁰⁵ The most recent version of this document (as of 25 September 2018) is the Guidelines for Transboundary EIA in the Lower Mekong Basin⁵⁰⁶ If this comes into force it will supplement the procedures of the PNPCA.⁵⁰⁷

⁵⁰⁴ Simon Marsden, 'Developing Agreements for Transboundary Environmental Impact Assessment and Strategic Environmental Assessment in Asia' in Robin Warner and Simon Marsden (eds), *Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives* (Transboundary Environmental Governance: Inland, Coastal and Marine Perspectives, Routledge 2012) 152-156

⁵⁰⁵ Environmental Law Institute, 'Establishing a Transboundary Environmental Impact Assessment Framework for the Mekong River Basin' (*Environmental Law Institute*, 2009) <<https://www.eli.org/research-report/establishing-transboundary-environmental-impact-assessment-framework-mekong-river-ba>> accessed 5 December 2019

⁵⁰⁶ MRC, 'Guidelines for Transboundary Environmental Impact Assessment in the Lower Mekong Basin (Working Document)' (MRC, 25 September 2018) <<http://www.mrcmekong.org/assets/Publications/TbEIA-Guidelines-Final-version-25-9-2018.pdf>> accessed 5 December 2019

⁵⁰⁷ MRC, 'Transboundary EIA' (MRC, 2015) <<http://www.mrcmekong.org/about-mrc/completion-of-strategic-cycle-2011-2015/environment-programme/transboundary-eia/>> accessed 5 December 2019

Chapter 4

Public Participation: Access to Information, Participation, and Access to Justice

4.1 Introduction

Public participation can be defined as a process in which the public (individuals, representatives, groups and organizations) who have an interest in or will be affected by a decision, take part in the decision-making process through information supply, consultation and active involvement.⁵⁰⁸ Under international environmental law, the recognition of procedural rights of the public to gain access to information, public participation and access to justice in environmental decision-making is now acknowledged in both soft law and international treaties as a part of the discourse to sustainable development, for it is considered to be a crucial factor to ensure transparency in governmental decision-making on environmental projects and activities.⁵⁰⁹ Therefore, as emerging norms, procedural obligations of the States to notify and consult in environmental law are no longer restricted to State-to-State obligations but also include obligations of States to individuals to provide them with access to information, public participation before the authorization and implementation of the environmental projects and activities.⁵¹⁰

In respect of the Xayaburi project, during the PNPCA process, regional and national prior consultation reveal some problems and challenges in the implementation of the practice on public participation in the MRC and Lower Mekong Basin (LMB) States. The *Stakeholder Consultation Report* on the Xayaburi Dam addresses the inadequacy of the project documents and studies submitted, and the limited time and period for public participation, particularly for the affected communities.⁵¹¹ Even though legal claims can be

⁵⁰⁸ Alistair Rieu-Clarke and others, 'The Science-Policy-Stakeholder Interface and Stakeholder Participation' in Geoffrey Gooch and Peter Stalnacke (eds), *Science, Policy and Stakeholders in Water Management: An Integrated Approach to River Basin Management* (Science, Policy and Stakeholders in Water Management: An Integrated Approach to River Basin Management, Earthscan 2010) 31; Kate Brottrielle and Marie-Claire Cordonier Segger, *The Principle of Public Participation and Access to Information and Justice: A Legal Working Paper in the Centre for International Sustainable Development Law (CISDL) Recent Developments in International Law Related to Sustainable Development Series* (2005) 3

⁵⁰⁹ Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (Routledge 2008) 216; Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law* 613-642; Marcos Orellana, 'Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration' (2016) 25(1) *Review of European Community & International Environmental Law* 50-58

⁵¹⁰ David Ong, 'Procedural International Environmental Justice? The Evolution of Procedural Means for Environmental Protection: From Inter-State Obligations to Individual-State Rights' in Duncan French (ed), *Global Justice and Sustainable Development* (Global Justice and Sustainable Development, Martinus Nijhoff 2010) 137-166

⁵¹¹ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project' (*Mekong River Commission (MRC)*, 24 March 2011) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/2011-03-24-Report-on-Stakeholder-Consultation-on-Xayaburi.pdf>> accessed 10 November 2018

brought by the affected public whose participation rights have been violated, the citizens of the LMB States hardly ever challenge the hydropower developments in domestic courts.⁵¹² No lawsuit has been brought against the State in Cambodia, Laos or Vietnam; only one case regarding the Xayaburi project was brought before the Administrative Court in Thailand.⁵¹³ This case is considered the first community-filed lawsuit in the region related to dam building on the Mekong River and the first lawsuit on a transboundary project.⁵¹⁴

In promoting the adequate and meaningful public participation in environmental decision-making related the large-scale hydropower development projects in the LMB, the aim of this Chapter is to recommend what may generally be considered international standard and best practice on public participation. The overall structure of this Chapter will be divided into 5 sections which will address the issues and answer the following the research questions on: What is the current approach of the MRC on public participation, with a specific focus on the rights of the affected public to get access to information and to partake in the decision-making process? What are the issues and challenges in the implementation and practice of public participation as part of the decision-making process in the Xayaburi Project? Is public participation recognized as a “procedural right” under international law? How can the Aarhus Convention, as the most advanced legal instruments on public participation, be used as a source of reference to help with the interpretation, filling in the gaps and improving the clarity and transparency of the current practice of public participation?

4.2 What Is the Current Approach of the MRC on Public Participation, With A

Specific Focus on the Rights of the Affected Public to Get Access to Information and to Partake in the Decision-Making Process?

Neither the 1995 Mekong Agreement nor the PNPCA Procedures make an explicit reference to the obligations of the riparian States towards non-State actors, particularly not to the potentially affected public and their procedural rights to get access to environmental information and to partake in the decision-making process regarding the proposed hydropower projects in the Lower Mekong Basin (LMB). However, following the adoption of the 1995 Mekong Agreement, the Mekong River Commission (MRC) began to

⁵¹² Ben Boer and others, *The Mekong: A Socio-Legal Approach to River Basin Development* (Earthscan Studies in Water Resource Management, Earthscan from Routledge 2016) 180

⁵¹³ Business & Human Rights Resources Centre, 'The Landmark Xayaburi Dam Case in Thailand: What Is At Stake?' (2015) <<https://www.business-humanrights.org/en/the-landmark-xayaburi-dam-case-in-thailand-what-is-at-stake>> accessed 20 March 2019

⁵¹⁴ Pianporn Deetes and Sor Rattanamanee Polkla, 'PR - Mekong Villagers To Appeal Xayaburi Court Case Decision' (*International Rivers*,, 25 december 2015) <<https://www.internationalrivers.org/resources/9233>> accessed 10 November 2018

contemplate public participation and participatory policies.⁵¹⁵ In 1996, the MRC Joint Committee (JC) commissioned the Thailand Development Research Institute (TDRI) to undertake a *Study on Public Participation in the Context of the MRC*⁵¹⁶ between 1996-1998, which then led to its adoption of the Secretariat Report on public participation at the 9th Meeting of the JC in 1999.⁵¹⁷

In *Public Participation in the Context of the MRC*⁵¹⁸, the MRC defines public participation as ‘a process through which key stakeholders gain influence and take part in decision making in the planning, implementation, monitoring and evaluation of MRC programs and projects.’⁵¹⁹ From this definition, it could be inferred that, the so-called “public” within the context of the MRC, in a broad sense, is taken to refer to “stakeholder” in the plans and programmes on the development activities.⁵²⁰ As such, the MRC has adopted a wide-ranging definition of stakeholder as ‘any person, group of institution that has an interest in an activity, project or program. This includes both those intended beneficiaries and intermediaries, those positively affected, and those involved and/or those who are generally excluded from the decision-making process.’⁵²¹ For clarification, the MRC categorizes stakeholders into five main types:

- (i) directly affected people (who live or work where the project will be located);
- (ii) indirectly affected people (who live nearby or use resources from the project area);
- (iii) public sector agencies (ministries, provincial or local government, government mandated mass organisations);
- (iv) private developers (private companies with a direct investment in the project) and their subcontractors and financiers;
- (v) others (donors, NGOs with a stake in the project, external advisors, the business sectors).⁵²²

With a broad range of stakeholders, the MRC has adopted a “participatory approach” in the work of all its core programmes and sector programmes, which consist of the Basin Development Plan, the Water Utilisation Programme, the Environment Programme, the Flood Management and Mitigation Programme, the Fisheries Programme, the Navigation Programme, the Agriculture, Irrigation and Forestry

⁵¹⁵Oliver Hensengerth, 'Transboundary River Cooperation and the Regional Public Good: The Case of Mekong River' (2009) 31(2) Contemporary Southeast Asia 328-329

⁵¹⁶ MRC, 'Public Participation in the Context of the MRC' (*Mekong River Commission (MRC)*, 1999) <<http://www.mrcmekong.org/assets/Publications/policies/Public-Participation-in-MRC-context.pdf>> accessed 2 November 2018

⁵¹⁷ Yasunobu Matoba, 'Stakeholder Participation and Mekong River Commission' (*Mekong River Commission (MRC)*, 1999) <<http://www.mekonginfo.org/assets/midocs/0003654-society-stakeholder-participation-and-mekong-river-commission.pdf>> accessed 1 November 2018

⁵¹⁸ The report conducted by the TDRI under the instruction of the MRC. The Report was adopted to be part of the Secretariat Report on public participation at the 9th Meeting of the JC in 1999.

⁵¹⁹ MRC, 'Public Participation in the Context of the MRC', Note 8

⁵²⁰ Ibid, 2

⁵²¹ Ibid

⁵²² Ibid

Programme, and the Hydropower Programme through the collaboration with both internal and external stakeholders with the support of the Task Group and Expert Group.⁵²³ Since the MRC does not differentiate between specific activities and general plans, programmes and policies, it appears that the term “projects” is meant to include both specific proposed projects initiated by the riparian States and developers, and projects run by the MRC Secretariat as parts of various programs and plans.⁵²⁴ In contrast, under the Aarhus convention, public participation on specific proposed environmental projects and activities are only open to the “public concerned”.⁵²⁵

With reference to the MRC’s publication on *Public Participation in the Lower Mekong Basin*, the MRC puts stakeholders into two groups:

Internal stakeholders are government bodies in MRC structures such as the MRC Council, Joint Committee, the MRC Secretariat, the National Mekong Committees and their Secretariats, and the principal line agencies in each member country.⁵²⁶

External stakeholders are non-state bodies such as NGOs, implementing partners, civil society organisations, policy advocates, research institutions, individuals, the media and other groups who have interests or stakes to lose or gain. They are the ones who can contribute information, views and their perspectives in discussion in development planning.⁵²⁷

It could be observed that, within the context of the MRC, the term “public participation” is used interchangeably with “stakeholder participation”. This indistinctness could be confusing because it simply puts the public within the large pool of stakeholders. While the MRC stakeholder participation focuses on the consultation among the MRC institutional bodies, the National Mekong Committees (NMCs), governments agencies, private developers, business sectors, donors and experts; the MRC, according to Chenoweth, Ewing and Bird does not engage directly with the “public” and the local communities that would be potentially affected by the development plans and projects on the Mekong River Basin.⁵²⁸ Within the context of the MRC, the “affected individuals” are

⁵²³ MRC, 'Public Participation in the Lower Mekong Basin' (*Mekong River Commission (MRC)*, 2005) <<http://www.mrcmekong.org/assets/Publications/governance/Public-Participation.pdf>> accessed 3 November 2018

⁵²⁴ MRC, 'Stakeholder Analysis for the MRC Basin Development Plan Programme Phase 2 (BDP2): Complementary Document to the Stakeholder Participation and Communication Plan for the Basin Development Planning in the Lower Mekong Basin' (*Mekong River Commission (MRC)*, March 2010) <<http://www.mrcmekong.org/assets/Other-Documents/BDP/BDP-SHA-Final-Mar-2010.pdf>> accessed 10 November 2018

⁵²⁵ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 2(5)

⁵²⁶ MRC, 'Public Participation in the Context of the MRC', Note 8

⁵²⁷ Ibid

⁵²⁸ Jonathan Chenoweth, Sarah Ewing and Juliet Bird, 'Procedures for Ensuring Community Involvement in Multijurisdictional River Basins: A Comparison of the Murray-Darling and Mekong River Basins' (2002) 29(4) *Environmental Management* 497-509. [Do you have a more up to date reference?]

considered as “external stakeholders” because the MRC takes a stance that it is only directly accountable to the four riparian States and not to the general public; the public is not the responsibility of the MRC but that of its member countries.⁵²⁹

On the other hand, Renn argued that the term stakeholders should, in fact, be differentiated from “directly affected public”, for the former, in a broad sense, means “general public” and those who may have financial and political interests in the project.⁵³⁰ To him, the “directed affected public” are not “general public” or “observing public” (i.e., the media, politician, military/ police officers, cultural elites and world leaders).⁵³¹ Similarly, Jonsson and Pahl-Wostl explain that public participation, in a narrow sense, essentially has a more specific definition which usually refers to participation by non-State actors that include individuals, communities and NGOs who are potentially affected or have an interest in the relevant activities and plans.⁵³²

There are four levels of public participation process under the MRC: (i) information gathering, (ii) information dissemination, (iii) consultation, and (iv) participation.⁵³³ The first level is “information gathering”, the stage at which information such as social, cultural, economic and political factors and local knowledge are gathered from the public and local communities.⁵³⁴ The second stage is “information dissemination” where information regarding the project and its implications are disseminated to public.⁵³⁵ At the third stage, through “consultation”, the public will be given opportunities to discuss and negotiate their needs and preferences on the proposed projects and activities.⁵³⁶ The final stage is “participation” where the public can contribute their ideas and recommendations on the proposed projects and policies.⁵³⁷ It is during this stage that projects, policies and everyday resource decisions are put into practice, and costs and benefits are allocated. It is not uncommon that the output of this stage will almost always be political in the sense that as to how far and to what extent the public’s opinions and comments will be taken into consideration for the final decision is entirely up to the administrative bodies.

These stages of participation somewhat reflect Arnstein’s ladders of participation at the tokenism level where the methods of informing, consulting and participating are

⁵²⁹ Mai-Lan Ha, 'The Role of Regional Institutions in Sustainable Development: A Review of the Mekong River Commission's First 15 Years ' (2011) 5(1) *Consilience: The Journal of Sustainable Development* 125,

⁵³⁰ Otwin Renn, *Risk Governance: Coping with Uncertainty in A Complex World* (Earthscan 2008) 273

⁵³¹ *Ibid*

⁵³² Anna Jonsson, 'Public Participation in Water Resources Management: Stakeholder Voices on Degree, Scale, Potential, and Methods in Future Water Management' (2005) 34(7) *Journal of the Human Environment* 495-500; Claudia Pahl-Wostl, 'Participative and Stakeholder-Based Policy Design, Evaluation and Modeling Processes' (2002) 3(1) *Integrated Assessment* 3-14

⁵³³ MRC, 'Public Participation in the Context of the MRC' Note 8

⁵³⁴ *Ibid*

⁵³⁵ *Ibid*

⁵³⁶ *Ibid*

⁵³⁷ *Ibid*

used.⁵³⁸ Consultation and participation allow the public to be involved in the decision making-process e.g., to voice their opinions, give comment and feedbacks, attend the meetings, give advice and recommendations on the matter⁵³⁹; however, it is still the government authorities that retains the ultimate power in making the final decision.⁵⁴⁰ A consultation would not be deemed fruitful if there is no following through, especially when the public's comments and opinions are not acknowledged and taken into account for the decision on the proposed plans and projects.⁵⁴¹ Moreover, it remains unclear, how the members of public are selected for the participation, who should be allowed to participate, who should be excluded; and whether and how far their opinions and advices would be taken into account for the decision.

To promote transboundary data sharing on the policies, plans, programmes and projects, the MRC set up the Procedures for Data and Information Exchange and Sharing (PDIES), which were implemented by the riparian States of the Lower Mekong Basin in 2001.⁵⁴² One of its objectives is to 'make available upon request, basic data and information for public access as determined by the National Mekong Committees (NMCs) concerned.'⁵⁴³ The PDIES provides general definitions for data, information and knowledge based on their literal meaning and form but do not clarify what basic data and information mean.⁵⁴⁴ It is ambiguous to determine what could be deemed as "basic"

⁵³⁸ Sherry Arnstein, 'A Ladder of Citizen Participation' (1969) 35(4) *Journal of American Planning Association* 216-224

⁵³⁹ Niklas Gudowsky and Ulrike Bechtold, 'The Role of Information in Public Participation' (2013) 9(1) *Journal of Public Deliberation* 1-25; Patrick Devine-Wright, 'Environment, Democracy, and Public Participation' (*Wiley Online Library*, 6 March 2017) <<https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118786352.wbieg0613>> accessed 12 November 2018

⁵⁴⁰ Robert Kweit and Mary Kweit, 'Bureaucratic Decision-Making: Impediments to Citizen Participation' (1980) 12(4) *The University of Chicago Press Journal* 647-666

⁵⁴¹ Henning Sten Hansen and Milla Mäenpää, 'An Overview of the Challenges for Public Participation in River Basin Management and Planning' (2008) 9(1) *Management of Environmental Quality: An International Journal* 67-84; Azizan Marzuki, 'Challenges in the Public Participation and the Decision Making Process' (2005) 201(1) *Sociologija I Prostor* 21-39

⁵⁴² Procedures for Data and Information Exchange and Sharing (PDIES) 2001 (adopted by the Council on 1 November 2001 at its Eighth Meeting in Bangkok, Thailand)

<<http://www.mrcmekong.org/assets/Publications/policies/Procedures-Data-Info-Exchange-n-Sharing.pdf>

⁵⁴³ Procedures for Data and Information Exchange and Sharing (PDIES) 2001 (adopted by the Council on 1 November 2001 at its Eighth Meeting in Bangkok, Thailand), Section 2

⁵⁴⁴ MRC, 'Communication Strategy and Disclosure Policy' (*Mekong River Commission (MRC)*, July 2009) <<http://www.mrcmekong.org/assets/Publications/policies/Communication-Strategy-n-Disclosure-Policy.pdf>> accessed 10 November 2018, 24

For the purposes of this Policy, the following terms are defined as they are in the MRC Procedures for Data and Information Exchange and Sharing:

Data: Representations of facts, expressed as measurements or statistics, suitable for communication, interpretation or processing.

Information: Data interpreted, processed and refined, and then displayed by the competent authorities having ownership or possession thereof, which is required for exchange and sharing for the purpose of the implementation of the Mekong Agreement.

Document: A piece of written, printed, or electronic matter that provides data and/or information and/or knowledge.

Data processing tools: Software or interconnected suites of software to which the MRC holds proprietary rights.

Knowledge: Awareness and understanding of a subject gained through the collation, organisation and analysis of information, experience, study and consultation with other individuals. Knowledge within the MRC may be held in policies, strategies, plans, guidelines, procedures, reports and other publications (hard copy and electronic), decision support tools, or within individual people.

information and what are not; the NMC of each riparian State is left with a sole discretionary power to decide on case-by-case basis.⁵⁴⁵ This is normally subject to the law of the respective States, in particular concerning the national defence or security, and commercial-in-confidence and copyright protection.⁵⁴⁶ Besides, there is no information on the policy and legislation of the Member States on water-related proposed plans and projects that are publicly available. Even though the data and information can be made available to the public upon request, no timeframe is set for the reply period; the PDIES do not provide any further detailed guidance as to how the public can make a request for an access to or for a disclosure of the information.

The adoption of the Communication Strategy and Disclosure Policy (CSDP) in 2009 was a major step forward on the disclosure of the data and information held by the MRC; it aims to enhance the transparency of the MRC through improving the responsiveness of the MRC to its Member States, partners and stakeholders.⁵⁴⁷ The MRC believed that increased sharing of information can help ensure successful local participation in decision-making, resulting in ownership of decisions by those engaged,⁵⁴⁸ Under the CSDP, the MRC allows three levels of access to environment information held by the MRC's Secretariat: (i) unrestricted access to information that can be made available to public in general; (ii) restricted access to information that 'may be provided to a specific audience following appropriate approvals'; and (iii) restricted access to confidential information.⁵⁴⁹ In other words, there are certain types of data and information that will not be made accessible and available for the public, such as internal correspondence within the MRC; working papers or reports and project and programme documents in progress; consultants' reports before consideration by MRC or clearance by the relevant stakeholders or other Parties; propriety information under copyright; information which has been determined by Member States as being subject to laws and regulations concerning national defence or security.⁵⁵⁰ These restrictions mean that some communications between the MRC and riparian States, and communications between governments can also be marked as secret.

Under Article 24.C. of the 1995 Mekong Agreement, one of the functions of the JC is 'to regularly obtain, update and exchange data necessary to implement this

Publication: The action of making available data, information and knowledge, generally in the form of documents, to a third party, so as to make them generally known and accessible

⁵⁴⁵ Procedures for Data and Information Exchange and Sharing (PDIES) 2001 (adopted by the Council on 1 November 2001 at its Eighth Meeting in Bangkok, Thailand), Section 4

⁵⁴⁶ Procedures for Data and Information Exchange and Sharing (PDIES) 2001 (adopted by the Council on 1 November 2001 at its Eighth Meeting in Bangkok, Thailand), Section 3

⁵⁴⁷ MRC, 'Communication Strategy and Disclosure Policy', 7

⁵⁴⁸ Ibid

⁵⁴⁹ MRC, 'Communication Strategy and Disclosure Policy', 26

⁵⁵⁰ Ibid,

Agreement.⁵⁵¹ Article 24.E. also states that the Joint Committee can 'assign tasks and supervise the Secretariat as is required to implement the Agreement including the maintenance of databases and information necessary for the Council and the JC to perform their functions.'⁵⁵² The Secretariat is consequently required to maintain databases of information as directed (Article 30.E.).⁵⁵³ The Secretariat is also required to perform an information provision function to Member States and donors (Rules 5 and 11 of the Revised Rules of Procedures of the Mekong River Commission Secretariat 2014).⁵⁵⁴ Section 4 of the MRC Guidelines on Disclosure of Data and Information Knowledge 2015 provides that the Secretariat should also be a repository of knowledge on the Mekong and inform the media and general public.⁵⁵⁵ The MRC has provided for a Communications Unit within the International Cooperation and Communications Section whose tasks include supervising and upgrading the MRC website.⁵⁵⁶ Nowadays, accessibility to information is made easier via the internet and online database through the MRC Information System and Data Portal, website, multimedia, toolboxes and a master catalogue.⁵⁵⁷ Though, it is questionable if local communities would have a true access to the data and information in the areas where there is a limitation of access to the internet as well as the problem with the language barrier. Yet, it could be seen that the PDIES and the Disclosure Policy of the MRC simply focus on the information submitted to or held by the MRC Secretariat but not on the information held by the NMCs and the governments of riparian States. For instance, the implementation of PDIES in Thailand by the Thai National Mekong Committee (TNMC) has been criticized for being influenced by its close connection with other powerful government agencies, such as the Royal Irrigation Department and the Electricity Generating Authority of Thailand (EGAT).⁵⁵⁸

⁵⁵¹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 15

⁵⁵² Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 17

⁵⁵³ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin 1995 (the 1995 Mekong Agreement) (adopted by the Governments of Cambodia, Lao, Thailand and Vietnam on 5 April 1995 in Chiang Rai, Thailand), Article 18

⁵⁵⁴ Revised Rules of Procedures of the Mekong River Commission Secretariat 2014 (approved by the JC on 15 March 2014 at its Thirty Ninth meeting in Pakse, Champasak Province, Lao PDR), Rule 5

Revised Rules of Procedures of the Mekong River Commission Secretariat 2014 (approved by the JC on 15 March 2014 at its Thirty Ninth meeting in Pakse, Champasak Province, Lao PDR), Rule 11
> <http://www.mrcmekong.org/assets/Publications/policies/RoPs-of-the-MRCS-REVISED.pdf>

⁵⁵⁵ MRC, 'MRC Guidelines on Disclosure of Data and Information Knowledge 2015' (*Mekong River Commission (MRC)*, May 2015) <<http://www.mrcmekong.org/assets/Publications/policies/MRC-Disclosure-Guidelines-RevisedVer-May2015-final.pdf>> accessed 15 November 2018, Section 4

⁵⁵⁶ Ibid

⁵⁵⁷ MRC Data and Information Services, 'Modelling Toolbox' (*MRC*, 2010) <<http://portal.mrcmekong.org/mrctoolbox>> accessed 11 November 2018

⁵⁵⁸ Bunthida Plengsaeng, Uta Wenh and Pieter van der Zaag, 'Data-sharing Bottlenecks in Transboundary Integrated Water Resources Management: A Case Study of the Mekong River Commission's Procedures for Data Sharing in the Thai Context' (2014) 39(7) *Water International* 933-951
John Dore and Louis Lebel, 'Deliberation and Scale in Mekong Region Water Governance' (2010) 46(1) *Environmental Management* 60-80, 68

4.3 What Are the Issues and Challenges in the Implementation and Practice of Public Participation as Part of the Decision-Making Process in the Xayaburi Project?

4.3.1 At Regional Level

On 20 September 2010, the Government of Laos (GOL), through Laos National Mekong Committee (LNMC), submitted the notification of its proposed Xayaburi Hydroelectric Project to the MRC Secretariat, who then forwarded it to the Joint Committee (JC) on 22 October 2010 before circulating it to other Member States later on 22 April 2011.⁵⁵⁹ Despite the fact that PNPCA Procedures do not explicitly require stakeholder consultation, the PNPCA Joint Committee Working Group (PNPCA JCWG)⁵⁶⁰ decided, on its first meeting on 26 October 2010, that stakeholder consultations should also be included in the PNPCA process for the proposed Xayaburi Project.⁵⁶¹ The inclusion of stakeholder consultations in the Xayaburi PNPCA process may well set a precedent for the other proposed transboundary hydropower projects in the future.⁵⁶² The PNPCA JCWG also concluded that public participation is a national matter of each State; it should be taken in charge by the National Mekong Committees (NMCs) and the governments of the riparian States.⁵⁶³ This approach resonates with the Association of Southeast Asian Nations (ASEAN) way that favours the non-interfering in the internal affairs of the neighbouring States.⁵⁶⁴ It should also be noted that the MRC does not act as a “supra-national authority” but an institutional body whose roles are to facilitate the cooperation, negotiation and conciliation among riparian States; it has no actual power to legally enforce, override, or explicitly constrain sovereign decision-making at the national level.⁵⁶⁵

⁵⁵⁹ MRC, 'Xayaburi Hydropower Project Prior Consultation Process' (*Mekong River Commission (MRC)*, 15th Dec 2010 - 22nd Apr 2011) <<http://www.mrcmekong.org/topics/pnpca-prior-consultation/xayaburi-hydropower-project-prior-consultation-process/>> accessed 8 November 2018

⁵⁶⁰ The PNPCA Joint Committee Working Group (PNPCA JCWG) is comprised up to four representatives from each riparian States; it is set up to oversee the entire PNPCA process.

⁵⁶¹ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project '

⁵⁶² Alistair Rieu-Clarke, 'Transboundary Hydropower Projects on the Mainstream of the Lower Mekong River - The Case of Public Participation and Its National Implications for Basin States' in Mara Tignino and Komlan Sangbana (eds), *Public Participation and Water Resources Management: Where Do We Stand in International Law?* (Public Participation and Water Resources Management: Where Do We Stand in International Law?, UNESCO 2015) 91-97, 94

⁵⁶³ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project ', Note, 2

⁵⁶⁴ Taku Yukawa, 'The ASEAN Way as A Symbol: An Analysis of Discourses on the ASEAN Norms' (2018) 31(3) *The Pacific Review* 298-314; Gabriella Neusner, 'Why the Mekong River Commission Matters' (*The Diplomat*, 7 December 2016) <<https://thediplomat.com/2016/12/why-the-mekong-river-commission-matters/>> accessed 25 December 2018

⁵⁶⁵ Ben Boer and others, *The Mekong: A Socio-Legal Approach to River Basin Development* 104-105

According to Section 5.3.1 d. of the PNPCA Procedures, one of the roles and functions of the NMCs is 'to facilitate any consultations, evaluation and site visit as requested by the MRC JC for the proposed use.'⁵⁶⁶ Consequently, the stakeholder meetings took place under the NMCs, and public participation was conducted in accordance with the requirements of the national law of each State.⁵⁶⁷ The NMCs possessed full discretion to decide how public participation should be organized and what information should be made accessible to local communities at a national level.⁵⁶⁸ For each State has a different approach and policy on public participation, the MRC depends pretty much on national governments as the communication interface at the local level.⁵⁶⁹

The *Prior Consultation Review Report of the Xayaburi Project* showed that seven national stakeholder consultations were held in each State during January-February 2011, except in Laos where the project is located.⁵⁷⁰ The GOL claimed that it did not carry out stakeholder meetings in Laos during the PNPCA process because public participations had already been organized previously by the TEAM Consulting Engineering and Management Co., Ltd. (TEAM Consulting Group) under the instruction of Ch. Karnchang Public Company Ltd. (Ch. Karnchang) during the development of the EIA and SIA in 2007 and 2008 respectively.⁵⁷¹ As for Cambodia, Thailand and Vietnam, public participations were held at two levels: among communities living downstream of the Xayaburi Project that might be potentially affected, and among a wide-ranging public at national level.⁵⁷² There were some significant concerns and suggestions raised by the participants at the stakeholder consultations on the impacts of the proposed Xayaburi Dam and stakeholder consultation process. Many concerns were raised on the fish migration, agricultural productivity, food security, sediment flow, the safety of the dam, and overall ecology and

⁵⁶⁶ Procedures for Notification, Prior Consultation and Agreement (PNPCA Procedures) 2003, 30 November 2003, Section 5.3.1 d.

⁵⁶⁷ MRC Secretariat, 'Prior Consultation Project Review Report: Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River' (MRC, 24 March 2011) <<http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>> accessed 5 November 2018

⁵⁶⁸ Pål Arne Davidsen, 'Between Rhetoric and Reality – A Critical Account of Stakeholder Participation in Decision Making in the Mekong River Basin' in Anton Earle and Daniel Malzbender (eds), *Stakeholder Participation in Transboundary Water Management* (Stakeholder Participation in Transboundary Water Management, Internationale Weiterbildung und Entwicklung 2006) 131-155; IUCN, 'Water Governance: A situational analysis of Cambodia, Lao PDR and Viet Nam' (IUCN, 2009) <https://www.iucn.org/sites/dev/files/import/downloads/water_governance_a_situational_analysis.pdf> accessed 5 November 2018

⁵⁶⁹ Pål Arne Davidsen, 'Between Rhetoric and Reality – A Critical Account of Stakeholder Participation in Decision Making in the Mekong River Basin', *Supra* note 61, p. 131-155

⁵⁷⁰ MRC Secretariat, 'Prior Consultation Project Review Report: Procedures for Notification, Prior Consultation and Agreement (PNPCA): Proposed Xayaburi Dam Project – Mekong River'

⁵⁷¹ Ch. Karnchang Public Company Ltd., 'Social Impact Assessment: Xayaburi Hydroelectric Power Project' (Mekong River Commission (MRC), August 2010) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-SIA-August-2010.pdf>> accessed 11 November 2018; Ch. Karnchang Public Company Ltd., 'Environmental Impact Assessment: Xayaburi Hydroelectric Power Project' (Mekong River Commission (MRC), August 2010) <<http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/Xayaburi-EIA-August-2010.pdf>> accessed 11 November 2018

⁵⁷² Alistair Rieu-Clarke, 'Transboundary Hydropower Projects on the Mainstream of the Lower Mekong River - The Case of Public Participation and Its National Implications for Basin States', Note, 96

biodiversity of the LMB.⁵⁷³ The participants pointed out that public participation should have started at the beginning of the prior consultation process and not at the end of the process; the participation should as well be taken place during the feasibility, planning, construction and operation phases of the projects.⁵⁷⁴ Furthermore, they made a request for more detailed information and further studies on transboundary impact, social impact and assessment of accumulative impacts on each downstream country, as well as the mitigation measures and mechanism.⁵⁷⁵ They considered the 6-month consultation period to be too short to allow further in-depth studies and to allow the governments and project developer to incorporate the public's opinions and recommendations into account for the final decision.⁵⁷⁶ Most prominently, the participants demanded that 'stakeholder consultation process needs to be transparent, open and accountable. All documents related to the projects, especially EIA need to be released to the public timely before the stakeholder consultations take place in order to allow effective involvement.'⁵⁷⁷ They called for stakeholder consultations to involve more community people who will potentially be affected by the proposed project.⁵⁷⁸ Despite these suggestions and concerns raised at the public consultations, the Laos Government took no follow-up action and just decided to go ahead with the construction of the Xayaburi Project unilaterally.⁵⁷⁹ This led to further protests by civil society organizations and communities in some riparian States which rendered Lao to solve the issues of fish migration and sediments by installing additional fish passage.⁵⁸⁰

The lack of transparency in the disclosure of information and public consultation process in the proposed Xayaburi Project is one of the main issues in the Xayaburi Project as addressed by NGOs and civil societies. When public consultation took place in 2011, only the *Project Feasibility Study* was made available through the website developed by the project developer at xayaburi.com; but other documents (including the information regarding the EIA document) submitted to the MRC were not made available to the public at the time.⁵⁸¹ Section 4 of the MRC Policy on Disclosure of Data, Information and Knowledge indicates that project related EIA and similar reports should be made publicly

⁵⁷³ Ibid

⁵⁷⁴ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project', Note

⁵⁷⁵ Ibid

⁵⁷⁶ Ibid

⁵⁷⁷ Ibid

⁵⁷⁸ Ibid

⁵⁷⁹ Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights From the Xayaburi Controversy' (2015) 5(1) Asian Journal of International Law 143-175

⁵⁸⁰ MRC, '20 Years of Cooperation' (*Mekong River Commission (MRC)*, 2015)

<<http://www.mrcmekong.org/assets/Publications/20th-year-MRC-2016-.pdf>> accessed 20 November 2018; 22

⁵⁸¹ Save the Mekong, 'Subject: Call for Halt to the PNPCA Process and Cancellation of Xayaboury Dam. A Letter to Mr. Jeremy Bird, CEO, Mekong River Commission' 13 October 2010)

<<http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SaveTheMekongtoMRC13-10-10.pdf>> accessed 10 November 2018

available under prevailing national regulations.⁵⁸² However, in the States where national law does not provide the disclosure of, and access to EIA document and environmental information to the public domain it could be an obstacle to achieve transparency at the regional level because the operation of the MRC also depends on the governments that are members of its Commission.⁵⁸³ Whereas Section 3 of the PNPCA Procedures states that transparency is one of its the key governing principles⁵⁸⁴, the PNPCA procedures does not mandate how to enforce transparency to the decision-making process regarding the proposed large-scale hydropower plants on the mainstream of the Mekong River that are made by the governments of the riparian States at the national level⁵⁸⁵; hence transparency largely depends on the good will of its member States.⁵⁸⁶ The *Prior Consultation Project Review Report* reveals that, according to the PNPCA JCWG, any submitted document related to the proposed Xayaburi Project 'could only be released and/or disseminated beyond the MRC framework with the official permission of the submitting country, in this case the Lao PDR.'⁵⁸⁷ This is a downside in terms of the public's access to the information related the proposed hydropower projects, as the disclosure of information and documents submitted for the PNPCA Procedures can be made available to the public only with the permission of the State.

4.3.2 At National Level

This section of the Chapter focuses on public participation, access to environmental information, and access to justice in Thailand because the Xayaburi Project was the first community-led lawsuit in the region related to dam construction on the mainstream of the Lower Mekong River.

In May 2011, the National Human Rights Commission of Thailand (NHRCT) received a complaint from the Network of Thai People in Eight Mekong Provinces based on the grounds that 'the project lacked information disclosure and public participation, including an Environmental Impact Assessment (EIA) and Health Impact Assessment (HIA).'⁵⁸⁸ Five months after the Power Purchase Agreement (PPA) had been signed, on

⁵⁸² MRC, 'Communication Strategy and Disclosure Policy', 26

⁵⁸³ Hang Ngo Thu and Uta Wenh, 'Data Sharing in International Transboundary Contexts: The Vietnamese Perspective on Data Sharing in the Lower Mekong Basin' (2016) 536 *Journal of Hydrology* 351-364; Milton Osborne, *River at Risk: The Mekong and the Water Politics of China and Southeast Asia* (Double Bay: Longueville Media 2004) 9

⁵⁸⁴ Procedures for Notification, Prior Consultation and Agreement (PNPCA Procedures) 2003, 30 November 2003, Section 3

⁵⁸⁵ Yumiko Yasuda, *Rules, Norms and NGO Advocacy Strategies: Hydropower Development on the Mekong River* (Earthscan Studies in Water Resource Management, Routledge 2015) 128

⁵⁸⁶ MRC, 'Strategic Plan 2006-2010' (*Mekong River Commission (MRC)*, December 2006) <<http://www.mrcmekong.org/assets/Publications/strategies-workprog/Strategic-plan-2006-2010.pdf>> accessed 11 November 2018

⁵⁸⁷ MRC, 'Procedures for Notification, Prior Consultation and Agreement: Prior Consultation for the Proposed Xayaburi Dam Project. Prior Consultation Project Review Report (Volume 2): Stakeholder Consultations related to the Proposed Xayaburi Dam Project', 2

⁵⁸⁸ NHRCT, 'National Human Rights Commission of Thailand's Press Release on Xayaburi (Unofficial English Translation)' (*National Human Rights Commission of Thailand (NHRCT)*, 9 May 2012) <<https://lists.kepa.fi/pipermail/mekong-l/2012-May/000180.html>> accessed 20 November 2018

21 February 2012, the NHRCT organized a public hearing to get opinions and views from the communities in Thailand who live along the Mekong River.⁵⁸⁹ It also contacted Ch.Karnchang, Thai Ministry of Energy, and Thai Central Bank for a written testimony in response to the complaint. After an investigation and the public hearing, the NHRCT found that the EGAT and the Thai Government failed to disclose the PPA or any other relevant information to the public before concluding the agreement.⁵⁹⁰ In fact, the PPA was signed on 29 October, even before the consultation with the public.⁵⁹¹ Notably, there is a lack of transparency in the decision-making process of Thai Government in signing the PPA and in financing the construction of the Xayaburi Dam; the EIA prepared did not include the transboundary impacts, and limited information is shared with the public before the signing of the PPA.⁵⁹² The NHRCT called for the Prime Minister to review the implementation of the dam construction but this request was ignored.⁵⁹³

In August 2012, a group of thirty-seven villagers (together with a further 1,000 signatures of other villagers) from eight provinces⁵⁹⁴ in the north-eastern part of Thailand along the Mekong River submitted a claim before the Administrative Courts of the First Instance against the Government agencies: the EGAT, the National Energy Policy Council, the Ministry of Energy (NEPC), the Ministry of Natural Resources and the Environment, and the Council of Ministers (Thai Cabinet) on three Counts.⁵⁹⁵

1. The Power Purchase Agreement (PPA) concluded between the EGAT and the Xayaburi Power Company Ltd. is an unlawful project and shall be revoked;
2. The resolutions adopted by the NEPC and the Thai Cabinet authorising the EGAT to sign an agreement should be invalidated; and
3. The process of acquiring the electricity from the proposed dam is inconsistent with both domestic law and international law:
 - (a) The PPA was concluded in a way that was contrary to the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) which provides a right of information

⁵⁸⁹ Carl Middleton, 'National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the Regions's Authoritarian Turn' (2018) 11(1) *Australian Journal of South-East Asian Studies* 81-97

⁵⁹⁰ Daniel King, 'Regulating Social and Environmental Risk in ASEAN Financial Integration: The Xayaburi Dam Project in Lao PDR and Thai Banks' in Mahdev Mohan and Cynthia Morel (eds), *Business and Human Rights in Southeast Asia* (Business and Human Rights in Southeast Asia, Routledge 2015) 99-120, 105

⁵⁹¹ International Rivers, 'Why Did Laos Proceed with the Xayaburi Dam, in the Face of Strong Opposition from Neighboring Countries? : New Insight from the Project's "Power Purchase Agreement" ' (*International Rivers*, August 2013) <https://www.internationalrivers.org/sites/default/files/attached-files/summary_of_ppa_analysis_august_2013.pdf> accessed 20 November 2018

⁵⁹² Pianporn Deetes, 'Thai Court Holds Hope for Transboundary Justice in the Mekong' (*International Rivers*, 23 July 2015) <<https://www.internationalrivers.org/blogs/254-1>> accessed 10 November 2018; Carl Middleton, 'National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the Regions's Authoritarian Turn', Note 71

⁵⁹³ Ibid

⁵⁹⁴ Chaing Rai, Loei, Nong Khai, Nong Khai, Nakhon Phanom, Bueng Kan, Mukdaharn, Amnat Charoen and Ubon Ratchatani

⁵⁹⁵ Pianporn Deetes, 'Thai Villagers File Lawsuit on Xayaburi Dam' (*International Rivers*, 8 August 2012) <<https://www.internationalrivers.org/blogs/254/thai-villagers-file-lawsuit-on-xayaburi-dam>> accessed 18 November 2018

and public participation to individuals and communities whose livelihood etc. may be affected by the project or activity.

- (b) The requirement to provide information was not fulfilled since the information given was incomplete and inadequate and was not such as to allow the people to apprehend those facts that may affect their livelihoods. In addition, opportunities to participate were not ensured since public hearings were only held in some areas, not all in eight provinces that are adjacent to the Mekong River as required by domestic and international law.⁵⁹⁶

In February 2013, the Administrative Courts of the First Instance rejected all three Counts based on the ground that it did not have a jurisdiction to rule on this matter. In March 2013 the Plaintiffs (the villagers) appealed the case to the Supreme Administrative Court of Thailand on the grounds that the Defendants did not provide adequate information related to the Xayaburi Dam that could have impacts on environmental quality and health issues; and that all three consultations organized in Thailand did not reflect the affected community thoroughly.⁵⁹⁷ The Plaintiffs requested further information, such as the survey data, transboundary impact assessment, resettlement plan, social impact assessment; nonetheless the request has never been responded to and no reason has been given.⁵⁹⁸ The Defendants (the Government Agencies) argued that the public's request for the information could not be granted because the information belongs to the Ch. Karnchang and the Xayaburi Power Co. Ltd. but not to the public or government authorities; thus, the information cannot be disclosed without their consent.⁵⁹⁹ Consequently, this issue raises the question whether the private sector has the obligation to disclose and provide information that is necessary for public participation. Although some information is available on the website, it is provided in English; and access to internet in some areas is limited.⁶⁰⁰

In June 2014, the Supreme Administrative Court rejected the first two Counts but accepted the hearing on the last Count on the right to participate and the right to be

⁵⁹⁶ *Case Concerning an Unlawful Act and Omission of an Administrative Agency or State Official and a Dispute in Connection with an Administrative Contract (Appeal Against the Order of the Administrative Courts of first Instance) (Order No.8/2014)* (Supreme Administrative Court of Thailand), 17 April 2014, 3-8; Krisdakorn Wongwuthikun, 'Country Report: Thailand' (*IUCN Academy of Environmental Law*, 2015) <file:///C:/Users/khanh/AppData/Local/Packages/MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/42_Thailand%20(1).pdf> accessed 12 October 2018, 1-11

⁵⁹⁷ Business & Human Rights Resources Centre, 'Summary of the Supreme Administrative Court Decision to Hear the Case Submitted by the Network of Thai People in 8 Mekong Provinces Challenging the Xayaburi Dam Power Purchase Agreement' (*Business & Human Rights Resources Centre*, 25 December 2015) <<https://www.business-humanrights.org/sites/default/files/documents/CourtDecisionXayaburi25%2012%202015ENG.pdf>> accessed 20 November 2018

⁵⁹⁸ Ibid

⁵⁹⁹ Ibid

⁶⁰⁰ Ibid

informed and consulted.⁶⁰¹ In granting the hearing of an appeal, the Supreme Administrative Court made a reference to Section 66 and 67 of the Constitution of the Kingdom of Thailand B.E.2550 (2007) (the 2007 Constitution).⁶⁰² It is the first time the Court publicly acknowledged the transboundary impacts of the Xayaburi Dam, and the threat posed by the project to the environment, livelihoods and community interest, particularly in Thailand.⁶⁰³

With regards to the rights of the public to participate in the making of environmental decision, Section 66 of the 2007 Constitution confers the rights upon the public, among other things, to participate in the management, maintenance and exploitation of natural resources to the local communities.⁶⁰⁴ The public also has a right under Section 67 of the 2007 Constitution to participate with the State in the preservation and exploitation of natural resources and biological diversity and in the protection, promotion and conservation of the quality of the environment for the sake of his well-being and livelihood in a way that is not hazardous to his health and sanitary condition, welfare or quality of life; this right must be protected appropriately.⁶⁰⁵ Accordingly, the 2007 Constitution of Thailand requires that the environmental assessment and health impact assessment must be carried out prior to the permission of any project or activity which may seriously affect the quality of the environment, natural resources, biological diversity, and health of individuals in the communities.⁶⁰⁶ Furthermore, it is required that consultation with the public and interested parties, as well as the opinions of an independent organisation should be obtained prior to the operation of such project or activity.⁶⁰⁷ Finally, the public also has the right to bring a legal claim against the government agency, State agency, State enterprise, local government organisation or other State authority within a jurisdiction that person is protected.⁶⁰⁸

This case is considered the first community-filed lawsuit in the region related to dam building on the Mekong River and the first lawsuit on a transboundary project.⁶⁰⁹ It could be seen that the rights of the public protected under Section 66 and 67 of the 2007 Constitution of Thailand are similar to the “procedural rights” protected under the Aarhus

⁶⁰¹ Amy Sawitta Lefevre, 'Thai Court Takes Villagers' Case Against Power Firm, Laos Dam' (*Reuters*, 24 June 2014) <<https://uk.reuters.com/article/thailand-laos-lawsuit-dam-idUKL4N0P51PN20140624>> accessed 10 October 2018

⁶⁰² *Case Concerning an Unlawful Act and Omission of an Administrative Agency or State Official and a Dispute in Connection with an Administrative Contract (Appeal Against the Order of the Administrative Courts of first Instance) (Order No.8/2014)* 22

⁶⁰³ Pianporn Deetes, 'PR - Thai Communities Appeal Xayaburi Lawsuit Verdict ' 25 January 2016) <<https://www.internationalrivers.org/resources/9274>> accessed 20 November 2018

⁶⁰⁴ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 66

⁶⁰⁵ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 67

⁶⁰⁶ *Ibid*

⁶⁰⁷ *Ibid*

⁶⁰⁸ *Ibid*

⁶⁰⁹ Pianporn Deetes and Sor Rattanamanee Polkla, 'PR - Mekong Villagers To Appeal Xayaburi Court Case Decision'

Convention, the effect of which obliges the State to provide the public with access to environmental information, to allow them to participate in making of environmental decision that will affect them, and to provide them with access to justice.

However, on 25 December 2015, the Supreme Administrative Court delivered the verdict finding that state agencies involved in the Xayaburi Dam had complied with Thai law by disclosing basic information about the project on their websites; and that the PPA was not regarded as project or activity; therefore, there is no need for them to conduct a study, an assessment or consultation.⁶¹⁰ As a consequence of that, the appellants filled the final appeal to the Supreme Court on 25 January 2016, and the case has not yet been decided.⁶¹¹ The final outcome of the case lies within the jurisdictional power of the national court of Thailand; and it is beyond the scope of this study.

4.4 How Public Participation Is Recognized As “Procedural Rights” under International Environmental Law?

4.4.1 Soft Law

In contrast to customary international law which is legally binding and manifests itself in the States' practice on a regular basis over a period of time and rendered obligatory (opinion juris), soft law is a quasi-legal instrument which does not have legally binding force.⁶¹² Still, soft law is, according to Dupuy and Barelli, considered as a legal instrument created and negotiated by States during international conferences and summits in a form of carefully drafted statements among member States with common aims and goals to have some normative significance which intends to have influence on the practice of States.⁶¹³ Examples of legal instruments classed as soft law are Resolutions and Declarations of the UN General Assembly; Actions Plan, Goals, Agenda, Codes of Practice, Guidelines, and Recommendations adopted by, international

⁶¹⁰Pratch Rujivanarom, 'Xayaburi Dam Opponents Appeal Against Administrative Court Ruling' 25 January 2016) <<http://www.nationmultimedia.com/breakingnews/Xayaburi-Dam-opponents-appeal-against-Administrati-30277686.html>> accessed 20 November 2018; Blue & Green Tomorrow, 'Thai Communities Appeal Xayaburi Lawsuit Verdict at Supreme Administrative Court' 25 January 2016) <<https://blueandgreentomorrow.com/environment/thai-communities-appeal-xayaburi-lawsuit-verdict-at-supreme-administrative-court/>> accessed 15 November 2018

⁶¹¹ Ibid

⁶¹² Bryan Druzin, 'Why does Soft Law Have any Power Anyway?' (2017) 7 Asian Journal of International Law 361-378

⁶¹³ Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1990) 12(2) Michigan Journal of Law 420-435; Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58(4) International and Comparative Law Quarterly 957-983

organizations such as the UNEP, FAO, IMO; as well as transnational networks and regulatory bodies.⁶¹⁴

There are some advantages of soft law in the sphere of international environmental law where soft law can serve as a flexible option for negotiation and cooperation among Member States.⁶¹⁵ As opposed to treaty which is legally binding subject to ratification and enforcement by States, soft law provides a more compromising commitment and achievable goal based on voluntary compliance.⁶¹⁶

Public participation in international environmental law first appeared in the non-legally binding international environmental instrument called the UN World Charter for Nature in 1982. Paragraph 3 of the Charter states that:

All persons, in accordance with their national legislation, shall have the opportunity to participate individually in the formulation of decisions of direct concern to their environment, and shall have access to mean of redress when their environment has suffered damage and degradation.⁶¹⁷

A decade later, the participation principle was adopted in principle 10 of the Rio Declaration in 1992 during the United Nations Conference on Environment and Development"(UNCED), and informally known as the Earth Summit. By virtue of Article 10:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁶¹⁸

⁶¹⁴ Dina Shelton, 'Soft Law in HANDBOOK OF INTERNATIONAL LAW (Routledge Press, 2008)' (*George Washington University Law School*, 2008) <https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2048&context=faculty_publications#:~:text=Common%20forms%20of%20soft%20law,of%20understanding%2C%20executive%20political%20agreements%2C> accessed 16 November 2021

⁶¹⁵ Alan Boyle, 'Soft Law in International Law-making' in Malcolm Evans (ed), *International Law* (International Law, 5th edn, Oxford University Press 2018) 119-137

⁶¹⁶ Ibid., Owen McIntyre, 'The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources' (*European Society of International Law*, April 2018) <<https://esil-sedi.eu/wp-content/uploads/2018/04/McIntyre.pdf>> accessed 27 July 2019

⁶¹⁷ UN World Charter for Nature, adopted on 28 October 1982, UN GAOR, UN Doc. A/RES/37/7, Paragraph 3

⁶¹⁸ Rio Declaration on Environment and Development, approved 5 June 1992, 31 ILM 874, Principle 10

In brief, the Rio Declaration laid down the three crucial elements of the participatory procedures: access to environmental information, public participation in the decision-making process and access to judicial and administrative process. Hunter, Salzman and Zaelke also add that these three elements of participation are considered as the “pillars of environmental democracy”.⁶¹⁹ At the Earth Summit, and alongside the Rio Declaration, Agenda 21 was created; it provides a more specific detail of the target group of publics that should be involved in participation: an equal participation of the people of all groups in the community, without discrimination, before the implementation of the water programs and development processes that may affect them.⁶²⁰

4.4.2 Treaty Law

In respect of legally binding instruments, there are a few international environmental treaties that contain provisions on public participation. For example, the Convention on Biodiversity (CBD) 1992⁶²¹ recognizes the participation right of indigenous people and local communities (Article 8(j)).⁶²² Apart from scientific knowledge, traditional knowledge and culture are valued as a contribution to the conservation and sustainable use of biodiversity (Article 1).⁶²³ In essence, the CBD Convention encourages cooperation between government authorities and its private sector to ensure the participation of local people at all levels (Article 10(c)).⁶²⁴

Public participation by local populations, NGOs and community-based organizations (CBOs) was prominently emphasized in the UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (UNCCD) 1994.⁶²⁵ Under Article 3(a) of the UNCCD, local communities have the right to take part in the decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought.⁶²⁶ Its preamble additionally stresses the importance of the role of men and women and “major groups” played in the participatory process.⁶²⁷ In brief, the UNCCD

⁶¹⁹ David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (4th edn, Foundation Press 2007) 535

⁶²⁰ Agenda 21 (approved on 24 June 1992) UN GAOR, UN Doc A/CONF.151/26/Rev.1

⁶²¹ The UN Convention on Bio Diversity, adopted on 5 June 1992, entered into force on 29 December 1993 (UN.Doc.UNEP/Bio.Div/N7-INC.S/4)

⁶²² The UN Convention on Bio Diversity (the CBD Convention) 1992, Article 8(j)

⁶²³ The UN Convention on Bio Diversity (the CBD Convention) 1992, Article 1

⁶²⁴ The UN Convention on Bio Diversity (the CBD Convention) 1992, Article 10(c)

⁶²⁵ The UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) 1994, adopted on 17 June 1994, entered into force 26 December 1996 (UN.Doc. A/AC.241/27)

⁶²⁶ The UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) 1994, Article 3(a)

⁶²⁷ The UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) 1994, Preambles

Convention (in particular, Article 22(7))⁶²⁸ promotes the participation of non-governmental actors in efforts to advance the implementation of participation at all levels including through partnerships.⁶²⁹

Public participation is also included in some parts of the UN Framework Convention on Climate Change (UNFCCC) 2015, known by another name as “the Paris Agreement”.⁶³⁰ In its Preamble, the UNFCCC affirms the importance of education, training, public awareness, public participation, public access to information and cooperation at all levels on the issues of climate change.⁶³¹ As specified Article 6(8)(b) of the UNFCCC Convention the Parties are urged to enhance the participation of both public and private sectors in the implementation of their nationally determined contributions through adaptation, finance, technology transfer and capacity- building.⁶³² For the participatory process to be transparent, it is important that the Parties to the UNFCCC Convention take into account vulnerable groups (e.g., indigenous people, youths and people with disability), communities and ecosystems⁶³³, as well as the traditional knowledge and local system with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions (Article 7(5)).⁶³⁴ In reinforcing public participation and access to information, Article 12 of the UNFCCC also calls for the cooperation among Parties.⁶³⁵

As presented above, a number of MEAs recognize the connection between the environment and human rights, such as the right to health and well-being, and the right to participate in the environmental decisions. International law also recognizes the rights of indigenous people, which encompasses the area where environmental rights and human rights law collide.⁶³⁶ Therefore, the rights of indigenous people to culture, knowledge, food, and natural resources are also protected under both systems.⁶³⁷

⁶²⁸ The UN Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD) 1994, Article 22(7)

⁶²⁹ Lindsay Stringer and others, 'Implementing the UNCCD: Participatory Challenges' (2007) (2007) 31 *Natural Resources Forum* 198

⁶³⁰ The UN Framework Convention on Climate Change (UNFCCC) 2015, adopted on 12 December 2015, entered into force on 4 November 2016 (UN.Doc.FCCC/CP/2015/10/Add.1)

⁶³¹ The UN Framework Convention on Climate Change (UNFCCC) 2015, Paragraph 10 of the Preamble

⁶³² The UN Framework Convention on Climate Change (UNFCCC) 2015, Article 6(8)(b)

⁶³³ Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) (2016) 6 *Climate Law* 109

⁶³⁴ The UN Framework Convention on Climate Change (UNFCCC) 2015, Article 7(5)

⁶³⁵ Sébastien Duyck, 'The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate' (2015) (2015) 26 *Yearbook of International Environmental Law* 3

⁶³⁶ Division of Environmental Law & Conventions and United Nations Environment Programme under the UNEP, 'Factsheet on Human Rights and the Environment' (UNEP, June 2015)

<<https://wedocs.unep.org/bitstream/handle/20.500.11822/9933/factsheet-human-rights-environment.pdf?sequence=1&isAllowed>> accessed 24 september 2021

⁶³⁷ Dinah Shelton, 'A Rights-Based Approach to Public Participation and Local Management of Natural Resources' (*Institute for Global Environmental Strategies*,

<https://www.iges.or.jp/en/publication_documents/pub/conferenceproceedings/en/739/3ws-26-dinah.pdf> accessed 14 September 2021

4.4.3 Case Law

In the *Pulp Mills* case, one of the arguments invoked by Argentina was that Uruguay had failed to duly consult the communities (of Argentina) likely to be affected by the construction of the Pulp Mills. According to Argentina's submission, public consultation is considered as a crucial element of the obligation to conduct a transboundary EIA.⁶³⁸ By basing its claim on the Espoo Convention, the ILC's Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Argentina did not, in its submission, address public participation as a separate principle but as an element of the (transboundary) EIA process.⁶³⁹ The ICJ however ruled that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.⁶⁴⁰ According to the fact that neither Argentina nor Uruguay is a party to the Espoo Convention, and that the Bali Guidelines are not binding.⁶⁴¹ In giving its judgment *ratione materiae*, the ICJ limited itself only to the legal instruments submitted by Argentina (i.e., the Treaty between Uruguay and Argentina, the Espoo Convention, the UNEP Guidelines and the ILC's Draft Articles) but did not examine beyond those instruments⁶⁴² – the ICJ did not consider whether there was a customary norm for public participation but a transboundary EIA in environmental decision. Rather than limiting itself to the treaties, Argentina could have argued in the first place that there existed a customary norm for public participation and the obligation to consult potentially affected individuals in international law.

Neither did the ICJ confirm that the State has the obligation to notify and consult potentially affected citizens (non-State actors) despite this subject not being disputed by the Parties.⁶⁴³ Hence, the right to information and consultation is exercised by the riparian States but not automatically extended to their citizens.⁶⁴⁴ Because of that, if and to what extent the affected individuals (especially those located outside their jurisdiction) should be informed and consulted is left open to each States' own discretion –this has caused uncertainty in international law and practice.

In Europe, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) play a significant role in conceding environmental rights

⁶³⁸ Alexander Langshaw, 'Giving Substance to Form: Moving towards an Integrated Governance Model of Transboundary Environmental Impact Assessment' (2012) (2012) 81(1) Nordic Journal of International Law 21
⁶³⁹ ICJ, 'Memorial of Argentina in the Case concerning Pulp Mills on the River Uruguay Case (Argentina v Uruguay)' (2007) <<http://www.icj-cij.org/files/case-related/135/15425.pdf>> accessed

⁶⁴⁰ *Pulp Mills on the Uruguay River (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 425, Note 39, Paragraph 217-219

⁶⁴¹ *Ibid*, Paragraph 205

⁶⁴² Panos Merkouris, 'Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay): Of Environmental Impact Assessments and "Phantom Experts" (*The Hague Justice Portal*, <http://haguejusticeportal.net/Docs/Commentaries%20PDF/Merkouris_Pulp%20Mills_EN.pdf> accessed 30 November 2017

⁶⁴³ *Pulp Mills on the Uruguay River (Argentina v Uruguay)*, Paragraph 216

⁶⁴⁴ Sabine Schulze, 'Public Participation in the Governance of Transboundary Water Resources – Mechanisms provided by River Basin Organizations' [2012] 365 *Europe en formation* 49-68

and public participation under human rights.⁶⁴⁵ For instance, in *Tatar v Romania*⁶⁴⁶, the ECtHR made a reference to Article 8 (the right to the respect of private and family life) and Article 10 (the right to express a proper and informed opinion) of the European Convention on Human Rights in ruling that the operation of the gold mine has exposed the applicants and their family to serious risk to human life and health – a breach of a dam caused the release of 100,000 m³ of cyanide-contaminated water into the environment.⁶⁴⁷ In addition to the right to family life and health, the Court pointed out that the authorities also had a duty to guarantee the right of the public to participate in the decision-making process concerning environmental issue; they need to ensure that the public can have access to the conclusions of the investigations and studies.⁶⁴⁸ By not making the 1993 impact assessment and the fact that the operating license had been granted available to the public, it was difficult (lack of information and evidence) for the public to challenge the results of that assessment.⁶⁴⁹

By ratifying the Aarhus Convention in 2005, the EU is under an obligation to ensure the EU citizens' entitlement to avail themselves of any of the environmental procedural rights—access to information, participation in decision-making and access to judicial/administrative remedies.⁶⁵⁰ For example, in *Stichting Natuur and Milieu*⁶⁵¹, the Dutch NGOs had challenged of the decision of the authority to disclose certain environmental studies and reports regarding the construction and operation of a power station Groningen.⁶⁵² In this case, the CJEU considered that the facts at issue in the main proceedings had to be assessed by reference to the right of access to environmental information under the Aarhus Convention. The Court found that the Commission's decision to refuse the NGO's request for internal review of the Commission's decisions on the ground that the acts were not of "individual scope" was "an error of law."⁶⁵³

With its ambition to become a global convention through the open ratification to the non-UNECE States, it is worth to consider whether the Aarhus Convention could be considered as one of the sources of international norm. In giving its judgment in the

⁶⁴⁵ Iliana Cenevska, 'A Thundering Silence: Environmental Rights in the Dialogue between the EU Court of Justice and the European Court of Human Rights' (2016) 28 *Journal of Environmental Law* 301

⁶⁴⁶ *Tatar v Romania* [2009] ECtHR 67021/01 112

⁶⁴⁷ James Harrison, 'Tatar v Romania -Case Comment' (2009) 21(3) *Journal of Environmental Law* 506-508

⁶⁴⁸ European Court of Human Rights, *Press Release (issued by Registra), Chamber Judgment: Tatar v Romania (HU Doc 61 27.1.2009), Summary Judgment, 2009*

⁶⁴⁹ *Ibid*; Claudia Sartoretti, 'The Aarhus Convention Between Protection of Human Rights and Protection of Environment' in Eva Lohse, Margherita Poto and Gaúlia Parola (eds), *Participatory Rights in Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective* (Participatory Rights in Environmental Decision-Making Process and the Implementation of the Aarhus Convention: a Comparative Perspective, Duncker & Humblot 2015) 52

⁶⁵⁰ Francesca Martines, 'Direct Effect of International Agreements of the European Union' (2014) 25(1) *European Journal of International Law* 129-247

⁶⁵¹ *Stichting Natuur en Milieu and Others v College van Gedeputeerde Staten van Groningen and College van Gedeputeerde Staten van Zuid-Holland (Environment and consumers)* (Cases C-165/09 to C-167/09) [2011] EUECJ (26 May 2011)

⁶⁵² *Ibid*

⁶⁵³ Richard Moules, 'Significant EU Environmental Cases: 2014' (2015) 27(1) *Journal of Environmental Law* 151-163

Taskin case⁶⁵⁴, the ECtHR made a direct reference to both the Rio Declaration and the Aarhus Convention in a “particularly expansive form”⁶⁵⁵, despite the fact that Turkey is not the Party to the Aarhus Convention. By citing the Aarhus Convention as an applicable law to the non-party, the Court signifies that the elements of public participation under the Aarhus Convention are emerging customary norms.

4.5 How Can the Aarhus Convention Be Used as A Source of Reference to Help with the Interpretation, Filling in the Gaps and Improving the Clarity and Transparency of the Current Practice of Public Participation?

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) 1998 was drafted and operated by the United Nations Economic Commissions for Europe (UNECE). It is the first environmental agreement that implements the link between human rights and the protection of the environment.⁶⁵⁶ The Aarhus Convention was mostly ratified by the EU States and some Central Asian States, such as Azerbaijan and Kazakstan; it is also open to the non-UNECE States to be a member.⁶⁵⁷ While the Aarhus Convention does not aim to protect the substantive right to live in a healthy environment directly, it guarantees the procedural environmental rights of the citizens to get access to environmental information, to participate in the decision-making process, and to get access to justice.⁶⁵⁸

The Aarhus Convention is chosen as the best practice in this research for number of reasons. Firstly, the Aarhus Convention is held to be one of the most advanced environmental treaty on public participation on transboundary environmental matters. Kofi Annan, the former UN-Secretary General, asserted that the Aarhus Convention is ‘the most ambitious venture in environmental democracy undertaken under the auspices of the UN. Its adoption was a remarkable step forward in the development of international law.... We must... strengthen our commitment to environmental rights - not only in Europe but throughout the world.’⁶⁵⁹ Similarly, Jendroska, Ebbesson, Stec and Casy-Lefkovitz considered the Aarhus Convention as ‘the most public-access-friendly environmental

⁶⁵⁴ *Taskin v Turkey* App no 46117/99 [2004] ECHR 621, Paragraph 98-99

⁶⁵⁵ Alan Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law*, 624

⁶⁵⁶ UN, 'Status of Treaties: CHAPTER XXVII Environment -13. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters' (*UN*, 2018) <https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-13&chapter=27&lang=en> accessed 12 January 2018

⁶⁵⁷ *Ibid*

⁶⁵⁸ Dinah Shelton, 'Developing Substantive Environmental Rights' (2010) 1(1) *Journal of Human Rights and the Environment* 89-120

⁶⁵⁹ Kofi Annan, 'What People Are Saying About the Aarhus Convention?' (*UNECE*, 30 October 2001) <<https://www.unece.org/fileadmin/DAM/env/pp/documents/statements.pdf>> accessed 20 January 2018

treaty'⁶⁶⁰, that it has 'a potential to serve as a global framework for strengthening citizen's environmental rights'⁶⁶¹ with the 'best world standards and practices in relation to public access to information and decision-making process.'⁶⁶²

Secondly, as addressed by Kravchenko and Boyle, the key provisions of the Aarhus Convention (the three pillars on public access to environmental information, their right to partake in the decision-making process and access to justice) are based on fundamental environmental rights in international law, such as Principle 1 of the Stockholm Declaration, Principle 10 of the Rio Declaration and the World Charter for Nature.⁶⁶³ Therefore, the Aarhus Convention is the first regional treaty that codifies the soft law principles on procedural rights to get access to information, partake in the environmental decision that will affect them, and to get access to justice.

Finally, the Aarhus Convention has inspired the drafting and the implementation of public participation into environmental law across many regions around the world; given its effect in protection the three pillars of the procedural rights and in reflecting customary law on public participation in environmental matters⁶⁶⁴, the Aarhus Convention can be used as a best practice of guidance for a legal model in strengthening public participation worldwide. For example, the Public Participation Strategy (PPS) of the Organization of the American States (OAS) acknowledges the Aarhus Convention as 'a good example of a mechanism that formalizes the States Parties' commitments to the three access areas', and the OAS used the Aarhus Convention as a model for its regional instrument.⁶⁶⁵

In the report on "Improving Public Participation in the Sustainable Development of Mineral Resources in Africa", the UN Economic Commission for Africa (UNECA) also praised the Aarhus Convention as 'a model of a public participation regime.'⁶⁶⁶ In implementing the effect of Principle 10 in the UNECLAC, the UN Economic Commission

⁶⁶⁰ Jerzy Jendroška, 'UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe' (1998) 13 National Environmental Enforcement Journal 159

⁶⁶¹ Jonas Ebbesson and others, 'The Aarhus Convention: An Implementation Guide (UN.Doc.ECE/CEP/72/Rev.1' (UNECE, 2014)

<http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf> accessed 10 November 2018

⁶⁶² Ibid, UNECE, 'Environmental Rights Not A Luxury -Aarhus Convention Enters into Force' (UNECE, 2001) <www.unece.org/press/pr2001/01env15e.html> accessed 15 September 2018

⁶⁶³ Jeroen van Bekhoven, 'Public Participation as a General Principle in International Environmental Law: Its Current Status and Real Impact ' (2016) 11(2) National Taiwan University Law Review 219; Svitlana Kravchenko, 'Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted' (2012) 7(2) Florida Agricultural and Mechanical University Law Review 163; Alan Boyle, 'Human Rights and the Environment: Where Next?'-642

⁶⁶⁴ Jona Razzaque, 'Implementing International Procedural Rights and Obligations: Serving the Environment and Poor Communities ' (*International Institute for Environment and Development*, 2005) <<http://pubs.iied.org/pdfs/G00466.pdf>> accessed 20 January 2019

⁶⁶⁵ Organization of the American States (OAS), 'Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development' (OAS, 13-14 April 2001) <http://www.oas.org/dsd/PDF_files/ispenglish.pdf> accessed 27 January 2018

⁶⁶⁶ UNECA, 'Improving Public Participation in the Sustainable Development of Mineral Resources in Africa' (UNECA, 2004) <www.africaminingvision.org/amv_resources/AMV/public_participation.pdf> accessed 25 January 2018

for Latin America and the Caribbean (UNECLAC) had just adopted the regional agreement on Access to Information and Justice in Environmental Matters in Latin America and Caribbean, which was modelled after the Aarhus Convention, on 4 March 2018.⁶⁶⁷ Furthermore, in promoting the importance of information, public participation and access to justice for developing countries, the 2010 Bali Guideline correspondingly reflects the three pillars in the Aarhus Convention.

To explore how the Aarhus Convention can be used as a source of reference or piecemeal solution, i.e., to help with the interpretations, filling the gaps and improving the clarity and transparency of the current procedure and practice on public participation relating to proposed environmental projects (including large-scale dams), this section of the Chapter will be divided into three sub-sections, which will cover (i) access to information, (ii) participation, and (iii) access to justice. The sub-sections will analyse the current law, gaps and how the Aarhus Convention might help fill in some gaps and help with the improvement.

4.5.1 Access to Information

In the case of Xayaburi, the Council of Ministers (Thai Cabinet), the Ministry of Energy (NEPC), the Ministry of Natural Resources and the Environment, the National Energy Policy Council, and Government agencies such as the EGAT did not publicly disclose the PPA or other important information prior to signing the agreement and commencing with funding and building the Xayaburi Project in conjunction with GOL and Ch Karnchang. Even though the NHRCT and villagers have made strenuous efforts to contact Government agencies; no response has been forthcoming, and no explanation provided as to why this is the case.

In Thailand, Section 57 of the 2007 Constitution protects the public's right to access information held by a State agency, enterprise, or local government organisation. The only exceptions made are when there is a threat to national security or the safety and interests of other individuals protected under law.

A person shall have the right to get access to public information in possession of a State agency, State enterprise or local government organisation unless the disclosure of such information shall affect the security of the State, public safety or interests of other persons which shall be protected as provided by law.⁶⁶⁸

Considering its relevance to the Xayaburi Project where the Thai State agencies, including the State-owned Thai banks and Ch Karnchang as the developer of the

⁶⁶⁷ Supra note 155

⁶⁶⁸ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 56

Xayaburi project, it can be deduced that the obligation does not only apply to information held by the administrative bodies of the State but also information held by the State agencies and the State enterprises.

Similarly, with respect to Principle 10 of the Rio Declaration, an obligation to provide access to information and implement public participation falls on the public authority is enshrined in the Aarhus Convention. An “ordinary person” could reasonably assume this to mean national, regional, and other levels of government, as reflected in Article 2(2)(a).⁶⁶⁹ The actual situation in the contemporary world of business is, however, a little more complex: increased levels of privatisation along with a growth in service-contracts and joint-venture agreements means that an increasing private sector companies are now legally entrusted or contracted to carry out public duties and provide public services on the government’s behalf with respect to the environment (e.g., constructing roads and dams, providing water and electricity).⁶⁷⁰ Ebbesson, Van Calster and Reins assert that such public functions within public-private partnerships effectively transform them into public authorities.⁶⁷¹ Consequently, the definition of a public authority in Article 2(2) of the Aarhus Convention has been expanded to include all natural or legal persons with public duties, a responsibility for providing public services, or performing public administrative functions relating to the environment. This includes those bodies providing financial support for projects such as the Xayaburi Hydropower Project.⁶⁷²

The Aarhus Convention requires the “public authority” to provide access to information and public participation. An “ordinary person” would understand “public authority” as government at all levels.⁶⁷³ As privatisation progresses, more private sector companies have been contracted for, or legally entrusted with undertaking public duties and providing public services relating to the environment.⁶⁷⁴ Ebbesson, Van Calster and Reins consider that the public functions of private sectors could effectively mean that they

⁶⁶⁹ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 2(2)

⁶⁷⁰ Elizabeth Bennett, Seldon James and Peter Grohmann, 'Joint Venture Public- Private Partnerships for Urban Environmental Services: Report on UNDP/PPPUE's Project Development Facility (1995 –1999)' (*UNDP and Yale University*, 2000) <https://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_infrastructure/pdf_public_private_services/UNDP_PPPUE_Joint%20Venture_2.pdf> accessed 26 January 2019

⁶⁷¹ Jonas Ebbesson 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4(2) *Erasmus Law Review* 71-89; Geert Van Calster and Leonie Reins, 'Chapter 5: Public Participatory Rights' in Geert Van Calster and Leonie Reins (eds), *EU Environmental Law* (EU Environmental Law, Edward Elgar 2017) 81-107

⁶⁷² UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 2(2)

⁶⁷³ *Ibid*

⁶⁷⁴ Elizabeth Bennett, Seldon James and Peter Grohmann, 'Joint Venture Public- Private Partnerships for Urban Environmental Services: Report on UNDP/PPPUE's Project Development Facility (1995 –1999)'

are public authorities.⁶⁷⁵ Therefore, the Aarhus Convention expands the definition of the public authority to cover:

- (a) Government at national, regional, and other levels;
- (b) Natural or legal persons performing public administrative;
- (c) Any other natural or legal persons having public responsibilities or providing public services, related to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration...⁶⁷⁶
- (b) Natural or legal persons performing public administrative functions under national law;
- (c) Any other natural or legal persons having public responsibilities or providing public services, related to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration...⁶⁷⁷

Therefore, the institutions of any regional economic integration government agencies⁶⁷⁸, and private entities,⁶⁷⁹ which perform “public functions” or have “public responsibilities” in providing services and financial support for the projects and activities related to the environment should be considered “public authorities”.

The term “public authorities” thus encompasses government agencies⁶⁸⁰(The Ministry of Energy, the Ministry of Natural Resources and the Environment, and the Council of Ministers), institutions of regional economic integration (ASEAN, MRC and GMS), private entities (TEAM Consulting Group, Pöyry and Compagnie Nationale du Rhône), State-owned enterprises⁶⁸¹(EGAT), construction companies⁶⁸²(Ch. Karnchang), project developers (Xayaburi Power Co. Ltd.), investors, and financial institutions⁶⁸³(Kasikorn Bank, Siam Commercial Bank Bangkok Bank, TISCO, Krung Thai Bank, and the Export-Import Bank of Thailand).

Section 9 of the Thai Official Information Act 1997 also states that State agencies and public authorities must disclose and make certain forms of information available

⁶⁷⁵ Jonas Ebbesson 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention'-89; Geert Van Calster and Leonie Reins, 'Chapter 5: Public Participatory Rights' 81-107
⁶⁷⁶UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 2(2)

⁶⁷⁷UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 2(2)

⁶⁷⁸ Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, (para. 19)

⁶⁷⁹ Hungary ACCC/C/2004/4; ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, (para. 10)

⁶⁸⁰ Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006, (para. 19)

⁶⁸¹ Kazakhstan ACCC/C/2004/1; ECE/MP.PP/C.1/2005/2/Add.1, 11 March 2005, (para.17)

⁶⁸² Hungary ACCC/C/2004/4; ECE/MP.PP/C.1/2005/2/Add.4, 14 March 2005, (para. 10)

⁶⁸³ European Community ACCC/C/2007/21; ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, (para. 26)

without any initial request from the public.⁶⁸⁴ Such information includes everything that may have a direct impact on the public. This includes concession contracts, monopolistic contracts, or joint venture agreements; along with cabinet resolutions and any relevant factual and technical reports.⁶⁸⁵ Within the parameters of the Official Information Act, the PPA created by the EGAT (the sole purchaser of the electricity) and Xayaburi Power Company Limited, which was signed on 29 October 2011 by the Ministry of Energy, constitutes “a concessional contract of a monopolistic nature”. As such, the details and content of the PPA should have been disclosed as it is one of the most crucial and legally binding documents needed to secure funding for the project.

However, in cases where there has been a failure to disclose or access to information has been denied, there is no detailed advice on the procedures and steps requesters need to take to demand such access in Thai law. In The Official Information Act 1997, information not available elsewhere can be demanded by the requester;⁶⁸⁶ but no details are provided as to what form such a request should take and the substance of the request is not regulated. It is also unclear whether requesters can request a copy, electronic reproductions, or inspect the documents.

Article 4(1) of the Aarhus Conventions states that the public can ask the public authority to provide environmental information in oral or written form, or by e-mail; they do not need to explain their choice.⁶⁸⁷ The public authority is then obligated to provide copies of such information as requested; unless it has a good reason for providing it in another form or the information is already available in an alternative form.⁶⁸⁸

The public authority must also make sure it provides the information as soon as possible and no later than one month after the initial request was made, which is equivalent to the timeline stated in Principle 1 of the Bali Guideline (Article 4(2))⁶⁸⁹ Compliance is essential as some information can be time-sensitive.⁶⁹⁰ However, the period can be extended to two months if the volume of information is large and/or is extremely complex, although the reasons for such an extension must be explained to the public.⁶⁹¹

⁶⁸⁴ Official Information Act B.E. 2540 (1997), enacted on the 2nd Day of September B.E. 2540 (2 September 1997), Section 9

⁶⁸⁵ Ibid

⁶⁸⁶ Official Information Act B.E. 2540 (1997), enacted on the 2nd Day of September B.E. 2540 (2 September 1997), Section 11

⁶⁸⁷ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 4(1)

⁶⁸⁸ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 4(2)

⁶⁸⁹ Ibid

⁶⁹⁰ Ibid

⁶⁹¹ Ibid

Uncertainty remains, however, regarding the extent to which the obligation to provide access to information and disclose can be realised in practice as certain kinds of information can be exempted from disclosure and there may be grounds for access to be denied.

The types of information that can be exempted from disclosure are listed in The Information Act 1997, and include litigations in progress; information that could harm international relations, economic and financial security, and national security; and information on views and guidance offered within State agencies (excepting factual and technical reports).⁶⁹² However, what counts as “national security” is unclear as there is no existing constitutional standard: according to the Rule of Maintenance of Official Secret 2001, it refers to anything associated with State defence, domestic and international politics, the economy, science, society, energy, technology, and the environment.⁶⁹³ This implies a more rigid restriction on the kind of “environmental information” that can be disclosed than is permitted under the Thai constitution. It is therefore left to administrative and judicial bodies to interpret this rule, which is rendered more complex by the fact several pieces of legislation (the Constitution, the Information Act and Rule of Maintenance) overlap and no precise, unambiguous interpretation exists under the law.

Like the Thai Information Act 1997, Article 4(4) of the Aarhus Convention endows public authorities with the “discretionary power” to make decisions on whether certain kinds of environmental information should be disclosed.⁶⁹⁴ Such information includes that which may have a damaging effect on international relations, public security, or national defence (as provided by national law); information regarding trade confidentiality and commercial secrets protected under national law, where the competitive position of the information holder could be harmed by the disclosure; personal information protected

⁶⁹² Official Information Act B.E. 2540 (1997), enacted on the 2nd Day of September B.E. 2540 (2 September 1997), Section 14 and 15

⁶⁹³ Rule on Maintenance of Official Secrets, B.E.2544 (2001), enacted on the 23rd Day of February B.E. 2554 (23 February 2001), Clause 5

⁶⁹⁴ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 4(4)

(a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) International relations, national defence or public security;

(c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) Intellectual property rights;

(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) The interests of a third party, which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) The environment to which the information relates, such as the breeding sites of rare species.

under national law where the consent of the individual concerned is needed; confidential documents protected under national law that detail the “internal operation” of the public authority; information that can have an adverse effect on the on-going judicial procedure; information protected under intellectual property rights (copyrights, trademarks, patent); information voluntarily provided by a Third Party to public authorities where no consent has been given by the Third party to release this information to the public; and documents or data whose disclosure could be harmful the environment.⁶⁹⁵

Private enterprises must submit environmental information and records in accordance with the Aarhus Convention and then report these to public authorities as part of the procedure for renewal of licensing and permitting. A general indication as to whether permit conditions are acceptable is provided by mitigation measures and EIA results.⁶⁹⁶ The entire record of EIA (including its modelling techniques and methodologies) must therefore be made available and regularly updated.⁶⁹⁷ In making its decision, the Compliance Committee explained that intellectual property rights mean EIA documents required for the “administrative procedure” (such as those open for comments and reviews, and those prepared for project approvals, licenses and permits, and building consent) cannot be exempt from disclosure, despite the public interest involved.⁶⁹⁸

4.5.2 Participation

The Constitution of the Kingdom of Thailand B.E. 2550 (2007) and the Enhancement of Conservation of National Environmental Quality Act B.E. 2535 (1992) (NEQA) both address the issue of public participation in Thailand. However, public participation and EIA were only made requirements for the enactment and construction of proposed environmental projects following the construction of Pak Mun Dam in 1990.⁶⁹⁹

Four kinds of public right on environmental matters are set out in Section 6 of the Enhancement of Conservation of National Environmental Quality Act 1992 (NEQA): the right to be provided with remediation and compensation for environmental damages

⁶⁹⁵ UNEP, 'UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters 2010 (the Bali Guidelines), adopted by the Governing Council United Nations Environmental Programme in Decision SS.XI/5, Part A of 26 February 2010' (UNEP, 26 February 2010)

<<http://wedocs.unep.org/bitstream/handle/20.500.11822/11182/Guidelines%20for%20the%20Development%20of%20National%20Legislation%20on%20Access%20to%20information%2c%20Public%20Participation%20and%20Access%20to%20Justice%20in%20Environmental%20Matters.pdf?sequence=1&isAllowed=y>> accessed 26 February 2018, The Aarhus Convention: An Implementation Guide, p 86-90; Jerzy Jendroška and Marcin Stoczkiewicz, 'Access to Environmental Information: Project to Assist Poland in the Implementation of the Access to Information Directive, the EIA Directive, and the Aarhus Convention' (*Poland Ministry of Environment*, 2002) <https://www.mos.gov.pl/g2/big/2009_04/0a277e6f2311ac8137a1b40c7ad46e74.pdf> accessed 11 August 2018

⁶⁹⁶ OECD, 'Integrated Environmental Permitting Guideline Guidelines for EECCA Countries' (OECD, 2005) <<https://www.oecd.org/env/outreach/35056678.pdf>> accessed 12 August 2018

⁶⁹⁷ Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 (para. 27)

⁶⁹⁸ Romania ACCC/C/2005/15; ECE/MP.PP/2008/5/Add.7 16 April 2008 (para. 30)

⁶⁹⁹ Jakkrit Sangkhamanee, 'From Pak Mun to Xayaburi: The Backwater and Spillover of Thailand's Hydropower Politics' in Nathaniel Matthews and Kim Geheb (eds), *Hydropower Development in the Mekong Region* (Hydropower Development in the Mekong Region, Routledge 2015)

resulting from the activities undertaken by the government and its agencies; the right to be informed and to obtain information; the right to cooperate and assist the government in protecting the environment; and the right to make or lodge complaints against government agencies for infringing environmental law.⁷⁰⁰ Furthermore, the public's right to participate in environmental decision-making and the management of natural resources by enabling NGOs to be registered and cooperate with the government is established in Sections 7 and 8. As such, they can ask for assistance or support from the government and help government officials in increasing public awareness, disseminating information, running campaigns, and conducting research which they then make available to government agencies.⁷⁰¹ This, however, raises a question as to the extent to which any assistance is led and controlled by the government. Moreover, the government decides whether to take any proposals into account and the amount of support they are willing to provide. Finally, the registration of an NGO involved in activities deemed "disturbances", "unsuitable", or contrary to public order by the government can be revoked;⁷⁰² however, on what grounds such decisions are remains unclear as there is no established ruling in such cases.

The NEQA (in sections 46 to 51) indicates what is necessary to conduct an EIA together with the authorities that are involved in this procedure.⁷⁰³ The National Environmental Board (NEB) has agreed that the Ministry of Natural Resources and Environment (MONRE) has authority to provide a notification which stipulates the size and classifications of the activities or projects of state enterprises and government agencies which need support from their EIA.⁷⁰⁴ Following this, the NEB will convey the notification to the Expert Review Committee (ERC) and the Office of Natural Resources and Environmental Policy and Planning (ONEP) who will reflect on the project prior to its acceptance by the cabinet.⁷⁰⁵ Nevertheless, there is consideration that consultants exhibit an intrinsic bias towards accepting the projects because agencies and consultants conducting an EIA/EHIA are chosen from a list of 70 registered firms which is issued by the ONEP.⁷⁰⁶

⁷⁰⁰ The Enhancement of Conservation of National Environmental Quality Act B.E.2535 (1992), enacted on the 29th Day of March B.E. 2535 (29 March 1992) Section 6

⁷⁰¹ The Enhancement of Conservation of National Environmental Quality Act B.E.2535 (1992), enacted on the 29th Day of March B.E. 2535 (29 March 1992) Section 8

⁷⁰² Ibid

⁷⁰³ Koltip Suwanteep, Takehiko Murayama and Shigeo Nishikizawa, 'The Quality on Public Participation in Environmental Impact Assessment (EIA) Reports in Thailand' (2017) 19(2) Journal of Environmental Assessment Policy and Management 1-21; The Enhancement of Conservation of National Environmental Quality Act B.E.2535 (1992), enacted on the 29th Day of March B.E. 2535 (29 March 1992) Section 46-51;

⁷⁰⁴ Office of Natural Resources and Environmental Policy and Planning (ONEP), 'Environmental Impact Assessment in Thailand' 2013) <www.onep.go.th/eia/images/7handbook/Environmental_Impact_Assessment_in_Thailand.pdf> accessed 20 March 2019

⁷⁰⁵ Andrew Wells-Dang and others, 'A Political Economy of Environmental Impact Assessment in the Mekong Region ' (2016) 9(1) Water Alternatives 33-55

⁷⁰⁶ Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Statement at the End of Visit to Thailand by the United Nations Working Group on Business and Human Rights' (*Office of the United Nations High Commissioner for Human Rights (OHCHR)*, 4 April 2018)

Furthermore, the Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ) undertook a review, and research was conducted by Wironajagud, Apipalakul, Otwong and Phenrat and others, both of which revealed the general authenticity of Thai EIA procedure, although there is insufficient public participation unless pressure is applied from campaigns that are planned by civil societies.⁷⁰⁷ Moreover, weak participation frequently results in numerous suggested development projects, that are funded by the government, being postponed or abandoned, this includes Thai overseas investment projects.⁷⁰⁸ Well-Dangs and others, who conducted interviews became aware that, although the EIA report was criticised, the authorities told the ONEP that it is necessary to approve the EIA report and to initiate the project.⁷⁰⁹ The final decision is made by the authorities and the investors despite the fact that the ONEP is technically authorised to approve EIA reports and consultants. Furthermore, NEQA does not, in its own right, disclose information regarding EIA or supply particular provisions on public participation.⁷¹⁰ With regard to implementation, uncertainty has resulted in there being few detailed requirements and provisions as to how public participation ought to be conducted.

Since there is little public participation in the NEQA, the 2007 Constitution accepts that members of the public are entitled to be involved in decision-making regarding the activities and projects which could have a major effect on the environment. Section 57 of the 2007 Constitution states:

In undertaking any social, economic, political, and cultural development planning, appropriation of immovable property, city planning, land use zoning, and issuance of regulations which may affect the interests of the people, the State shall thoroughly hold “public hearings procedure” prior to the implementation of the plan or project.⁷¹¹

Although the function of the authorities is to organise public hearings before the implementation, they cannot do this before the project is approved. However, the government could have made the decision before public was consulted.⁷¹² In Thailand,

<<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22915&LangID=E>> accessed 22 April 2019

⁷⁰⁷ Wanpen Wironajagud and Chanya Apipalakul, *Public Involvement in Environmental Impact Assessment Towards Sustainable Hydropower Development*, Deutsche Gesellschaft für internationale Zusammenarbeit (GIZ) 2014, Vientiane, Laos)

⁷⁰⁸ Ashijya Otwong and Tanapon Phenrat, 'Comparative Analysis of Public Participation in the EIA Process for Thai Overseas Investment Projects: Krabi Coal Terminal, Hongsa Coal Power Plant, and Dawei Special Economic Zone' (2017) 35(4) *Impact Assessment and Project Appraisal* 325-339

⁷⁰⁹ Andrew Wells-Dang and others, 'A Political Economy of Environmental Impact Assessment in the Mekong Region' Note 57

⁷¹⁰ Chutarat Chompunth, 'Role of Public Participation in Environmental Impact Assessment in Thailand' (2017) 12(33) *International Journal of GEOMATE* 109-113

⁷¹¹ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 57

⁷¹² Chutarat Chompunth and Suphattharachai Chomphan, 'Evaluating Public Participation Process in Development Projects in Thailand: A Case Study of the Hin Krut Power Plant Project' (2012) 9(6) *American Journal of Applied Sciences* 865-873

public participation frequently occurs subsequent to the making of the decision, thereby resulting in dissension and friction between the government agencies and the citizen.

The 2007 Constitution stipulates that members of the public are entitled to retain their wisdom and local customs, to participate together in sustaining, managing, exploiting and balancing biological diversity and natural resources.⁷¹³ It is necessary for the “independent bodies” to study, assess and review the Environmental and Health Impact Assessment (EHIA) to be studied, assessed before such activities are allowed. The “independent bodies” consist of academics from higher educational establishments and representatives of NGOs.⁷¹⁴ However, the people concerned are not required by the review procedure to participate, neither is it necessary for the government to consider the opinions of the public. Furthermore, the way in which the EIA and the review procedure will be combined is not yet decided. The reasons and explanations given by the government to the public in the Xayaburi case concerning the PPA are brief and imprecise. It is necessary to provide greater clarification as to who may participate in matters such as transparency, early involvement and suitable time frames.

The Aarhus Convention requires public participation at the initial step when the authority needs to decide whether to authorise or accept a particular project which may possibly have a major environmental impact (Article 6).⁷¹⁵ The Aarhus Convention (Annex 1) contains a list of particular activities that need participation in order to present the minimum standard.⁷¹⁶ As many as 19 activities are given in the list, which also comprises an omnibus clause but excludes additional specifications in each sector. The listed activities are: the chemical industry, dams, construction of overhead electrical power lines, the energy sector, extraction of natural gas and petroleum, groundwater abstraction or recharge schemes, installations for the intensive rearing of pigs or poultry, installations for the storage of petroleum, other specific activities such as textile pre-treatment plants, the mineral industry, opencast mining and quarries, pipelines, ports and inland waterways, production and processing of metals, railways and airports, specific industrial plants, waste management, waste-water treatment plants, works for transferring water resources. Also listed are any activities which are not mentioned above where public participation applied under an environmental impact assessment process which complies with national legislation.⁷¹⁷ Nevertheless, states are permitted to apply more stringent rules for the

⁷¹³ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 66

⁷¹⁴ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 67

⁷¹⁵ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6

⁷¹⁶ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Annex I

⁷¹⁷ Ibid

threshold depending on individual cases, whereas national defence is regarded as being exempt from this requirement (Article 6(1)(c)).⁷¹⁸

It is particularly important to be aware that the entitlement to participate is given only to the “the public concerned”. Furthermore, the Aarhus Convention Implementation Guide, states that this means members of the public who are impacted or potentially affected or who have an interest in the decision.⁷¹⁹ This expression could be understood as the non-discriminatory principle which includes the public of the states that are possibly affected, and the NGOs’ participatory rights. The procedural rights, which are under the protection of the Aarhus Convention are “non-discriminatory”;⁷²⁰ therefore, irrespective of their nationality, citizenship, domicile and place of their registered seat or activities, they are allowed to exercise their entitlement to environmental participation and information.⁷²¹ Consequently, non-residents and people who are not citizens⁷²², as well as foreign NGOs and international organisations which are established and functioning a different nation who have an interest in the information⁷²³ would usually be considered as the public who have the right to access environmental information after making a request to do so.

In the Xayaburi case, the following groups are under the category of being the “public concerned”: those potentially affected who are living in Cambodia, Laos, Thailand and Vietnam; NGOs who work in environmental protection such as EarthRights, Mekong Watch and International Rivers. This also includes those who work in international organisations such as ASEAN and IUCN, and in human rights councils (the NHRCT, the UNHRC and OHCHR) which represent the communities or act in their interest, and also affected persons. Therefore, such people should be allowed to access environmental information on the Xayaburi project as well as participating in decision-making on the project that could have an impact on them.

For the purpose of giving the public sufficient, appropriate, and useful information, the Aarhus Convention requires the state authorities to inform the public of:

- (a) The suggested activity and the application on which a decision will be reached;
- (b) The nature of potential or draft decisions;

⁷¹⁸ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(1)(c)

⁷¹⁹ UNECE, *The Aarhus Convention: An Implementation Guide (2nd edition)*, UN.Doc. ECE/CEP/T2/Rev.1 (UNECE 2014), 134

⁷²⁰ Simon Marsden, 'Enforcing Non-discrimination in Transboundary Environmental Impact Assessment: Advantages for EU Citizens from the Transportation of the Espoo and the Aarhus Convention' in Simon Marsden (ed), *Transboundary Environmental Impact Assessment in the European Union* (Transboundary Environmental Impact Assessment in the European Union, Earthscan 2011)

⁷²¹ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 3(9)

⁷²² *Turkmenistan ACCC/C/2004/5, ECE/MP.PP/C.1/2005/2/aDD.5, 14 March 2005 (Paragraph 16)*

⁷²³ *Ukraine ACCC/C/2004/3 and ACCC/S/2004/1; ECE/MP.PP/C.1/2005/2/Add.3, 14 March 2005*

- (c) The public authority with responsibility for decision-making;
- (d) The anticipated procedure, which includes as and when this information can be made available;
 - (i) The start of the procedure;
 - (ii) The opportunities for public participation;
 - (iii) The venue and time of any anticipated public hearing;
 - (iv) Information regarding public authority from which appropriate information may be acquired and where such information may be inspected by the public;
 - (v) Information regarding the relevant public authority or any other official body to which questions or comments may be addressed and of the time for which the comments or questions can be submitted;
 - (vi) Details of the availability of environmental information relevant to the suggested activity
- (e) The fact that the activity is liable to a national or transboundary environmental effect assessment process.⁷²⁴

Furthermore, state authorities ought to permit the concerned public, on request, to access additional information regarding decision-making which is obtainable for inspection during public participation.⁷²⁵ The information presented in the notice (if it is to be effective) ought to be accessible to the concerned public as well as being clear. This is also dependent on the choice of suitable techniques in promoting and disseminating the information. It is essential that the information given in the notice is precise and understandable. The ACC/C/2006/16 (Lithuania) Compliance Committee was of the opinion that if a notification lacks accuracy, it is regarded as being inadequate and giving an incorrect description of the potential decisions.⁷²⁶

Moreover, it is necessary to fix acceptable time frames for the various stages in order that enough time is available for informing the public, thereby enabling them to prepare and to participate productively.⁷²⁷ The Aarhus Convention stipulates an explicit

⁷²⁴ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(2)

⁷²⁵ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(4)

⁷²⁶ UNECE, 'Communication ACCC/C/2006/16 (Lithuania): Report by the Compliance Committee: Compliance by Lithuania with Its Obligations under the Convention, UN Doc. ECE/MP.PP/2008/5/Add.6' 4 April 2008) <https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf> accessed 5 January 2018

⁷²⁷ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(3)

requirement that productive public participation ought to occur “early” in an environmental decision-making process when “all options are open”.⁷²⁸ This means that the best time to arrange public participation is at the early phase when it is still possible to adjust the plan of the activities. This is particularly the case when certain projects of which the suggested activities are part of the large and long-term development plan. The concerned public, with regard to the participatory process, ought to be permitted to give an appropriate written submission of their comments at a public hearing as well as including their viewpoints and further information appropriate to the suggested activities.⁷²⁹

When reaching the ultimate decision, the competent authority is obliged to guarantee that consideration is given to the result of the public participation (Article 6(8)).⁷³⁰ The authority is required to convey the decision to the public concerned as soon as it has been made, of which the concerned public should be able to access the text of the decision in addition to the reason why it was made (Article 6(9)). Ultimately, the state has the power to make the decision and to authorise an activity irrespective of public opinion. Therefore, this could be a weakness in the Aarhus Convention since the state/authority is under no obligation to inform the public of why their opinions and feedbacks have been rejected. If the reason had been revealed to the public, the decision-making process would have been seen as more equitable and transparent.

The constructor, buyer, and investors in the Xayaburi project investors and the buyer are Thai Government entities and private agencies. Therefore, the government and agencies are not only obliged to provide utilities and energy service to the public but also to permit the concerned citizens to be involved in decision-making. Such decisions are associated with distribution of power resources, power policy and the investment plan on the development projects for the purpose of avoiding the negative effect of the communities and the environment.

4.5.3 Access to Justice

If their participation rights have been infringed, the public are permitted to make legal claims. However, it is a rare occurrence for LMB states’ citizens to challenge the hydropower developments in the domestic courts.⁷³¹ In fact, there has never been any lawsuit associated with this topic against the state in Vietnam, Laos or Cambodia. Moreover, with regard to the Xayaburi project in Thailand, only one case was brought

⁷²⁸ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(4)

⁷²⁹ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(7)

⁷³⁰ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 6(8)

⁷³¹ Ben Boer and others, *The Mekong: A Socio-Legal Approach to River Basin Development* 180

before the Administrative Court.⁷³² This case is regarded as being the first community-filed lawsuit in the area associated with a dam building project on the Mekong River, which was also the first lawsuit on a transboundary project.⁷³³ The Cabinet approved power-purchase decision, and the state agencies funded the Xayaburi project, despite the fact that the dam was located outside the borders of Thailand.

When the right of the public to gain access to information is refused, they can make a “complaint” directly to the Official Information Board (OIB), mainly under the Official Information Act 1997. If the public do not accept the result, they have the right to “appeal” to the Information Disclosure Tribunal (IDT), whose decision will be final. This sets a potential for a resolution to the dispute that is an alternative to the conventional lengthy judicial procedure. The Official Information Commission (part of the Prime-Minister’s office) is the secretariat, and is in charge of the ID and OIB. This means that the appeal procedures and the transparency of the complaint are sceptical because the OIB and IDT certainly cannot function as an independent body.

In Thailand, the 2007 Constitution gives access to justice through litigation. This accepts the rights of a community or a person have been infringed by the authorities, in which case the person or community is entitled to bring a lawsuit against state enterprises, government agencies and organisations. This would make them liable for an “act or omission” on the part of its agencies, officials and employees.⁷³⁴ The environmental divisions of the Administrative Court in the Administrative Courts of First Instance and the Supreme Administrative Court were inaugurated on 5 July 2011, and officially functioned on a nationwide basis on 2 August 2011. Their objective is to be a channel for judging administrative cases regarding environmental matters.⁷³⁵ Environmental issues can be particularly complicated; therefore, it is necessary to employ environmental specialists to facilitate the inquiry of the facts by the Administrative Court during the course of the trial. There will certainly be an effect on the economy and on society generally following any judgement or order associated with environmental matters given by the Administrative Court.

The Constitution in Thailand has been in a state of suspension following the 2014 *Coup d’état* which has resulted in political instability. The military regime has meant that

⁷³² Business & Human Rights Resources Centre, 'The Landmark Xayaburi Dam Case in Thailand: What Is At Stake?'

⁷³³ Pianporn Deetes and Sor Rattanamanee Polkla, 'PR - Mekong Villagers To Appeal Xayaburi Court Case Decision'

⁷³⁴ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 28 and 60

⁷³⁵ The Recommendation of the President of the Supreme Administrative Court Re: The Establishment of Environmental Division in the Administrative Court of First Instance and the Recommendation of the President of the Supreme Administrative Court on the Administrative Court Proceedings concerning Environmental Issue were announced in the Government Gazette Volume 128 Part 54 A dated 4th July B.E. 2554 (2011). The establishment of environmental division in the Administrative Court shall come into force as the date of 5th July B.E. 2554 (2011), the day following the date of its publication in the Government Gazette.

the National Council for Peace and Order (NCPO) has assumed a veto power over the judiciary and the appointed cabinet, whereas while military courts have dominance; therefore, they take precedence over other courts.⁷³⁶ However, other areas of the judiciary still operate in a similar way to which they did before 2014; nevertheless, they under increasing government intervention.⁷³⁷ The NCPO's Order 9/2016 prescribed, in March 2016, when the contract of public-private partnership large-scale projects were fast-tracked, government agencies and state enterprises were authorised to sign a contract with the private company and continue with the implementation of the project before the EIA approved it.⁷³⁸ This order permits state agencies to request cabinet endorsement of the suggested programme, and also seeks the agreement of BOT and PPA with private sub-contractors in the development projects prior to the completion of the EIA or even without it. This includes the construction and financing of hydropower plants.⁷³⁹ Furthermore, the NCPO's orders are not liable to a "judicial review". Any action taken by state agencies with the approval of and under the orders of the NCPO will be exempt from legal liabilities.⁷⁴⁰

In the Xayaburi case, the villages, being the plaintiffs, claimed that the Constitution states that the government is under obligation to give them essential information regarding the Xayaburi dam. They are also required to arrange public hearings and consultations, so that people can give their opinions on the government's environmental activities and how they will be affected by the project. The Administrative Courts of the First Instance, in February 2013, refused to hear the case as they claimed that the court had no jurisdiction to rule on this. This implies that the court's hearing was not grounded on the constitutional rights of the public to access information and to participate in decision-making on environmental matters that could affect them, but based on the fact that the decisions of the state agencies and the cabinet were not eligible for judicial review by the court.

The verdict delivered by Supreme Administrative Court on 25 December 2015 found that the state agencies that were involved in the Xayaburi Dam project had complied with Thai law because they revealed basic information on their websites

⁷³⁶ The Bertelsmann Stiftung's Transformation Index (BTI), 'Thailand Country Report' (*BTI*, 2018) <<https://www.bti-project.org/en/reports/country-reports/detail/itc/THA/>> accessed 20 April 2019

⁷³⁷ Ibid

⁷³⁸ Prachatai, 'Thai Junta Slashes EIA Procedures on State Projects' (*Mekong Eye*, 9 March 2016) <<https://www.mekongeye.com/2016/03/09/thai-junta-slashes-eia-procedures-on-state-projects/>> accessed 30 April 2019; Prachatai, 'Thai Government to Cut Short EIAs for Mega Projects' (*Prachatai*, 4 November 2015) <<https://prachatai.com/english/node/5585>> accessed 22 April 2019

⁷³⁹ EarthRights International, 'Environmental Impact Assessment in the Mekong Region: Materials and Commentary' (*EarthRights International*, October 2016) <https://earthrights.org/wp-content/uploads/eia_manual_final_0.pdf> accessed 25 April 2019

⁷⁴⁰ International Commission of Jurists, 'Joint Submission of the International Commission of Jurists and Thai Lawyers for Human Rights in Advance of the Examination of the Kingdom of Thailand's Second Periodic Report Under Article 40 of the International Covenant on Civil and Political Rights at the 119th Session of the UN Human Rights Committee in Geneva' (*Office of the United Nations High Commissioner for Human Rights (OHCHR)*, 6-9 March 2017) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/THA/INT_CCPR_CSS_THA_26602_E.pdf> accessed 30 April 2019

concerning the project, and the court also ruled that the PPA was not considered to be a project or activity. Consequently, it was not necessary to conduct a study, evaluation or consultation.⁷⁴¹ Therefore, on 26 January 2016, the appellants filed the final appeal to the Supreme Court, which means that case has not yet been decided despite the fact that the dam is now complete.⁷⁴²

International law states that instruments of international human rights, for instance Article 10 of the Universal Declaration of Human Rights 1948⁷⁴³, Article 14 of International Covenant on Civil and Political Rights 1966⁷⁴⁴, and Article 6 of the European Convention of Human Rights and Fundamental Freedoms 1950⁷⁴⁵, in addition to Article 9 of the Aarhus Convention, ensure a person's right to a fair trial before the courts or other impartial and independent tribunals.⁷⁴⁶ However, Schall indicates that the majority of domestic laws usually permit persons who have incurred damage and injuries to obtain access to judicial remedies, whereas those who are unaffected could bring environmental claims against the wrongdoers' act or the omission.⁷⁴⁷

The Aarhus Convention entrusts NGOs, international organisations and the public with the right to apply for a "review procedure". This can reverse the previous decision where the public authorities have refused to provide the requested environmental information or have managed the situation badly.⁷⁴⁸ This can also occur when a decision is taken by the public authorities or there has been an act or omission on their part regarding permits or permit-procedures. It also occurs when there has been a decision to authorise particular activities which needed public consultation and participation.⁷⁴⁹ If an individual or a public authority commits an act or omission which infringes national environmental law, the state is required to allow the public access to "administrative or judicial procedures" for satisfactory judicial remedies. This includes interim relief, financial

⁷⁴¹Pratch Rujivanarom, 'Xayaburi Dam Opponents Appeal Against Administrative Court Ruling'; Tomorrow, 'Thai Communities Appeal Xayaburi Lawsuit Verdict at Supreme Administrative Court'

⁷⁴² Ibid

⁷⁴³ Universal Declaration of Human Rights 1948 (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 10

⁷⁴⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Article 14

⁷⁴⁵ European Convention of Human Rights and Fundamental Freedoms 1950 (adopted on 4 November 1950, entered into force on 3 September 1953, as amended by Protocols Nos. 11 and 14 and entered into force on 1 November 1998, allows for the right of individual petition and compulsory jurisdiction of the Court for all the States Parties) Article 6

⁷⁴⁶ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 9

⁷⁴⁷ Christian Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?' (2008) 20(3) Journal of Environmental Law 417

⁷⁴⁸ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 9(1)

⁷⁴⁹ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 9(2)

compensation or a suspension of the activities.⁷⁵⁰ It is particularly important to be aware that the Aarhus Convention states that the state of origin should guarantee that members of the public outside its own boundaries who may possibly be impacted by the suggested activities or project have an equal right to bring a legal proceeding against the state agencies and public authorities and State agencies before the national court of the state of the origin, under conditions that are no less favourable to the public in its own country.⁷⁵¹

Contrastingly, Section 4 of the Act amending the Civil Procedure Code of Thailand (No.30) B.E. 2560 (2017) permits Thai courts to accept hearings of cases in which acts or omissions by Thai businesses which are functioning in another country (but are registered in Thailand) that were committed in an area outside its territorial jurisdiction.⁷⁵² Nevertheless, it remains uncertain how this Section would be applied to their subsidiary contractors. It would also be unclear how foreign citizens who suffered injuries and loss could bring a legal proceeding in the Thai national courts. Consequently, it is not yet known how this new law would be practically implemented in the future. It is important to promote an equal treatment and due process in judicial proceedings to individuals who may be affected by transboundary impacts of the exploitation of natural resources and environment. Therefore, consideration should be given to promoting fair treatment and appropriate process to persons who could be impacted by transboundary effects of the exploitation of the environment and natural resources. With regard to this, the OHCHR and researchers in environmental law hold the opinion that Thai courts together with domestic courts in other nations ought to give consideration to introducing special environmental courts whose role would be to manage disputes associated with natural and environmental resources.⁷⁵³

4.6 Conclusion

The recognition of the public participation principle and procedural environmental rights is now acknowledged in both soft law, international treaties, and rulings by the international courts, for it is a crucial factor to ensure the legitimacy, accountability, and transparency in governmental decision on environmental projects and activities. The development of environmental law and human rights saw an increasing acceptance of the

⁷⁵⁰ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 9(4)

⁷⁵¹ UNECE Convention on Access to Information, public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (adopted on 25 June 1998, entered into force on 30 October 2001) 2161 UNTS 447; 38 ILM 517 (1999) (Aarhus Convention) Article 3(9)

⁷⁵² Act amending the Civil Procedure Code of Thailand (No.30) B.E. 2560 (2017), enacted on the 2nd Day of July B.E. 2560 (2017), Section 4

⁷⁵³ Gita Gills, 'Access to Environmental Justice in India: Innovation and Change' (European Environmental Law Forum, 14 - 16 September 2016, Wrocław, Poland); Office of the United Nations High Commissioner for Human Rights (OHCHR), 'Statement at the End of Visit to Thailand by the United Nations Working Group on Business and Human Rights'

need to involve the public in the making of environmental decision. Procedural obligations of the States to notify and consult in environmental law are no longer restricted to State-to-State obligations but also include obligations of States to individuals to provide them with access to information, public participation before the authorization and implementation of the environmental projects and activities.

With regards to the Xayaburi Project, regional and national prior consultations reveal some problems and challenge in the implementation of public participation both at the regional and national level due to gaps, ambiguities, procedures and the enforcement of the current law. Furthermore, the lack of detailed specific provisions and requirements on how public participation should be carried out, has caused uncertainty in terms of the implementation. This Chapter has identified and evaluated the development of information transparency and public participation from international, regional and domestic perspectives considered, through the legal analysis, how the Aarhus Convention, as the most advanced legal instruments on public participation, can be used as a source of reference to help the interpretation, filling the gaps and improving the clarity and transparency of the current practice of public participation. Even though the LMB States are not the Parties to the Aarhus Convention; given the development of the ASEAN Charter and the ASEAN Human rights Declaration, the development of a further regional instrument which reflects elements of the Aarhus Convention is conceivable.

Chapter 5

Conclusion

5.1 Introduction

After the implementation of the Xayaburi Project, there have been a growing number of hydropower projects, such as the Don Sahong Dam, the Pak Beng Dam and the Pak Lay Dam constructed on the mainstream of the LMB. In order to assist the MRC, the LMB States and potentially affected people to cooperate and communicate with one another efficiently in mitigating significant transboundary harm, and to avert future conflict that may arise as a result of the projects; notification and consultation, EIA in transboundary context and engagement of the potentially affected public could be used as a tool in strengthening the clarity, accuracy, and transparency of the PNPCA process. This Chapter will conclude the thesis by, firstly presenting its key findings and the overall conclusion of the thesis. Secondly, it will address the thesis's contribution to knowledge. Finally, the third section, it will propose potential lines for further research.

5.2 Findings and the Overall Conclusion

The Xayaburi Dam Project serves as a good case study in this research because it was the first large-scale dam on the mainstream in the LMB that went through the PNPCA procedure putting national law and regional law on notification and consultation, as well as EIA to test. Chapter 2,3 and 4 of this thesis identified issues and challenges encountered during the practice and implementation of the PNPCA process and EIA and public participation; and then assessed how international law and environmental law treaties, namely the UN Watercourses Convention, the Espoo Convention and the Aarhus Convention could help strengthen and improve current laws on the obligations of State to notify and consult and to conduct an EIA in transboundary context when dealing with proposing large-scale dams in the LMB. The following sections provide a synopsis of the findings in Chapter 2,3, and 4

5.2.1 Chapter 2

After conducting a thorough case study of the Xayaburi Project, it was discovered that both the 1995 Mekong Agreement and the PNPCA contain gaps and ambiguities, which create difficulties in the interpretation and implementation of procedural rules governing notification and consultation on proposed large-scale hydropower projects in the LMB. Chapter 2 concluded how the provisions under the UN Watercourses Convention could help improve the clarity of the 1995 Mekong Agreement and the PNPCA on how long should the notification and consultation period be? When should the notification be submitted? What documents and information should be provided and

exchanged during the notification and consultation period? Does it include an EIA? What should the scope and content of an EIA be for a project that could have significant detrimental transboundary effect? Is it permissible for a proposed State to proceed with the project without the permission of possibly impacted States?

While Article 5 of the 1995 Mekong Agreement requires States to use Mekong River water in a reasonable and equitable way based on seasonal usage, it does not include a list of considerations that States must consider when justifying their use and development.⁷⁵⁴ Article 6 of the UN Watercourses Convention may contribute to filling in the gaps in the 1995 Mekong Agreement by identifying environmental, geographical, ecological, conservation, social, and economic factors to consider while exploiting and developing projects in international watercourses.⁷⁵⁵ Additionally, Article 7 of the United Nations Watercourses Convention reconciles the objective of equitable and reasonable use with the requirement not to create serious harm.⁷⁵⁶ McCaffrey says that if a State can demonstrate that its water use is fair and equitable, it may be permitted to proceed with the development project even if it results in significant injury, provided that such harm is reduced to the extent possible.⁷⁵⁷ This could be used to the Xayaburi Project as long as the proposed State notifies and consults with potentially affected States in advance of implementing the proposed projects, consulting with them on mitigating measures and negotiating compensation.

Whereas the PNPCA specifies that a State should abstain from implementing a planned project during the notification and prior consultation process, the law is unclear whether the preparatory operations, such as road building, evacuation of residents, are considered part of the planned measure.⁷⁵⁸ Regarding the UN Watercourses Convention's interpretation under Article 11⁷⁵⁹, the ILC, as well as the ICJ's decision in the *Pulp Mills* case, preliminary works such as a construction of the road to the site, the clearance of the area, and the evacuation is considered as part of the planned measure.⁷⁶⁰ When applying this interpretation to the Xayaburi Project, the construction of the access road and relocation of residents could be considered planned measure that should have been subject to notification and consultation as well. Both Article 12 of the UN watercourses Convention and the ILC, as well as the ICJ's decision in the *Pulp Mills* case clearly states

⁷⁵⁴ 1995 Mekong Agreement, Article 5

⁷⁵⁵ UN Watercourses Convention, Article 6

⁷⁵⁶ UN Watercourses Convention, Article 7

⁷⁵⁷ Stephen McCaffrey, 'An Assessment of the Work of the International Law Commission' (1996) 36(2) *Natural Resources Journal* 297

⁷⁵⁸ Procedures for Notification, Prior Consultation and Agreement (PNPCA) (approved by the Council on 13 November 2003 at its Tenth Meeting in Phnom Penh, Cambodia) Section 5.4.3

⁷⁵⁹ UN Watercourses convention, Article 11

⁷⁶⁰ International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water' pp. 111-113; Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention: User's Guide* p.136; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep (20 April 2010), Paragraph 143-148

that notification should be sent prior to authorizing and implementing the planned measure⁷⁶¹, which is in direct contrast to the facts in the Xayaburi Project case study where preparatory works and evacuation of people occurred prior to notification and consultation.

For both the UN Watercourses Convention (Article 13) and the PNPCA (Section 5.5), the response period is six months from notification.⁷⁶² It may be extended for an additional six months upon request by the notified States for more information and deliberation.⁷⁶³ During the consultation and reply period, the notifying State is required by Article 14 of the UN Watercourses Convention to refrain from authorizing or permitting the implementation of the intended actions.⁷⁶⁴ Moreover, the decision of the Permanent Court of Arbitration in the *Indus Waters Kishenganga* Arbitration and the ruling of the ICJ in the *Pulp Mills* case clearly stated that there is an obligation under international law that planning State should suspend and not to proceed with the disputed project during the consultation and negotiation period, if the planning State continues its work without alerting or consulting appropriately with possibly impacted States, it risks facing the expense of compensation, as well as the cost of revising or altering the plan's design and compensating potentially affected States; Rieu-Clarke and Leb are also in support of this interpretation.⁷⁶⁵ When applying this construal to the Xayaburi Project case study; it could be summed that when proposing hydropower projects; LMB States also have an obligation under international law to suspend the implementation of the project during the consultation and negotiation period. Riparian States may decide to go ahead with the projects when an agreement cannot be reached, but they will bear the risk of being held liable for environmental harm befallen as a result of the executed project.

5.2.2 Chapter 3

As discussed in Chapter 3, when there is a risk that a planned project will have a significant adverse transboundary impact, States are required by international law to conduct EIA. While conventional customary law leaves it to each State to determine its domestic law and regulations on EIA, the ICJ made a landmark decision in the Pulp Mill case by affirming that a domestic EIA procedure should also consider the transboundary

⁷⁶¹ UN Watercourses Convention, Article 12; International Law Commission, 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Ground Water' p.111; Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010), Paragraph 99

⁷⁶² UN Watercourses Convention, Article 13; PNPCA Section 5.5

⁷⁶³ Ibid.

⁷⁶⁴ UN watercourses Convention, Article 14

⁷⁶⁵ *Indus Waters Kishenganga* Arbitration (Pakistan v. India) Permanent Court of Arbitration, Partial Award (18 February 2013). Paragraph 143; Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep (20 April 2010) International Court of Justice; Paragraph 33; Paragraph 143-148; Alistair Rieu-Clarke, 'Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases'-130, p. 25-27; Christina Leb, *Cooperation in the Law of Transboundary Water Resources* (Cambridge University Press 2013) 129-131

impact of the proposed project, such as the location, the scale of the project, and the nature and magnitude of the proposed project. Chapter 3 demonstrated how provisions under the Espoo Convention can be utilized as a reference source to enhance the implementation of EIA in the LMB; what should be the scope and content of EIA on large-scale project that may have significant adverse transboundary effect; what should be included in the EIA documentation; and how to include public participation as part of EIA process.

The LMB is experiencing an increase in the number of large-scale hydropower projects, and the project's transboundary implications are undeniable as a result. Nonetheless, there is no official agreement in the LMB at the moment on transboundary EIA. To a degree, the PNPCA shares some characteristics with transboundary EIA in that it requires the notification and consultation between States, both of which are regarded to be part of transboundary EIA process. However, since each LMB State has its own EIA law and some do not require transboundary EIA, the disparate domestic law in the LMB States make it difficult for them to reach consensus on the scope of the areas, the content of document, and the manner in which EIA should be conducted for large-scale hydropower projects.

Though Section 4.2 of the PNPCA requires notifying States to include a feasibility assessment, implementation plan, schedule, and all other available data with the notification, the wording "all other available data" is quite vague. While EIA and IEE are recommended in the PNPCA Guidelines (Section I.B.2)⁷⁶⁶, they are not mandatory or binding under either the 1995 Mekong Agreement or the PNPCA. In conventional EIA practice in LMB States, the scope and substance of the EIA report, as well as the information that should be included, are not specified. The EIA for the Xayaburi Project assessed only the first ten kilometres downstream; there are also gaps in knowledge about fisheries, sediment movement, and the impact on the ecology and people living along the river in four nations.⁷⁶⁷ A major issue in the Xayaburi Project was a lack of clarity over which documents should be revealed and submitted, as well as a deficiency of information. The LMB may wish to consult the Espoo Convention, as it specifies the papers and types of information that must be provided with the notification.

As seen in the Xayaburi Project case study, disagreements developed on what should be included in the EIA documents and the geographic area to be evaluated for EIA. To facilitate understanding, Appendix II of the Espoo Convention contains a list of topics that should be included in the EIA documentation, as well as reasonable

⁷⁶⁶ PNPCA Guidelines, Section I.B.2

⁷⁶⁷ Carl Middleton, 'Arenas of Water Justice on Transboundary Rivers: A Rights-Based Approach to the Food-Water-Energy Nexus in Southeast Asia' (*STEPS Centre*, 7-9 September 2015)

<<https://resourcepolitics2015.files.wordpress.com/2015/10/middleton.pdf>> accessed 15 September 2021

alternatives (for example, the location and technologies associated with the proposed activities; potential environmental impact; mitigation measures; methods; assumptions and environmental data used; gaps in knowledge; and outline for monitoring and management programs).⁷⁶⁸

In determining the threshold of harm, Article 2(3) of the Espoo Convention includes a list of activities that are likely to have a significant adverse transboundary impact and are therefore subject to EIA in Appendix I; one of these activities also includes the construction of a large-scale dam.⁷⁶⁹ Additionally, the Espoo Convention considers the scale, location, and characteristics of the potential impact when assessing whether planned activities not on the list should be subject to EIA.⁷⁷⁰ According to that, the Espoo Convention's listing system and criteria under Article 2(3) may assist LMB States in determining whether proposed operations, such as large-scale dams, should be subject to transboundary EIA.

Article 3(1) of the Espoo Convention implements the principle of non-discrimination by requiring the State of origin to notify any affected State as soon as possible and no later than when informing its own public of proposed activities listed in Appendix I and activities likely to have a significant adverse transboundary impact.⁷⁷¹ The term “as soon as possible” implies that the procedure for conducting an EIA should begin immediately, which appears to be more stringent than the term timely used in the PNPCA process.

Additionally, the Espoo Convention stipulates the notification's content, which includes information on the planned activity, its potential transboundary impact, the plan and timeline for the EIA procedure, the nature of any resulting decision, and a fair timeframe for responding Article 3(2).⁷⁷² In an uncommon scenario when the State of origin's national legislation allows for early public participation in the EIA process, beginning with screening and scoping, it would be appropriate to invite both the affected State and its public to participate concurrently via an “early notice”.⁷⁷³

While the PNPCA requires communication after the completion of the EIA papers, the Espoo Convention's notification method is quite unique in that the impacted States and their public are notified concurrently with the public of the State of origin and prior to the conduct of the EIA. Unlike the PNPCA, which only mandates communication between

⁷⁶⁸ The Espoo Convention, Appendix II

⁷⁶⁹ The Espoo Convention, Article 2(3)

⁷⁷⁰ The Espoo Convention, Appendix III

⁷⁷¹ Espoo Convention, Article 3(1)

⁷⁷² Espoo Convention, Article 3(2)

⁷⁷³ United Nations Economic Commission for Europe, Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN.Doc.ECE/MP.EIA/7)

States, the Espoo Convention compels States to notify potentially impacted individuals on both sides concomitantly.

For the Espoo Convention recognizes the public of the affected State's rights as equal to those of the State of origin⁷⁷⁴; thus, the State of origin is required to ensure that the public of the affected State is informed about the proposed project and its impact; and that they also have an equal right and opportunity to express their opinion and submit comments on the project through the competent governmental authority.⁷⁷⁵

Conspicuously, Article 1(x) was amended to include associations, organizations, or groupings in conformity with national legislation or practice.⁷⁷⁶ As a result, the public that is subject to notification and EIA documentation may include NGOs, non-State actors, and members of ethnic minority groups, all of whom should be allowed to comment and participate in the EIA process. Because the Espoo Convention makes no distinction between the public of the State of origin and the public of the affected States, all comments and opinions will be considered equally before a final decision on the project is made. This might be applied to the Xayaburi Project case study, in which potentially impacted citizens of neighbouring states, including non-state actors, should have been permitted to participate in the EIA process.

LMB States could recourse to Article 3(5) of the Espoo Convention which recommends that EIA information should include information on the proposed activity and its potential transboundary harm, as well as time table for transmitting public comments.⁷⁷⁷ In addition to that, EIA information ought to be provided in each State's native language, if possible, in non-technical language, so that local people can understand.⁷⁷⁸ The presence of researchers, environmental agencies, legal consultants, as well as NGOs, and local public groups with specific interests and skills can be beneficial for the EIA process when engaging directly with the public in the event that there is a need for assistance with the project's legislative background and scientific knowledge.⁷⁷⁹

Early and open communication between concerned States and their respective publics should be encouraged, since this can help avoid misunderstandings and tensions between all parties involved. Following public engagement, public comments and opinions shall be gathered and submitted to the responsible authorities before the project's final decision is reached (Article 4(2)).⁷⁸⁰ Comments and objections filed to the competent

⁷⁷⁴ Espoo Convention, Article 2(6)

⁷⁷⁵ Espoo Convention, Article 3(8)

⁷⁷⁶ Espoo Convention, Article 1(x)

⁷⁷⁷ Espoo Convention, Article 3(5)

⁷⁷⁸ United Nations Economic Commission for Europe, Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN.Doc.ECE/MP.EIA/7), Guidance on Public Participation in Environmental Impact Assessment in Transboundary Context (UN. Doc. ECE/MP.EIA/7) p.20

⁷⁷⁹ Ibid.

⁷⁸⁰ Espoo Convention, Article 4(2)

authority of the State of origin shall be forwarded to the competent authorities of the affected States - they should receive identical copies and all information pertaining to the participation.⁷⁸¹ This is to guarantee the data acquired through the participative approach is transparent and accurate. While public engagement is often governed by domestic legislation, the Espoo Convention facilitates interaction between the State and the public of another State via the transboundary EIA process. Therefore, the Espoo Convention operates on both a State-to-State and a State-to-individual level, owing to its cross-border binding effect.

The LMB States could benefit from adopting the Espoo Convention's practice for public participation as part of transboundary EIA process organized in both proposing and potentially affected States, so that all copies and information gathered during the participation process can be accessed and viewed by all parties involved to ensure the service's transparency and consistency. Additionally, it will enhance the governments' legitimacy in terms of how they maintain records and how they weigh public input when making a decision on a project.

In terms of accuracy, a transboundary EIA is completed in its totality to account for the project's full impact across borders. In so doing, the project developer and environmental authorities could collect all the documents necessary for the national assessment and the assessment of the impact on the affected States - both scientific facts and opinions and comments from both sides of the border. As each State in the LMB has its own domestic EIA regulations governed by national law, the developer and environmental agency may choose to conduct a combined EIA report when dealing with a large-scale transboundary project. The most effective way to accomplish this is for them to first write a combined environmental assessment on the entire project to assess its overall impact, and then to prepare an individual national report that should be given to each State. To achieve this, the LMB States may refer to Article 8 and Appendix VI (2)(g) of the Espoo Convention, which establishes a legal foundation for States to undertake a joint EIA under existing or new bilateral or multilateral agreements or other arrangements.⁷⁸²

While the Espoo Convention covers the post project analysis (Article 7; and Appendix V)⁷⁸³, the PNPCA does not; the MRC could consider extending the obligation of the notifying state to consult the affected state on the potential impact of the planned project and mitigation measures after the EIA report is completed. To make the most of consultations, Craik also proposed that post-project analysis and the plan for project

⁷⁸¹ *Supra* Note 25, *Ibid*.

⁷⁸² Espoo Convention, Article 8; Appendix VI(2)(g)

⁷⁸³ Espoo Convention, Article 7; Appendix V

monitoring during and after construction should be discussed during the consultation.⁷⁸⁴ The discussions' findings and agreements should be finalized and transmitted to all affected states, with details published in the final EIA paperwork accessible to the public.⁷⁸⁵

Under the Espoo Convention, the State of origin is expected to consider the EIA results and opinions received from affected States and their citizens when deciding whether to proceed with the project (Article 6(1)).⁷⁸⁶ Even so, the State of origin is not required to cancel the project; notwithstanding the bad outcome of the EIA and comments from the impacted State and the public, the State of origin may choose to proceed with the project. However, after the final decision is reached, the affected State and its citizens should be informed of the decision's conclusion, as well as the reasons and considerations that led to it. This will guarantee the decision-making process is transparent and will help to build trust amongst them.

To summarize, the Espoo Convention is critical in advancing the practice of EIA in the LMB because it establishes rather comprehensive details of how EIA should be conducted by considering the project's overall potential impact through public participation and consultation with all concerned Parties across borders. The Espoo Convention's listing methodology and criteria for activities that may result in serious transboundary impact may assist LMB States in evaluating the scope and content of the EIA that should be conducted. Additionally, the Espoo Convention specifies the facts and information that should be included in the notice and EIA documentation, which will be communicated to/and consulted with the publics of the affected States concurrently with the publics of the State of origin within the period. The development of transboundary EIA in the LMB in accordance with the Espoo Convention's best practice can assist in assessing the adverse impacts of hydropower projects in the LMB by involving any potentially affected neighbouring States in the EIA and decision-making process.

5.2.3 Chapter 4

To ensure the legitimacy, accountability, and transparency of governmental decisions on environmental projects and activities, the principle of public participation as well as procedural rights is now recognized in both soft law and hard law, international treaties, and judgments of international courts. With the advancement of environmental legislation and human rights, there has been a growing recognition of the importance of involving the potentially affected public in the decision-making process on the environmental issues. The procedural obligations of states to notify and consult under

⁷⁸⁴ Neil Craik, *The International Law of Environmental Impact Assessment* (Cambridge Studies in International and Comparative Law, Cambridge University Press 2008) (Note 18), pp.153-155

⁷⁸⁵ *Ibid.*

⁷⁸⁶ Espoo Convention, Article 6(1)

environmental law are no longer limited to obligations between States, but also include obligations of States to individuals, such as providing them with access to information and allowing them to participate in environmental project and activities. Chapter 4 of the thesis suggested how the Aarhus Convention can be used a source of reference to help with the interpretation, filling in the gaps and improve the clarity and transparency of public participation.

In respect of public participation rights, unless national law provides that the disclosure of certain information will affect the security of State, public safety or interests of other persons, individual should have the right to get access to public information held by public authority.⁷⁸⁷ Likewise, the Aarhus Conventions requires the public authority to provide access to information and public participation, and the terms “public authority” includes governmental bodies at all levels.⁷⁸⁸ Ebbesson, Van Calster and Reins consider that the public functions of private sectors could effectively mean that they are public authorities.⁷⁸⁹

As presented in chapter 4, various government organisations did not provide relevant information to the public before signing the agreement and proceeding with the Xayaburi Project, ignoring the village’s request. As privatisation progresses, more private sector companies have been contracted for, or legally entrusted with undertaking public duties and providing public services relating to the environment.⁷⁹⁰ Article 2(2) of the Aarhus convention therefore expands the definition of the public authority to cover natural or legal persons performing public administrative function under national law; any other natural or legal persons having public responsibilities or providing public services related or a person to the environment, under the control of governmental bodies at all levels or natural or legal persons who perform public administrative functions; and the institution of any regional economic integration.⁷⁹¹ When applying to the Xayaburi case study, it could, thus, be inferred that the institution of any regional economic integration, government agencies, and private entities, which perform public functions or have public responsibilities in providing services and financial support for the projects and activities related to the environment should be considered as public authorities.

⁷⁸⁷ Constitution of the Kingdom of Thailand B.E. 2550 (2007), enacted on the 24th Day of August B.E. 2550 (24 August 2007), Section 56

⁷⁸⁸ Aarhus Convention Article 2(2)

⁷⁸⁹ Jonas Ebbesson 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' (2011) 4(2) *Erasmus Law Review* 71-89; Geert Van Calster and Leonie Reins, 'Chapter 5: Public Participatory Rights' in Geert Van Calster and Leonie Reins (eds), *EU Environmental Law* (EU Environmental Law, Edward Elgar 2017) 81-107

⁷⁹⁰ Elizabeth Bennett, Seldon James and Peter Grohmann, 'Joint Venture Public- Private Partnerships for Urban Environmental Services: Report on UNDP/PPPUE’s Project Development Facility (1995 –1999)' (UNDP and Yale University, 2000) <https://www.ucl.ac.uk/dpu-projects/drivers_urb_change/urb_infrastructure/pdf_public_private_services/UNDP_PPPUE_Joint%20Venture_2.pdf> accessed 26 January 2019

⁷⁹¹ Aarhus convention, Article 2(2)

Although domestic law provides that certain types of information and decisions directly affect the public should be disclosed and made available, both the Information Act 1997 and the Aarhus Convention give the public authorities discretionary power to decide not to disclose certain types of environmental information.⁷⁹²The Information Act 1997 indicates which types, including information that may jeopardise national security and other sensitive issues.⁷⁹³ Consequently, the type of environmental information that can be publicly disclosed is more restricted than the constitution allows.

The Aarhus Convention requires private enterprises to submit environmental information to the authorities when renewing the licensing. EIA results and mitigation measures usually indicate acceptability of permit conditions.⁷⁹⁴The entire updated EIA record should be made available. Considering public interests served by disclosure, the Compliance Committee clarified that the EIA documentations prepared for the administrative procedure cannot be exempted from disclosure according to intellectual property rights.⁷⁹⁵

In Thailand, public participation and EIA were adopted as a requirement prior to the construction of proposed projects. Section 6 of the NEQA 1992 establishes four types of public rights: to be informed; to be remedied and compensated for environmental damages; to lodge complaints against government agencies for violation of environmental law; and to cooperate with the government in environmental protection.⁷⁹⁶Section 7 and 8 of the Act underpin public rights to participate in the environmental decision by enabling NGOs to cooperate with the government.⁷⁹⁷ They may request government support, and assist government officials in disseminating information.

Regarding the participation process, Thai law also recognizes the public's right to participate in making of decision on the environmental project that may affect them through "public hearing procedures". The Aarhus Convention could complement this by clarifying that public participation is required initially when the authority decides to authorise a project with a potentially significant environmental effect, as well as providing a list of activities that require public participation. Moreover, the right to participate is non-discriminatory, which means that the affected public have a right to get access to relevant information and to partake in the decision-making process that will directly affect them. During the public participation process, they should be informed of the proposed activity and application; potential or draft decisions; the authority responsible for the decision-

⁷⁹² Aarhus Convention, Article 4(2); Thai Information Act 1997, Section 14, 15

⁷⁹³ Ibid

⁷⁹⁴ OECD, 'Integrated Environmental Permitting Guideline Guidelines for EECCA Countries' (OECD, 2005) <<https://www.oecd.org/env/outreach/35056678.pdf>> accessed 12 August 2018

⁷⁹⁵ Ibid.

⁷⁹⁶ NEQA, Section 6

⁷⁹⁷ NEQA, Section 7 and 8

making; envisaged procedure; the commencement of the procedure; the opportunities for public participation; the time and venue of any public hearing; an indication of the public authority from which relevant information can be obtained; an indication of the relevant authority or any other official body to which comments or questions can be submitted; and an indication of what environmental information relevant to the proposed activity is available; and the fact that the activity is subject to a national or transboundary EIA procedure.

As for the access to justice, the Aarhus Convention entrusts the public and organisations to apply for a review procedure to reverse decisions where authorities have handled a situation inadequately; and where they make decisions concerning permit-procedures and the approval of activities requiring public participation.⁷⁹⁸ Where an act of omission violates national environmental law, a State is obliged to give public access to administrative or judicial procedures for adequate remedies. The Aarhus Convention requires the State of origin to ensure that the public beyond its territory who may be affected by the proposed project have a right to bring legal proceedings under no less favourable conditions than in its own territory.

In sum, the Aarhus Convention, as one of the most advanced legal instruments on public participation, can be used as a source of reference to aid in the interpretation and improving the clarity and transparency of the current practice of public participation. Even though the LMB States are not signatories to the Aarhus Convention, the establishment of the ASEAN Charter and the ASEAN Human Rights Declaration suggested that the establishment of a further regional instrument that incorporates features of the Aarhus convention is a distinct possibility.

In conclusion, it was found in this research that international law and specific treaty law, namely, the UN Watercourses convention, the Espoo Convention, and the Aarhus convention could help to clarify the unclear terminology, advance the accuracy process by taking into account the overall transboundary impact, as well as improve the transparency of regional and national consultation with potentially affected public, in which their views and comments are taken into account before the final decision is made on the projects. This research proposes that the effective regional guidelines on transboundary EIA and public participation could be developed as an addendum to the 1995 Mekong Agreement and the PNPCA in order to ensure that States' obligations regarding the notification and consultation, the conduction of EIA and public participation are consistent with international law and treaty law practice. Future research could be conducted in terms of how the guidelines should be drafted, endorsed, and implemented.

5.3 Contribution to Knowledge

This research improved the existing studies of Gao, Rieu-Clarke and Kinna as it provides comparative legal analysis of procedural law on notification and consultation, EIA, and public engagement. The research will benefit a variety of academic fields, including water law, international environmental law, human rights, and environmental justice. Additionally, the research will be valuable to the government of each riparian State, project developers, EIA consultants, investors and development partners who are preparing to participate or invest in prospective large-scale projects, which might have substantial transboundary implications in the future. The findings of this study could potentially also be applied to serve as a foundation for river basins in other regions that have encountered comparable issues and wish to sign the Conventions or build a framework for managing shared water and coping with megaprojects on transboundary watercourses.

5.4 Further Research

The development of large-scale dams on the lower Mekong River's mainstream is critical not only for riparian States and stakeholders involved in the problem, but also for international organisations, attorneys, engineers, and environmental scientists who can conduct additional research on the subject. There is plenty of room for additional research on the development projects involving shared water and natural resources, including the possibility of establishing special regional environment court to resolve disputes involving the environment and natural resources, ADR and arbitration as a substitute for lengthy litigation, and financial regulations and foreign direct investment in the region, as well as irrigation engineering, dam regulation and design of the plan of future project, and the development of dams in relation to sustainable development goals, economic and social policies. All of these proposed areas of research would have both academic and social benefits in the future.

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