

National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn

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This article examines the role of National Human Rights Institutions (NHRIs) and transnational civil society in pursuing Extraterritorial Obligation (ETO) cases in Southeast Asia as a means to investigate human rights threatened by cross-border investment projects. Two large hydropower dams under construction in Laos submitted to NHRIs from Thailand and Malaysia, namely the Xayaburi Dam and Don Sahong Dam, are detailed as case studies. The article argues that the emergence of ETOs in Southeast Asia, and its future potential, is dependent upon the collaborative relationship between the NHRIs and transnational civil society networks. Whilst NHRIs are in positions of political authority to investigate cases, civil society also enable cases through networking, research, and public advocacy. Further institutionalization of ETOs is significant to emerging regional and global agendas on business and human rights, including the UN Guiding Principles on Business and Human Rights that both the Thai and Malaysian governments have expressed commitment to. However, in Thailand and its neighboring countries where investments are located there has been an authoritarian turn. Reflecting this, there are weakening mandates of NHRIs and reduced civil and political freedoms upon which civil society depends that challenges the ability to investigate and pursue cases.

Keywords: Civil Society; Don Sahong Dam; Mekong River; National Human Rights Commission of Thailand; Xayaburi Dam



INTRODUCTION

In Southeast Asia, new means are needed to ensure that governments and businesses protect and respect human rights. Transnational business activities are well-documented to have threatened or violated substantive and procedural human rights across the region, including industrial projects and special economic zones, the extractive industry, hydropower dams, and agribusiness (Business and Human Rights Resource Center, 2015; Middleton & Pritchard, 2013). In response, civil society have networked across the region and innovated new strategies, including working with the National Human Rights Commission of Thailand (NHRCT) to conduct cross-border investigations of Thai business practices in neighboring Myanmar, Cambodia, and Laos (Thailand's Extra-Territorial Obligations Watch & Community Resource Center, 2018). The basis

of these investigations is that the Thai state has a responsibility to ensure that the practices of businesses operating from within its territory also respect human rights outside of it, especially in places where access to justice may be weak. These state duties towards protecting human rights beyond borders are known as Extraterritorial Obligations (ETOs) (ETO Consortium, 2013). Despite a tangible push back by governments across Southeast Asia against human rights and its institutionalization (Gomez & Ramcharan, 2016; Welsh, 2017), and a broader turn towards political authoritarianism (Einzenberger & Schaffar, this issue; Dittmer, 2018; Pongsudhirak, 2018), the NHRCT and civil society have had some qualified success in pursuing ETO investigations.

In this article, I argue that the emergence of ETOs in Southeast Asia, and its future potential, depends upon a productive relationship between the National Human Rights Institutions (NHRIs) and transnational civil society networks. The implication of this argument is that *both* appropriately mandated NHRIs and an active civil society empowered with political and civil freedoms – including across borders – are necessary for the further institutionalization and effective utilization of ETOs in the region. To substantiate this argument, I examine two dams currently under construction on the Mekong River’s mainstream, namely the Xayaburi Dam in Northern Laos and the Don Sahong Dam in Southern Laos. For the Xayaburi Dam, which has been investigated by the NHRCT, Thai construction firms and financiers are undertaking the project. For the Don Sahong dam in Southern Laos, the lead developer is a Malaysian firm, and the project was considered by the Human Rights Commission of Malaysia (SUHAKAM). While I do not claim that NHRIs and ETOs are the sole – or even the most important – means to redress power imbalances and facilitate access to justice,¹ I suggest that given the limited avenues for transnational justice in Southeast Asia they are important despite their constraints. For example, they enable a degree of access to information, offer an arena for deliberating the impacts of projects, and can raise public awareness via media coverage of investigations. Indeed, despite growing authoritarianism in Southeast Asia, transnational civil society and NHRIs to date have managed to maintain momentum towards building ETO investigations.

Conceptually, this article builds upon Hensengerth (2015) who examined the politics of decision-making and sources of political authority associated with hydropower projects on transboundary rivers. Taking the Xayaburi Dam as his case study, Hensengerth argued that the Government of Laos (GoL) worked through a transnational network to bolster its political authority to proceed with the project, including the Thai private hydropower consortium, the Thai state-owned electricity utility, and two international consultancy firms, which it commissioned to undertake key studies. Hensengerth focuses on how the GoL was able to proceed with the Xayaburi Dam despite resistance from neighboring states – in particular Vietnam and Cambodia, and to an extent also Thailand (Rieu-Clarke, 2015a) – as well as an active transnational civil society campaign. In his analysis, he brings into relation state actors who are *in* authority “to resolve procedural issues”, and non-state actors who are *an* authority “to legitimize claims” (Hensengerth, 2015, p. 915). He argues that

1 See also Khalfan (2013) cited in Grennan et al. (2016), and Middleton and Pritchard (2016), who list a range of accountability mechanisms that may be utilized in ETO cases, of which NHRIs are only one.

through collaborating with transnational non-state actors, including private sector, selective civil society actors, and supportive state agencies of neighboring countries (e.g., Thailand's Ministry of Energy and the state electricity utility), an apparently weak government such as the GoL could bolster its regional political authority and ultimately proceed with the controversial hydropower project.

In contrast, this article explores the relationship between NHRIs and transnational civil society networks that produces *countervailing* political authority challenging large dam projects. The importance of transnational civil society networks in environmental politics is well-recognized (Doherty & Doyle, 2008), including how transnational civil society networks create "advocacy networks" with state actors to influence state action either at the national or international level (Betsill & Bulkeley, 2004). Social movement theory demonstrates how civil society strategically networks and builds allied coalitions where shared values and interests exist (McCarthy & Zald, 2001). Civil society may simultaneously challenge some agencies of the state while building alliances with others (Middleton, Pengkam, & Tivasuradej, 2017). Following Hensengerth (2015), NHRIs are autonomous state agencies *in* positions of political authority, although their power is relatively limited. In Southeast Asia, for example, they may conduct investigations but not prosecutions (Grennan, Velarde, Zambrano, & Moallem, 2016). Conventionally, NHRIs are considered national political authorities given that their investigations occurred only domestically. However, with the push towards investigating cases where investors from their country are building projects in neighboring countries, NHRIs are also emerging as transnational political authorities through innovating the use of ETOs. Meanwhile, transnational civil society networks that have also responded to cross-border investment projects, and which are formed of organizations and community representatives in the host and home country, constitute actors who are *an* authority.

The article is structured as follows: In the next section, the research method is detailed, followed by a contextual discussion on the region's authoritarian turn and the implications for NHRIs and civil society. I then outline key moments that have marked the emergence of ETOs in Southeast Asia, before turning to ETOs and the Xayaburi Dam and Don Sahong Dam. This is followed by a discussion and conclusion on the prospects for ETOs in the region.

METHOD

This research is based upon in-depth interviews and participatory observation with community representatives, civil society groups, NHRIs, and the ASEAN Intergovernmental Commission on Human Rights (AICHR). It is triangulated with literature reviewed from academic and civil society sources as well as credible news outlets. Expert interviews were conducted with senior campaigners (n=6) from five leading regional civil society organizations based in Thailand in mid-2016 on their work and experience of the regional human rights system in relation to hydropower development. Community leaders (n=4) involved in the campaigns on the Mekong and Salween rivers were also interviewed. Two interviews were conducted with a recent commissioner from the NHRCT (March 2016) and a current commissioner from SUHAKAM (October 2016). In Malaysia, a leading civil society organization

and a researcher on ETOs were interviewed (October 2016). The researcher also participated as a presenter in three AICHR regional workshops on Environment and Human Rights in September 2014, September 2015, and October 2017 where cross-border responsibilities were an emergent topic of discussion. In February 2018, the researcher met with representatives from the lead developer of the Xayaburi Dam.

In my role as an academic, I co-organized the first major conference on ETOs in Southeast Asia at Chulalongkorn University (Bangkok, Thailand) in September 2014. I have joined numerous workshops and seminars on the topics of business, environment, ETOs, and human rights in Southeast Asia with civil society, academics, and state actors over the past five years, often as a presenter. Overall, as a regionally-based academic, I have maintained a close relationship with civil society working on ETOs.

THE AUTHORITARIAN TURN AND ITS IMPLICATIONS FOR HUMAN RIGHTS INSTITUTIONS

Political authoritarianism is deepening across Southeast Asia (Pongsudhirak, 2018). In this section, I briefly survey features of this authoritarian turn and their implications for NHRIs and civil society. I address in particular state-NHRI and state-civil society relations, and the political and civic space for civil society and media. Given that it is the NHRCT that is most active on ETOs, I focus first on Thailand, and then more briefly on Malaysia given that SUHAKAM only recently considered the Don Sahong Dam as an ETO case. I then discuss Laos, where the Xayaburi Dam and Don Sahong Dam are located.

Thailand

In Thailand, a military coup in 2014 heralded an increasingly limited space for civil and political rights, including a tightening space for media freedoms, increased use of the *lese majeste* law and Computer Crimes Act, and a constrained space for civil society (Mérieau, 2018; Peoples' Empowerment Foundation, 2018). Section 44 of the interim 2014 constitution gave the military government unlimited legislative, executive, and judicial power. A new constitution was ratified in April 2017, paving the way for elections that are called for by a growing proportion of the population (McCargo, 2018). The new constitution considerably constrains the power of elected politicians (Mérieau, 2018).²

The 2017 constitution affirmed the NHRCT's continued existence, which for a while was in doubt. Under the military government, in 2015, a third batch of commissioners was selected by a committee that was not inclusive of broad civil society and lacked transparency (Ashayagachat, 2015). As a result, the Global Alliance of National Human Rights Institutions (GANHRI, 2017) downgraded the NHRCT from A (fully compliant) to B (partially compliant) as gauged by the Paris Principles, which are an international benchmark assessing NHRIs capacity to work to protect and promote

2 Significant powers have been given to the Constitutional Court, anti-corruption bodies, the Senate which had been fully appointed by the current military government for the first five years, and the National Strategy Committee formed of 35 military government appointed members who have defined a 20-year national strategy for Thailand.

human rights.³ The 2017 constitution also required a new Organic Act on National Human Rights Commission 2017, passed in August 2017. Under this new legislation, the NHRCT lost the power to file lawsuits to the Court of Justice, and to refer cases to the administrative or constitutional courts. In addition, a new responsibility to review and comment on the accuracy of reports produced by human rights organizations and release their findings was allocated to the NHRCT, raising concerns among civil society that the NHRCT might be called upon to defend the state (Peoples' Empowerment Foundation, 2018). Civil society organizations have raised other concerns regarding the reduced role for them on the NHRCT's sub-commissions, which they previously viewed as a key means for substantive civil society participation. The pre-2015 NHRCT has not been without controversy either. However, a key flashpoint was the NHRCT report on major political protests in Bangkok in 2010, published at a time of high tension in 2013, that was criticized by some "for allegedly absolving the authorities while placing the blame for instigating the violence that led to the military crackdown on the United Front for Democracy Against Dictatorship" ("NHRC Under Fire For", 2013).

Malaysia

Until the recent election in May 2018, the same party coalition – the *United Malays National Organization* (UMNO) – ruled Malaysia as a parliamentary democracy for almost six decades (Milner, 2018). Regarding political and civil liberties, Freedom House (2016) labels Malaysia as "partly free". Access to the political space and the capacity of civil society organizations are relatively limited, the media is not overly critical of the government, and the government largely maintains its authority to censure the press and to detain dissidents, including opposition politicians (see also Juego this issue). Operating under these conditions, although rated as grade A (fully compliant) according to the Paris Principles, SUHAKAM investigation recommendations have "consistently failed to be tabled and debated in Parliament due to the Government's indifference" (Suara Rakyat Malaysia, 2018, p. 22). Despite the political challenges it faces, SUHAKAM is recognized as having made some progress on indigenous rights to land, on establishing a business and human rights agenda, and on maintaining its engagement with civil society (Interview with SUHAKAM commissioner, 2016; Interview with Malaysian civil society leader, 2016; Suara Rakyat Malaysia, 2018). The implications of the election of *Pakatan Harapan* in May 2018 for SUHAKAM's role and space for civil society remains to be seen.

Laos

Laos is a single party socialist state. Since 1986, it has increasingly transitioned towards a market economy facilitated by a mixture of illiberal and quasi-neoliberal institutions (Barney, 2012). The single-party state remains strongly authoritarian with entrenched patronage networks (Gainsborough, 2012). While expanding the

3 The Global Alliance on National Human Rights Institutions (GANHRI) is a global umbrella body that assesses and accredits NHRI (see also Grennan et al., 2016, pp. 12-13)

economy, accelerating ‘resourcification’ via hydropower dams, mining, and land concessions is rapidly producing resource scarcity and numerous impacts on local communities (Lagerqvist, 2017). With regard to freedom of the press, domestic media is largely owned by the state. The constitution of Laos forbids mass media activities that are contrary to “national interests” or “traditional culture and dignity” (Lintner, 2016). Liberal forms of civil society are limited (Rehbein, 2011), and most “non-profit associations” (NPAs) are service-oriented or community-based and cannot undertake overt advocacy work (Belloni, 2014). In the late 2000s, political space for civil society appeared to be growing, cumulating in the 9th Asia Europe People’s Forum (AEPF) in Vientiane in October 2012 (Kepa, 2015). However, shortly afterwards, in December 2012, the Ramon Magsaysay award winner Sombath Somphone, who was also co-chair of the AEPF Lao National Organizing Committee, forcibly disappeared. Sombath’s disappearance has had a “chilling effect” on Laos’ civil society (Freedom House 2016; Interview with Thai civil society leader, 2016).

ECONOMIC REGIONALIZATION AND THE EMERGENCE OF ETOS IN SOUTHEAST ASIA

Since the mid-1980s, governments and business in Southeast Asia have pursued economic regionalization and liberalization as a key policy agenda. From the 1990s, regionalization was principally pursued through the Asian Development Bank’s Greater Mekong Subregion program, since the mid-2000s also as a vision of ASEAN economic integration leading to the ASEAN Economic Community (AEC) in 2015, and most recently via the China-led Belt-and-Road Initiative. Large-scale infrastructure has been central to these programs, including roads, railways, special economic zones, and hydropower dams, which have been associated with a range of human rights violations. Substantive human rights include the right to life, the right to health and the right to food. Procedural human rights include the right to participation, the right to access information, and the right to access justice (Business and Human Rights Resource Center, 2015; Middleton & Pritchard, 2013).

Despite the challenge to human rights, numerous civil society groups including public interest lawyers, NGOs, and community groups have sought to defend, reinforce, and innovate the region’s human rights system (Asian NGO Network on National Human Rights Institutions [ANNI], 2017). Given that domestic access to justice in some countries in Southeast Asia such as Laos, Cambodia, and Myanmar is extremely weak, civil society organizations have sought to make cross-border investments more accountable through utilizing arenas within the home countries of investors rather than the location of investment. This effort has led to the emergence of ETOs, especially in Thailand (Thai ETO Watch WG, 2017). The nascent practice of ETOs reflects a wider global trend in which transnational obligations are increasingly referenced in international human rights pronouncements (The Global Initiative for Economic, Social and Cultural Rights, 2017).⁴ ETOs are, however, not universally endorsed, including due to the difficulties of conducting extraterritorial

4 The implications of ETOs in international human rights law, in particular as it relates to Economic, Social and Cultural Rights, is mapped out in the Maastricht Principles (ETO Consortium, 2013).

investigations (Grennan et al., 2016). In Southeast Asia, the government-claimed ‘ASEAN way’ of non-interference also makes ETOs a politically sensitive issue that bounds the scope in which NHRIs may act. Yet, there are numerous examples of regional agreements that set in place bounds on sovereignty, for example, the 1995 Mekong Agreement that mandates the Mekong River Commission, and various commitments within ASEAN.

The first ETO case investigated in Southeast Asia was a sugarcane Economic Land Concession (ELC) in Koh Kong province, Cambodia, by the NHRCT. In 2006, the Cambodian government awarded the ELC to Thailand’s Khon Kaen Sugar Industry and a domestic company owned by an influential Cambodian senator. 456 households were dispossessed of approximately 5,000 ha of upland land where they grew swidden rice and various cash crops and raised cattle (EarthRights International [ERI] & Cambodia Legal Education Center [CLEC], 2013). The NHRCT complaint was filed in January 2010 by a Cambodian NGO, the Community Legal Education Centre of Cambodia (CLEC), and designated to the Subcommittee on Civil and Political Rights (SCPR). In July 2012, the SCPR concluded that it had jurisdiction to investigate the case, despite the investment’s location in Cambodia (NHRCT, 2012a). The commission’s report, published in 2014, concluded that human rights violations had occurred, including the right to manage and benefit from resources and the right to life (NHRCT, 2015). It also concluded that the Thai government and the Thai company involved had failed in their respective duties and responsibilities towards human rights, and made a series of recommendations to the company and Thailand’s Ministry of Foreign Affairs and Ministry of Commerce.

The Koh Kong case entailed a transnational civil society movement undertaking advocacy to challenge the ELC developer (Sokphea, 2017). A range of actions were taken in addition to the complaint registered with the NHRCT, including direct protest, submission of a case to the Koh Kong provincial court, direct communication with the company, a complaint submitted to the industry group Bonsucro and the OECD, and an attempted litigation in the UK court (where the purchaser of the sugar was based) (Middleton, 2014). While some families received compensation due to these actions, as of the time of writing, there remain families who are uncompensated for the loss of their land. Addressing why the case was so difficult to resolve, Sokphea (2017) highlights how a powerful constellation of political and economic elites in Cambodia sought to repress the civil society groups and community movement, together with the complexity of the sugar industry’s global supply chain that complicated accountability.

This first ETO case demonstrates the close relationship between civil society groups (as *an* authority) and the NHRCT (as *in* authority). Civil society groups working in a transnational network from Cambodia and Thailand first brought the case to the NHRCT and subsequently supported the investigation through the provision of research reports, meetings with community leaders, and other forms of evidence. They also undertook public advocacy to maintain public awareness about the case and thus assert political pressure. Meanwhile, at the NHRCT, a progressive commissioner and key support staff were able to proceed with and conclude the case (Grennan et al., 2016; Interview with NHRCT commissioner, 2016). While at first it was individuals within the NHRCT who pushed forward an ETO agenda, over time with a now growing number of investigations they have, to-an-extent, become more institutionalized.

Until this case, NHRIs in Southeast Asia had interpreted their human rights obligations as applicable only within their own borders. As the possibility of investigating cross-border cases became recognized, a discussion emerged in Thailand and more widely among ASEAN civil society on the potential for ETOs in Southeast Asia. For example, in September 2014, Chulalongkorn University in Bangkok hosted a regional conference titled “Rights-based governance beyond borders: The role of extraterritorial obligations (ETOs)”. In April 2015, a session at the ASEAN Peoples Forum in Kuala Lumpur, Malaysia, titled “ETOs in cross-border investment: the role of human rights institutions” was organized. In October 2014, five NHRIs in Southeast Asia together with eleven civil society groups signed the “Bangkok Declaration on Extraterritorial Human Rights Obligations”, stating:

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

HYDROPOWER, HUMAN RIGHTS AND ETOS

The construction of a large hydropower dam has the potential to violate a range of substantive and procedural human rights (Hurwitz, 2014). In Southeast Asia, an increasingly extensive program of large hydropower dam construction is underway in Laos, Vietnam, Cambodia, and Myanmar to meet domestic electricity demand and for power export to neighboring Thailand, Vietnam, and China (Middleton & Dore, 2015). Since 2006, plans for a cascade of up to eleven dams on the lower Mekong River’s mainstream have been revived (International Center for Environmental Management [ICEM], 2010). Two projects are under construction in Laos (Xayaburi and Don Sahong) and a third project, the Pak Beng Dam, commenced the Mekong River Commission’s (MRC) regional-level consultation process in December 2016. In this section, I first consider the role of the NHRCT in the Xayaburi Dam case.⁵ I then contrast this case with the role of the SUHAKAM in the Don Sahong Dam case.⁶

5 The 1,285 megawatt Xayaburi Dam in Xayabour province, Northern Laos, will export 95% of its electricity to Thailand, and is owned and operated by a predominantly Thai private-sector consortium. The government of Laos and the project developer signed a Memorandum of Understanding for the Xayaburi Dam in May 2007, a Project Development Agreement in November 2008, and a Concession Agreement in November 2010. The MRC-facilitated Procedures for Notification, Prior Consultation and Agreement (PNPCA) process was initiated in September 2010 and claimed concluded by the Lao government in April 2011 (although the governments of Thailand, Vietnam, and Cambodia requested further studies). The Power Purchase Agreement between the Electricity Generating Authority of Thailand and the project developer was signed in October 2011. As of February 2018, the project is 90% complete. For details, see Matthews (2012), International Rivers (2014), Rieu-Clarke (2015a), and Middleton and Pritchard, (2016).

6 The 260 megawatt Don Sahong Dam is located 2 km upstream of the Cambodia border in the Siphandone Island complex on the Mekong River in Champasack province, Southern Laos. The project developer, the Malaysian company Mega First Corporation Berhad (MFCB), first signed a Memorandum of Understanding with the Lao government in March 2006. Following the preparation of various studies, in

NHRCT and the Xayaburi Dam

The NHRCT, under the second batch of commissioners, accepted the case of the Xayaburi Dam after receiving a complaint from the Network of Thai People in Eight Mekong Provinces, submitted in May 2011. The complaint was based “on the grounds that the project lacked information disclosure and public participation, including an Environmental Impact Assessment (EIA) and Health Impact Assessment (HIA)” (NHRCT, 2012b). The Sub-Committee on Community Rights and Natural Resources (SCCRNR) of the NHRCT was assigned to investigate the complaint.

The NHRCT sent a written request to the project’s main developer, Ch. Karnchang, to submit a written testimony in response to the complaint, together with relevant government agencies including the central bank and the Ministry of Energy. They also approached the Thai commercial banks that provided loans to the project (International Rivers, 2012). As the inquiry proceeded, a NHRCT commissioner also visited impacted areas to talk with the communities. The NHRCT encouraged the community to conduct research that could be an input into the inquiry. These activities were coordinated with civil society (Interview with NHRCT commissioner and civil society groups, 2016).

On 21 February 2012, five months after the project’s Power Purchase Agreement (PPA) had been signed, the NHRCT organized a public hearing. In May 2012, the NHRCT issued an opinion where they recommended that “the Prime Minister should review the implementation of the dam construction” (NHRCT, 2012b). Issues of concern that raised questions about the signing of the PPA included the limited EIA prepared for the project, which did not include an assessment of transboundary impacts; and little sharing of information with the public about the project before the PPA had been signed (King, 2015). The public statement of the NHRCT (2012b) wrote:

We found that although this project may affect to the said issues [impacts on natural resources, environment and way of life of affected communities], the EGAT and the Thai government have not disclosed the PPA or any other relevant information to the public before concluding the agreement. It is therefore not in line with the human rights protection principle, as prescribed in the constitution of Thailand, and a breach of the cabinet and NEPC’s [National Energy Policy Council] resolutions, including on the 1995 Mekong Agreement and good governance.

On completion of the inquiry by the NHRCT, a preliminary report was issued by the sub-committee, but a final report has not been completed and in principle is now the responsibility of the third NHRCT committee. However, it is not clear if the final report will be produced (Interview with civil society, 2016).

June 2014, the Lao government initiated the MRC-facilitated PNPCA. In June 2015, the MRC shifted this process to “diplomatic channels” when agreement could not be reached. The project’s Concession Agreement was signed in September 2015 and a Power Purchase Agreement with Electricite Du Laos signed in October 2015. Project construction officially commenced in January 2016. For details of the Don Sahong Dam, see Baird (2011), International Rivers (2015), and EarthRights International (n.d.).

Interviews with civil society groups who had worked with the Network of Thai People in Eight Mekong Provinces said that the NHRCT was “a very useful mechanism for getting copies of documents that were unavailable, getting meetings with companies and government who weren’t available, and having an independent body investigate the situation and then file a report that was publicly available.” In a public meeting in 2018, another prominent campaigner commented that although the project was not stopped, the civil society campaign did improve the project, including the construction of a fish passage structure and revised design for maintaining sediment movement reportedly at a cost of USD 100 million (“Xayaburi Dam Project Commits”, 2012). They also noted that the most recent proposed project, the Pak Beng dam, had prepared a transboundary EIA study.

Since the release of the preliminary report, civil society efforts shifted from the NHRCT process to the submission of a case to Thailand’s Administrative Court in August 2012, which had the potential to make more enforceable requirements on the involved state agencies (but not the private-sector developers) (Interview with civil society group, 2016). The case was submitted by community leaders from eight Thai provinces along the Mekong River on the basis that the decision-making process had not followed Thailand’s constitution that requires adequate public consultation, and that a transboundary EIA had not been prepared. Although the project is located in Laos, they claimed that the case should be under the court’s jurisdiction as Thai state agencies were key decision makers (also as electricity purchasers) and impacts could occur in Thailand due to the project being located on the Mekong River (Suriyashotichyangkul, 2012). In February 2013, however, the court announced that it did not accept jurisdiction on the case. In March 2013, the plaintiffs appealed to the Supreme Administrative Court of Thailand, and in June 2014, the Supreme Administrative Court of Thailand reversed the lower court decision. On 25 December 2015, the Supreme Administrative Court rejected the case, and an appeal was filed in January 2016 that has not yet been concluded. The court case, however, was unprecedented for Thailand, as it investigates the implications of Thai investment in a neighboring country, even though it only considers the extent of the project’s impacts on Thai communities and thus is not fully an ETO case. However, in April 2018, the Thai courts received a case submitted by Cambodian farmers against a Thai sugar producer that they claim has dispossessed them of their land, which if accepted would set a further precedent in terms of ETO cases in the Thai court system (“Cambodian Farmers Sue Thai”, 2018).

The complexity of the role of NHRIs investigating cross-border investments is apparent from this case. The NHRCT emphasized its mandate to investigate and ensure compliance with Thailand’s human rights obligations in domestic law, international obligations, and those of the ASEAN Human Rights Declaration passed in 2012 related to the activities of Thai state agencies and private sector, including practices that occur outside of Thailand (Interview with NHRCT commissioner, 2016). At the same time, it does not have jurisdiction to inquire into state agencies of neighboring countries. To fulfill its constitutionally defined role requires a collaboration with civil society to enable meetings and further investigation with affected communities.

SUHAKAM and the Don Sahong Dam

On 20 October 2014, six NGOs from Cambodia, Thailand, and the United States submitted a complaint against Mega First Corporation Berhad (MFCB), the developer of the Don Sahong project, to SUHAKAM. The basis of the complaint was the risk that the project posed to the right to health, the right to life and the right to livelihood that are threatened by harms to fish stocks. Furthermore, violations over the right to information and the right to participation for riverside communities formed part of the complaint (Community Resource Centre, EarthRights International, International Rivers, NGO Forum on Cambodia, Northeastern Rural Development, & Cambodian Rural Development Team, 2014). The complaint is stated to be on behalf of Cambodian communities from Kratie and Stung Treng provinces and Thai communities from Ubon Ratchathani, Chiang Rai, Nong Khai, and Bueng Kan provinces. In contrast to the NHRCT, SUHAKAM stated that they are unable to conduct an onsite visit to verify the claims of the complaint, given that “the Commission’s power and mandate are limited within the boundaries of Malaysia” (SUHAKAM, 2015, p. 95). Instead, SUHAKAM considered itself as a mediator (Interview with SUHAKAM commissioner, 2016). SUHAKAM first met with MFCB to discuss the complaint in February 2015, and following a response by the complainants to MFCB’s initial response, a second meeting was held in August 2015 at which MFCB disputed the complainants’ analysis. SUHAKAM concluded that:

Given that there is no National Human Rights Institution in Laos, the Commission finds it difficult to proceed further with the inquiry into the complaint. Therefore, guided by its mandate to provide recommendations on issues involving human rights, the Commission wrote to MFCB on 8 December, and recommended MFCB to ensure that its business operations and activities are conducted in a manner which respects the human rights of the people living in the affected areas, besides generating profit out of the project. (SUHAKAM, 2015, p. 96)

SUHAKAM also recommended to the Malaysian government to “formulate policies or guidelines to monitor Malaysian companies operating outside of Malaysia in order to ensure compliance with applicable human rights principles and standards as provided under Principle 3 of the UN Guiding Principles on Business and Human Rights (UNGPs)” (SUHAKAM, 2015, p. 96).

Several interviewees highlighted that there was comparatively little political pressure upon the Malaysian government and MFCB to respond to the issues raised by SUHAKAM due to the limited media coverage in Malaysia on the impact of the Don Sahong Dam. This reveals the crucial role of civil society in working with the NHRI. Cambodian and international civil society groups brought the case to SUHAKAM, generating media interest in mainland Southeast Asia, which is not surprising given the broader public interest in the Mekong mainstream dams. However, in Malaysia there is a comparatively limited civil society, with little experience on ETOs, and thus few opportunities to build public awareness that contributed to the lack of traction in the investigation.

MOMENTUM TOWARDS ETOS IN THAILAND AND BEYOND

There has been a growing trend for Thai-based companies to invest overseas since the 1980s. In 2015, 37% of the 517 firms listed on the Stock Exchange of Thailand invested outside of Thailand, with 60% of these firms investing in Cambodia, Laos, Myanmar, or Vietnam (SET Research Department, 2016). According to research by the Thai ETO Watch Working Group (2017), among these are at least 13 megaprojects, including large agricultural land concessions, industrial special economic zones, and energy projects (gas, hydropower, coal-fired power stations) that have been documented to create environmental and social harms. These projects, if built in Thailand, would have been challenged legally and through community protest. Therefore, developers are exploiting weaker civil and political freedoms, legal standards, and institutions in neighboring countries (Interview with civil society 2016).

Thai civil society groups have called on the Thai government to regulate these investments through an outbound investment law and oversight body. A significant development occurred in May 2016, when the Thai government issued a cabinet resolution on outbound investment recommending compliance with the United Nations Guiding Principles on Business and Human Rights (UNGPs). The resolution was directed at the Ministry of Foreign Affairs, Ministry of Commerce, and Ministry of Justice, and was at least partly in response to the NHRCT's ETO investigations into the Dawei Special Economic Zone in Myanmar and Hongsa lignite-fired power station in Laos (Suk, 2017). The Ministry of Justice was also given responsibility to develop Thailand's National Action Plan (NAP) for the UNGPs, working with the other two ministries. A second cabinet resolution was issued in May 2017 regarding an ETO investigation into a sugarcane concession in Cambodia in Oddar Meanchey. These resolutions have also been interpreted by the NHRCT as mandating its role in investigating ETO cases (Public statement by NHRCT commissioner, 2018, 1 June). Prime Minister General Prayuth Chan-ocha has spoken on several occasions on his expectation that businesses adopt the UNGPs (Ministry of Finance, 2017). Most recently, a high-profile invited visit by the United Nations Working Group on Business and Human Rights in April 2018 assessed a range of areas of progress as well as outstanding problems, including closing civic space and the need to restore and further strengthen the NHRCT's mandate (United Nations Human Rights Office of the High Commissioner, 2018). Over the duration of this recent interest in the UNGPs by the Thai government, Thai civil society groups have maintained a watchdog role on its implementation. For example, in November 2017, the Thai ETO Watch Working Group presented their analysis to the UN Business and Human Rights Forum in Geneva (Thai ETO Watch WG, 2017). According to the Thai ETO Watch Working Group (2017):

The drafting of the NAP has involved input from CSOs [Civil Society Organisations] working on migrant labor, human trafficking, LGBT rights and discrimination, and land and natural resource rights within Thailand. However, Thailand's current draft NAP fails to integrate the extraterritorial obligations of Thai investors, nor does it include a mechanism for affected communities to seek justice and remedies. (p. 7)

Meanwhile, the third round of the NHRCT Commission has also taken up a number of ETO cases, including on the Heinda mine and Dawei Special Economic Zone in Tanintharyi region, Myanmar, both of which involve Thai companies (Wongcha-um, 2017). Additional hydropower projects are investigated on the mainstream of the Mekong River and Salween River (Sukprasert, 2017). Besides from attempting to maintain the principle of investigating ETOs, the NHRCT aims to further the implementation of the UNGP in Thailand.

CONCLUSION AND OUTLOOK

This article has evaluated the roles, opportunities, and challenges for NHRIs to protect and promote human rights via ETOs, which are of growing interest in the region. It has detailed how, in spite of the region's growing political authoritarianism, it has been possible for Thailand's NHRCT in particular to (continue to) undertake ETO cases. The article has argued that the interaction of the NHRI as *in* authority and transnational civil society as *an* authority is crucial to the innovation of ETOs in the region. Within a relatively short period, since 2010, ETOs have emerged as an increasingly established mechanism, in Thailand at least. In the cases of both Xayaburi Dam and Don Sahong Dam, the role of civil society was important for raising the case in the first place, drawing upon transnational networks, and then providing evidence and maintaining political momentum. Regarding the Xayaburi Dam, while it is arguably the national court case that has had the greatest impact in Thailand in terms of seeking to hold state agencies accountable for the project, the complaint first submitted to the NHRCT was an important initial attempt by communities and civil society groups to raise questions about the project and its environmental, social, and human rights impacts. Together with other ETO cases, it has contributed to a broader momentum towards the UNGP and the preparation of a National Action Plan in Thailand. For the Don Sahong Dam, while the impact upon the project is less clear and the case within SUHAKAM did not proceed beyond a limited discussion with the company, the case did draw some attention to the responsibilities of Malaysian companies investing overseas and led to recommendations towards the government which could be considered significant as Malaysia also works towards developing a National Action Plan for the UNGP.

An examination of the co-productive relationship between NHRIs and civil society on ETOs also offers some insights in ongoing research about legal pluralism in Southeast Asia (Breslin & Nesaduri, 2018). While certainly not discounting the role of the state, these studies draw attention to the role of non-state actors in producing norms, rules, standards, and practices that reshape ecological governance in a range of sectors, including transboundary water governance (Boer, Hirsch, Johns, Saul, & Scurrah, 2016; Rieu-Clarke, 2015b). Studying the emergence of ETOs reveals the significance of *interaction* between allied state and non-state actors in producing a new transboundary governance regime, where the normative basis of ETOs draws on the government's already stated commitments to international human rights law and civil societies' expectation that these commitments be fulfilled.

Overall, ETOs as a recent innovation in the regional human rights system have offered new opportunities for access to information and public participation in particular. However, there are contradictions within the rise of the governments' business

and human rights agenda. In Thailand, the current National Council for Peace and Order (NCPO) government has publicly stated its support for the UNGP agenda and instructed state agencies to prepare plans accordingly (although not specifically on ETOs). At the same time, there has been a closing space for political, civil, and media freedoms with implications for civil society and community activists, together with a weakening of the mandate of the NHRCT. The implications are that even as limited discussion on business and human rights is officially invited by the government, the means to investigate and pursue cases where human rights have been threatened or violated are in fact weakened. Meanwhile, in neighboring countries, the closing of civil and political space for civil society to work on human rights, both domestically and across borders is also an important consideration for the potential of future ETO cases. In Cambodia, for example, NGOs and critical media outlets have been shut down and the main opposition party disbanded since 2016, which holds implications for how Cambodian civil society working on human rights can operate and network, including in cross-border cases. Given the transnational character of some human rights cases in Southeast Asia, including in the case of large hydropower dams on transboundary rivers, and the uneven access to justice across the region, ETOs could be a significant transboundary justice mechanism. However, to consolidate and institutionalize ETOs will require sustained work by both NHRIs and civil society.



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