



Connecting the dots between law and transboundary water management: can international law accommodate the dynamics between investment, environmental protection and human rights in hydropower projects in the Lower Mekong River Basin?

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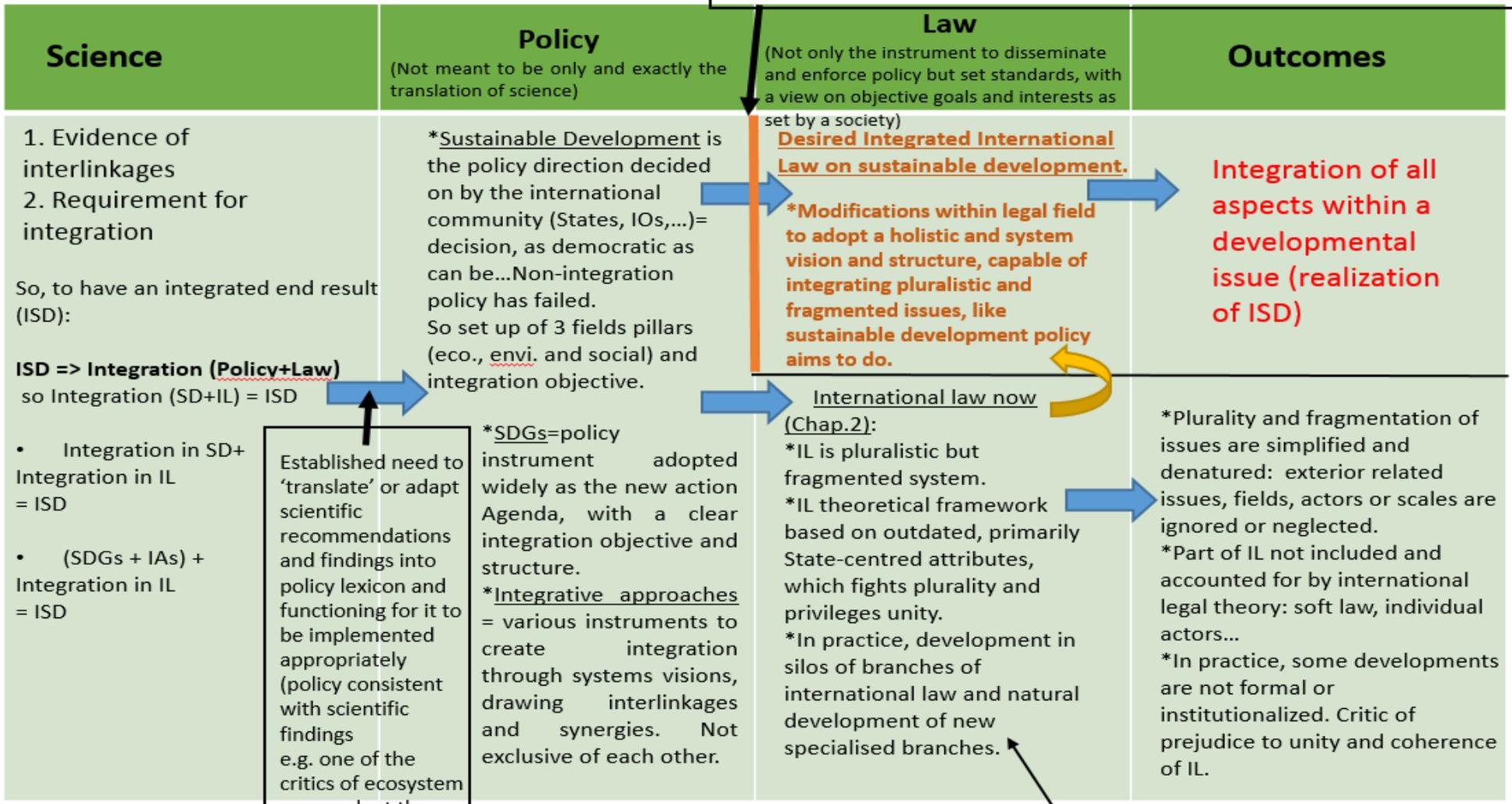
1st December 2021, 12h-13h15

Sustainable development and integration

- Sustainable development has been focused **on integration and inclusiveness**. This goal is formulated through the idea of the **three pillars** (economic-environmental-social pillars) and the objective of **leaving 'no one behind'**.
- An instrument to implement this policy objective is **the SDGs** (a single document gathering 17 goals, embodying the diversity within the overall objective of Integrated sustainable development)
- Other policy instruments and visions developed towards integrated sustainable development: IWRM, nexus, ecosystem approach...
- The integration at the centre of sustainable development requires to **consider and include all actors** (participants and beneficiaries), **scales** (international to national) **and regimes** (including economy, social and environment fields).
- **Law can contribute** to implementing the policy objectives of integrated sustainable development. Sustainable development, the SDGs and other integrative approaches are often not considered legal instruments. There is a need to **'translate'** such objectives of integration and deals with the pluralism also present in law and international law.

Science – Policy – Law – Integrated SD

Assumes need to 'translate' or adapt policy into law: *same as science-policy, law has a special vocabulary and rules. *Examples of policy measures, where inappropriate legal implementation brought unwanted results.



Established need to 'translate' or adapt scientific recommendations and findings into policy lexicon and functioning for it to be implemented appropriately (policy consistent with scientific findings e.g. one of the critics of ecosystem approach at the beginning, too scientific.

Not really integrative as is. Integration is about setting a holistic vision, gathering all the pluralistic and fragmented elements at hand.

Index:
SD: Sustainable Development
IL: International Law
ISD: Integrated Sustainable Development
IAs: Integrative Approaches
IOs: International Organizations
TNL: Transnational Law

Red: Ultimate goal
Brown: changes to be brought or thought about.

International Law and Integrated Sustainable Development: gaps

International law is **limited in relation to legal pluralism**:

- ▶ Traditionally focused on State-to-State relations or their delegated sovereignty within international organisations
- ▶ Legal pluralism is often paired with fragmentation, a generally negatively viewed phenomenon
- ▶ Reactions is generally towards either 'sovereign territorialism' or 'universalist harmonization' (Berman 2006). Both simplify and 'manage' pluralism instead of embracing it and keeping its diversity.
- ▶ International law incorrectly and inappropriately representing, understanding and analysing complex issues on the ground.

Changes bringing a transformation in International Law?

- ▶ Organic/functional evolution of law going towards recognising more actors, regimes and scales as interlocutors and stakeholders (eg ICSID, ICC etc)
- ▶ Several notions have been studied to bring integration, like transjurisdictionality, global law...

International law and legal pluralism: the option of Transnational Law (TNL)

- ▶ In Jessup's definition, transnational law is meant 'to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as other rules which do not wholly fit into such standard categories'. The author specifies that such cases 'may involve individuals, corporations, states, organizations of states, or other groups'.
- ▶ Examples of Canon law, lex mercatoria, International Economic Law within the European Union, or International Human Rights Law
- ▶ **Pluralist, holistic and interconnected approach.**
- ▶ Defined as a phenomenon, as a group of substantive or procedural rules, and as a lens/methodology. Can also be described as a 'non-compartmentalised thinking'

Transnational law: potential and benefits

As Fisher formulates it, transnational law is not international law 'with a sexier title' but the use of **transnational law marks a departure from traditional international legal theory towards a more inclusive, pluralist approach.**

Transnational law is sometimes considered as an 'extended international law'. It is important to highlight that the concept, contrary to international law, also focuses on movements and interactions, **across and beyond**. Transnational law can be located in its own sphere, neither national nor international but in between.

Transnational law brings a different mindset using existing legal systems and rules. Its extended and interconnected nature can lead to a new approach to integration and International Law.

It is especially **fitted for integration and transboundary issues**: the diversity of actors, scales and regimes, interacting in different ways and across categories, is essential to represent, understand and analyse well these complex issues.

International law, water and transboundary issues

- ▶ The inadequacy and gaps between the use of international law and integration is even more visible with issues that are transboundary.
- ▶ **Water resources** are a prominent subject of transboundary, complex issues linked to sustainable development (several SDGs, including water, food and energy security and integrates the three pillars). Water resources are also a vital issue and stake for everyone, everywhere and for anything. Many of these resources are shared.
- ▶ Shared rivers have natural transboundary aspects : the different countries it involves; its natural cycle; affecting economy, food security, energy, ecosystems around, land and water river use; across levels: international, regional, national and local...
- ▶ International water governance needs to reflect and manage the integration of all aspects.

The policy instrument of IWRM often guides an integrated approach to water resources and is linked to International Water Law. In law and international law, many of the principles of integrated water resources management and transboundary considerations are in international water law, with key documents like the 1997 Convention on the law of the non-navigational uses of international watercourses (**UNWC**) and the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (**Water Convention**)

Hydropower projects and integration

Hydropower energy production:

- ▶ First ranking renewable electricity-producing technology
- ▶ A solution for Climate Change, population growth and demands to secure water-food-energy.
- ▶ A 'greener' (not exactly green) alternative to fossil fuel energy and participates to the objectives of SDG7.
- ▶ Building Hydropower projects is a reality that needs to be worked with and not denied
- ▶ Hydropower involves notably the combination of International Investment Law –International Environmental Law – International Human Rights Law
- ▶ Many specific International Law and other regimes applying to it and many actors, scales and regimes included.

Hydropower projects are a perfect embodiment of integrated sustainable development challenges. The challenge of integration is **enhanced due to the scale and stakes** of the projects. An important element is the often **transboundary** nature of such projects.

- ▶ The need for integration is evident.

Does Transnational law have the potential to bring the integration and balance needed for hydropower projects to develop in a sustainable way on shared basins?



The Mekong river basin: background information

- 12th longest river in the world biggest river, rich biodiversity especially in the Tonle sap basin in Cambodia.
- 6 riparians: China, Myanmar, Laos, Thailand, Vietnam and Cambodia.
- 1995 Mekong Agreement and Mekong River Commission (MRC) with the 4 lower riparians
- 11 dams cascade project of which ***done –state of luang prabang and pak beng, according to basin plans from the 1980s.
- Priorities for each countries are different but all are interested in the energy from hydropower
- Most hydropower potential in Laos. Thailand and China especially participate to projects and purchase hydropower energy from there. Laos has a priority to get out of the LDC status and be the ‘battery of Asia’. (Has 9 of the 11 mainstream dams planned).
- Highly criticised projects, already operating ones and pending: issues of displacement, loss of livelihoods, loss of fisheries and biodiversity, loss of river flows

The Mekong river basin and the legal framework for hydropower projects

- ▶ The framework of actors, scales and regimes having a potential normative influence on the basin and on the development of hydropower projects on the mainstream is **very large and diverse**.
- ▶ Some of the legal rules can be **found at different scales or within different regimes**, despite contents that may vary, e.g. the duty to conduct an Environmental Impact Assessment. The Mekong Agreement itself, being a key regime of the regional-basin regulation of the river, contains similar rules to some cornerstones of international water law, like Equitable and Reasonable Utilization, the need for cooperation and data exchange, the duty to cause no (significant) harm, and the general objective of managing the basin in a sustainable way.

- ▶ Various international, regional and national normative documents can be applicable (directly or indirectly) to hydropower regulation in the Lower Mekong River Basin. Some of these actors or regimes can be shown from different scales:

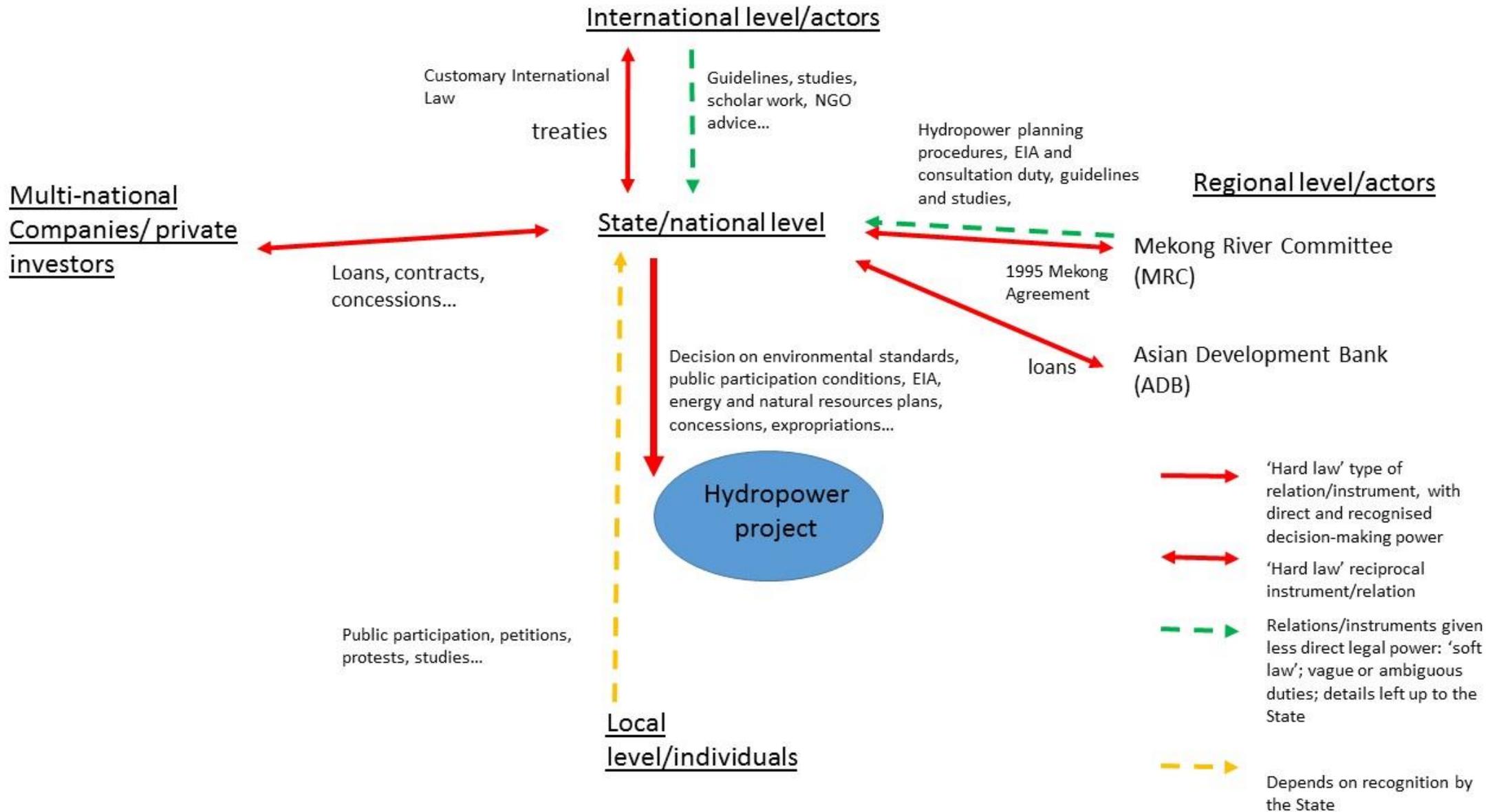
International: the no harm doctrine, the duty to cooperate and good faith, the duty to conduct an (TB) EIA, pacta sunt servanda, stakeholder participation and other human rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), World Commission on dams and the 2000 'Dams and development' report, the International Hydropower Association, the World Bank, the Equator principles, the UN Guiding Principles Business and Human Rights, the OECD Multi-National Enterprises Guidelines...

Regional: the Mekong River Commission, the Lancang-Mekong Cooperation programme, the Greater Mekong subregion, the Asian Development Bank, the Asian Infrastructure Investment Bank

National: national laws

- ▶ However, the legal importance and the interconnections of each of these normative elements vary and they affect the decision-making of a hydropower project in a different way. Some of these instruments and actors can be considered traditionally non-legal or related to a more 'soft law'.

Example of relations between actors, scales and regimes around a hydropower project in the LMRB



International Law and the Mekong: the need for integration and a transboundary approach

- ▶ The Mekong River Basin is an example of shared water resources with a River Basin Organisation (the MRC) as advised in international water law for the establishment of cooperation and joint management of a shared river.

Water governance in the Mekong basin is already developed in terms of the diverse and numerous rules applying to it

- ▶ This legal framework or grid reflects to some extent traditional classifications of international law, like a hierarchy between the different normative influences, a certain division between the international and national levels, a certain fragmentation coming from legal pluralism (this fragmentation within this legal framework is not absolute and some links are already built and creating synergies between the different regimes, actors and scales).

There is a lack of complete representation of the actors, scales, regimes and interconnections within this legal framework.

- ▶ There is a need for a more pluralist, holistic and interconnected approach to the legal framework of hydropower regulation in the Mekong River Basin.

Transnational Law benefits

- ▶ Increases the visibility and consideration of non-legal regimes, actors and less traditional scales. The recurring opposition/imbalance between economic-environmental/social aspects within hydropower could be lessened through the representation of individuals, affected communities and NGOs' normative discourses, which often put forward environmental and social interests (Balance in line with the integrated development objective)
- ▶ Levelling the playing field between the different set categories from traditional international law. Brings a more accurate and balanced representation of the complex and transboundary issues. (by for instance changing the dialectic to 'normative discourses')
- ▶ Allows to concentrate on transversal interactions and interconnections between the different normative discourses. Focus on both negative and positive interactions (and gaps) – not only negative interactions to be managed or conflicts of law). A broader and more complete assessment of these would help analysing how to manage conflicts, strengthen synergies and fill normative gaps.

Application of TNL?

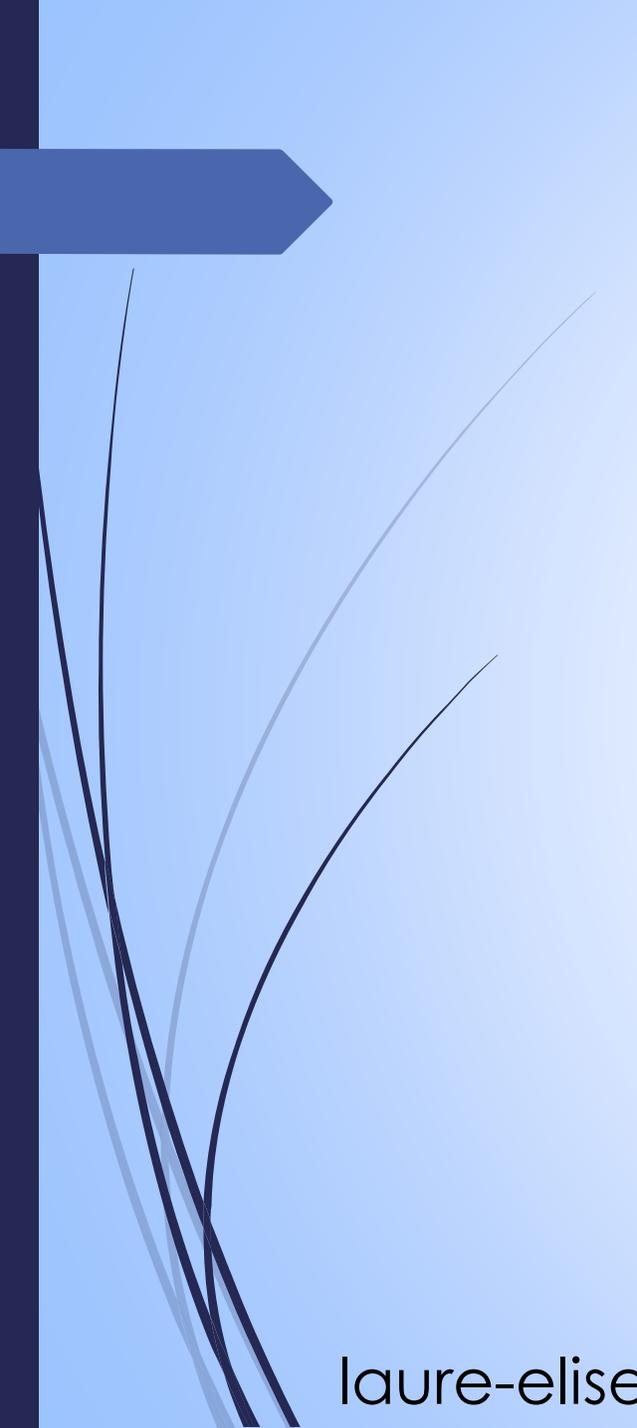
- ▶ In this context, Transnational law as a different approach to the legal framework could create an interface to place (or a methodology to read) the different actors, scales and regimes on a same level of normativity and **level the playing field**. The representation, understanding and analysis of the situation at hand would be **more accurate and representative of all the influences at hand**.
- ▶ Such an approach and method to apply while considering transboundary complex issues could help reduce the traditional limits of international law (and of international water law as related to IL). The final goal is not to unify international law as a transnational law regime or to recommend using only law at an international or transnational level.
- ▶ Transnational Law could help with the accurate evaluation of the legal framework and rules surrounding a hydropower project on a transboundary river. It would make the decision-making more difficult but projects more sustainable, more accepted and less artificial. More complex but complete. Hydropower can be more difficult to build then and deter investors but there is no other way to do it.
- ▶ Transnational Law can then **help governance and decision-making in other transboundary issues** and with the objective of integrated sustainable development.

- ▶ Possible application of a more transnational law approach:

Linking similar rules at different levels to strengthen overall normative expectations, e.g. Xayaburi EIA and the lack of transboundary studies criticised.

Extra-Territorial Obligations claims to national judicial bodies, e.g. the Human Rights Commission of Thailand

Claims to the OECD National Contact Points for the breach of the MNE Guidelines by a company within the OECD, e.g. claims against Pöyry company at the Finnish NCP



Thank you

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