Contributing to integrated sustainable development through a transnational law approach.

Exploiting the linkages between economic, environmental and human rights legal regimes as applied to hydropower projects on the Mekong River

Laure-Elise Mayard

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Laure-Elise Mayard

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Abstract

Unsustainability is often linked with to extreme trade-offs and imbalances between the different interests of a plurality of actors, scales and regimes. The objective of integration tackles the need to address this growing diversification and multiplication within decision-making/governance. The transboundary nature of these elements of governance often complicates and heightens the challenge of integration.

The aim of this thesis is therefore to study the way international law can contribute to this objective. Its participation to implementing integrated sustainable development depends (itself) on its suitability and capacity to address legal pluralism. However, such integrated approach is not effectively provided by traditional international law. Its limited and strict legal classifications and scope related to the State create a key challenge to embracing legal pluralism and integration.

This thesis suggests a new approach and insights to this inquiry through the concept of transnational law (TNL). Its unique pluralist, holistic and interconnected approach is explored and developed to measure up to the objective of integration. The design of an analytical framework built on the conceptual underpinnings of TNL helps developing this reflection and to go beyond its theoretical understanding. In addition, a case study of hydropower in the Lower Mekong River Basin and transboundary water management offers interesting conditions to apply and test TNL.

TNL allows to envision a different/broader approach to legal pluralism and to the growing transboundary issues within sustainable development. The concept also suggests a way international law can make a stronger and more relevant contribution to the objective of integration.

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Abbreviations

ADB	Asian Development Bank
AfDB	African Development Bank
AIIB	Asian Infrastructure Investment Bank
ARIO	Draft Articles on the Responsibility of International Organizations
ASEAN	Association of Southeast Asian Nations
B-O-O-T	Build-Own-Operate-Transfer
CSO	Civil Society Organisation
ERU	Equitable and Reasonable Utilisation
ETO	Extra-Territorial Obligations
EU	European Union
FDI	Foreign Direct Investment
GEG	Global Environmental Governance
GMS	Greater Mekong Subregion
GWP	Global Water Partnership
HLPF	High Level Political Forum
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IHA	International Hydropower Association
IL	International Law
ILC	International Law Commission
IO	International Organisation
IUCN	International Union for Conservation of Nature
IWRM	Integrated Water Resources Management
KTNC Watch	Korean Transnational Corporation Watch
LAO PDR	Lao People's Democratic Republic
LMRB	Lower Mekong River Basin
MA	Mekong Agreement
MNE	Multi-National Enterprise
MRC	Mekong River Commission
NGO	Non-Governmental Organisation

OECD	Organisation for Economic Co-operation and Development
PIDA	Programme for Infrastructure Development in Africa
PNPCA	Procedure for Notification, Prior Consultation and Agreement
RBC	Responsible Business Conduct
SDG	Sustainable Development Goals
TEL/TER	Transnational Environmental Law/Governance
TNL	Transnational Law
TNLS	Transnational Legal Space
UN	United Nations
UNWC	United Nations Watercourses Convention
WB	World Bank
WCD	World Commission on Dams
WEF nexus	Water Energy Food nexus

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[1] Joachim Du Bellay, ‘Heureux qui comme Ulysse’ (*Les Regrets* 1558)

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To an end and a beginning.

힘들 땐 우리가 함께 걸어온 길을 돌아봐.

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 thesis has been approved. Approval has been sought and granted by the Faculty Ethics Committee on 25th September 2019.

I declare that the Word Count of this Thesis is 83,808.

Name: Laure-Elise Mayard

Signature:

Date : 28 March 2021

Introduction

In the complex context of globalisation, the promotion of sustainable development calls for more integration in regulating the different facets of an issue. Integration can help address the current trade-offs and imbalances between the economic, environmental and social interests within many issues. International law can offer an important means to promote integration and create a more pluralist and holistic analysis and governance fitted for these complex issues.

Despite the general policy consensus over the pursuit of a more sustainable future, global challenges remain with unsustainable and imbalanced outcomes, most often environmental degradation and deep social disparities.[2] Indeed, economic activity is often at tension with environment and social interests. They are perceived as competing and sometimes exclusive of each other. For example, this extreme trade-off relationship is visible in the conduct of intense industrial activity, which is responsible for a great part of emissions and pollution affecting the environment, including the quality of the air and climate change, the health and livelihoods of populations.[3] This 'either / or' relationship between economic, environmental and social aspects leads development to be inherently unbalanced and unsustainable. The tensions that derive from economic activity create and exacerbate the stress, and potentially irreparable costs, to the environment and to populations. The needs and rhythm of economic activity have especially put pressure on natural resources and are often leading to overexploitation. Development projects require the use and exploitation of the environment, such as rivers or forest, on which many populations also rely.[4] These projects then imply trade-offs and costs for the environment and for people like displacement or loss of livelihoods. This is the case for hydropower projects, which rely on the ecosystem of rivers.[5] The objectives of energy production to

[2] W. L. Filho, F. Wolf, A. L. Salvia, A. Beynaghi, K. Shulla, M. Kovaleva and C. R. P. Vasconcelos, 'Heading towards an unsustainable world: some of the implications of not achieving the SDGs' (2020) 1(1) *Discover Sustainability*

[3] The link between these factors was sometimes debated due to the need for a clear causality and relation with the economic activity. However, the unusual occurrence of a reversed situation can comfort the idea that economic activity and environmental and social issues are most often at odds with each other. The recent pandemic of the Covid-19 and the slowdown of the economic activity in many countries (especially the biggest greenhouse gases emitting countries, like China) have on the other hand been followed by an improvement in the environment, for example in the quality of air and wildlife situation. See for example Qiang Wang and Min Su, 'A preliminary assessment of the impact of COVID-19 on environment – A case study of China' (2020) 728 *Science of the Total Environment*

[4] L. M. Serra, M-A. Lozano, J. Ramos, A. V. Ensinas and S. A. Nebra, 'Polygeneration and efficient use of natural resources' (2009) 34(5) *Energy*

[5] Xing Lyu, 'From Manwan to Nuozhadu: the political ecology of hydropower on China's Lancang River' in Nathanial Matthews and Kim Geheb (eds) *Hydropower development in the Mekong region. Political, socio-economic and environmental perspectives* (Chapter 1, Routledge Earthscan 2015), 73

attract investment and to develop cleaner energy often result in water stress in relation to the flow, quantity and quality of the water, and other costs to the ecosystem of fisheries or land.[6] In addition, the development of large hydropower projects affects populations at different scales and in a transboundary way, mostly the local and vulnerable population depending on the river and its resources, but also at the national, river basin and international levels.[7] The promotion of hydropower, and economic growth more generally, is often presented as being essential for development and for poverty alleviation.[8] However, the obvious costs to environmental and social aspects and the often primary focus on economic benefits need to be addressed as creating unsustainable and damaging outcomes.

Therefore, reflection needs to be engaged on how to bring a more balanced and sustainable pathway to governing complex issues and how to maximise benefits for all. The global challenges mentioned above rest primarily on the entrenched perception that economic, environmental, and social aspects of development are generally independent and competing. Exclusive choices within regulation are then made that favour a certain sector, set of interests and actors, at the expense of others. On the other hand, signs of concurrent promotions of economic, environmental and social interests and of their mutually beneficial effects have shown the possibility of a more connected and balanced to these three fields within an issue. This interconnected mindset and approach to global issues can and must be elaborated on to ensure a more integrated and sustainable development. For instance, the investment in renewable energies, like solar and hydropower, follows economic needs and interests for energy. But it could also participate in principle to a lesser environmental impact than the exploitation of fossil fuel energy and to a cleaner provision of energy for populations. Thus, one sector is not independent from another and the connections between economic, social and environmental aspects can also be mutually reinforcing. To move past the well-established idea that the three fields are competing and to explore their mutually reinforcing connections and avoid excessive trade-offs, a broader and balanced consideration of the different regimes, actors and scales involved is needed. International policy follows this reflection on the need for an integrative and balanced approach and the emphasis needed on converging interlinkages.

[6] A. Bhaduri, J. Bogardi, A. Siddiqi, H. Voigt, C. Vörösmarty, C. Pahl-Wostl, S. E. Bunn, P. Shrivastava, R. Lawford, S. Foster, H. Kremer, F. G. Renaud, A. Bruns and V. R. Osuna, 'Achieving Sustainable Development Goals from a Water Perspective' (2016) 4 Frontiers in Environmental Science, <https://core.ac.uk/download/pdf/143904052.pdf> accessed 27 May 2020, 8-9

[7] Ibid

[8] A. Intralawan, A. Smajgl, W. McConnell, D. B. Ahlquist, J. Ward and D. B. Kramer, 'Reviewing benefits and costs of hydropower development evidence from the Lower Mekong River Basin (2019) 6(4) *WIREs WATER, 2*

However, the challenge of adopting a holistic and pluralist approach to different sectors, actors and scales is even heightened in the context of transboundary issues. These issues unfold beyond political borders. They also take place beyond the traditional categories framing and dividing the different scales of governance, but also sectors and actors. For instance, global issues like climate change are most effectively regulated at the international level. Indeed, the global nature of the problem cannot be fully grasped by national regulation alone. However, the regulation of climate change can even be considered to go beyond international and national scales. It also harbours a cross-category and cross-border level of regulation. For such transboundary issues, the level at which to regulate is made more complex. It is then difficult and inefficient to choose only one scale as the most fitted to regulate. Reaching a consensus on the way to regulate the issue between the different levels of governance would be challenging. It can be hard to reconcile the competing interests at the project level which affect local communities, by decisions often made at the national level, with needs and impacts occurring at the regional and international levels. A transboundary dimension proves complex as it interconnects different scales, actors and rules. It requires more attention to the combination of these elements for an integrated and balanced regulation. Complex and multi-faceted issues require to be informed on the diversity of interests at hand. A more holistic, pluralist and interconnected approach at the transboundary level would be needed to understand and put together harmoniously all the interests.

An example of complex transboundary regulation is visible in the context of transboundary basin issues.[9] Shared water resources, such as rivers, transcend political borders and may span the jurisdiction of two or more countries.[10] Considering transboundary governance through transboundary river basins is even more evident as it is a very common and important setting for countries around the world. In 2001, the Transboundary Freshwater Dispute Database, reported 276 transboundary river basins covering more than 45% of the land surface of the Earth.[11] Because of its transboundary and international nature, the different scales and actors are involving national, regional and international dimensions and concerns over the shared resource. In addition, transboundary basin issues involve a wide range of interest areas over the water resource, which need to be considered for a complete and balanced regulation. Natural resources like water are under great pressure because of the vital role within economic

[9] Francesco Sindico, 'Transboundary Water Cooperation and the Sustainable Development Goals' (*UNESCO-IHP* 2016) <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/SC/pdf/Transboundary_Water_Cooperation_and_the_SDGs.pdf> accessed 13 March 2021, 6

[10] S. P. Rai, A. T. Wolf, N. Sharma and H. Tiwari, 'Hydropolitics in Transboundary Water Conflict and Cooperation' in Nayan Sharma (ed) *River System Analysis and Management* (Springer Singapore, 2017), section 'Hydropolitics in Transboundary Rivers'

[11] Ibid section 'Introductions to International Rivers'

development, environmental stability and even in the survival of populations.[12] The joint management of a transboundary river is then complex and creates various tensions between the actors, scales and sectors involved. For instance, the Mekong river basin is shared between six different riparian countries, with specific, and often competing, national priorities on fisheries, navigation, energy or agriculture.[13] In addition to the prevalent national level, the Mekong river basin is influenced by international rules, regional basin interests set by actors like the Mekong River Commission, and by the interests of the different local populations and indigenous communities along the river.

In addition, transboundary basin issues highlight the need for an effective regulation to include the interlinkages and interdependences between economic, environmental and social sectors, actors and scales. The nature of water resources most evidently presents the importance of a more interconnected approach to promote interdependent and mutually reinforcing connections. Water resources are a renewable resource following a transboundary natural cycle, for example with rains, sea evaporation without a territory limit. Often, these water resources are framed as a transboundary basin.[14] These elements imply the indivisible nature and approach needed to regulate the river basin. A fragmented approach to a transboundary river basin creates an unrealistic and incorrect governance, which lead in turn to imbalances and unsustainable uses of the resource. An example can be the worrying priority given to large hydropower constructions on parts of shared rivers like the Mekong. The river basin is then fragmented according to the plans of one of the riparian countries on its share of the river, as opposed to the analysis of these interests in the context of the full basin. Then, the use of the river for agricultural purposes, fisheries or even tourism might not be fairly weighed in the decision-making balance against economic and energetic needs. Dramatic consequences can already be observed such as loss of livelihoods of populations depending on the river, drying out of the overall Mekong river basin, decrease in fisheries and rice production, or changes in the ecosystem. Because of the interconnection between economic, social and environmental aspects of development, these unsustainable outcomes affect in return the initial economic investments, such as hydropower projects, agricultural practices, domestic water needs, and recreational

[12] 'Water and sustainable development' (*United Nations, International Decade for Action 'Water For Life' 2005-2015*) <https://www.un.org/waterforlifedecade/water_and_sustainable_development.shtml> accessed 12 March 2021; Dan A. Tarlock, 'International Water Law and the Protection of River System Ecosystem Integrity' (1996) 10(2) *BYU Journal of Public Law*, 181

[13] '1. Key water-related development challenges in the Mekong River Basin – Brief overview' (OECD) <https://www.oecd-ilibrary.org/sites/b3463307-en/index.html?itemId=/content/component/b3463307-en> accessed 12 March 2021

[14] UN Water, 'Transboundary Waters' (UN Water) <https://www.unwater.org/water-facts/transboundary-waters/> accessed 12 March 2021

activities linked to the river.[15] Issues of unsustainable development and the compartmentalised consideration of economic, environmental and social aspects create larger impacts and on different levels because of the transboundary nature of the basin. Transboundary river basins are vital to both States and to the livelihoods of the communities that live therein. Potential tensions and imbalanced uses can have a dramatic effect on a large scale and in various fields.

The complexity of transboundary basins has often led to a fragmented approach to regulation and to difficulties in promoting a balanced and sustainable development in the basin. However, the cross-border and cross-category nature of transboundary basins mentioned above can also be a decisive point for the emergence of an integrated vision of water resources. The interdependence between the different scales, actors and fields of interest within a river basin can be the steppingstone for a reflection and promotion of mutually benefitting and reinforcing governance.

Sustainable development's most prominent challenge is to reach a balanced, equitable and sustainable future. This objective rests on achieving a more pluralist, holistic and interconnected approach to issues. The current gaps in this ideal pluralist regulation can be seen though disconnections, tensions and limitedly integrated vision between different actors, scales and regimes. In a transboundary context, the number and diversity of actors, scales and regimes is exacerbated and cross-cutting. Therefore, the impacts of the idea that economic, environmental and social aspects are inherently and solely competing can be devastating. Progress towards sustainable development rests on emphasizing the idea that the three sectors can be mutually reinforcing. This new positive approach of interlinkages between the different regulating elements must be first implemented in the understanding, analysis and governance of these complex issues. The role played by law, and especially international law, is key in progressing towards more integrated sustainable development. Indeed, international law applies to and regulates

[15] See, Ezra Ho, 'Unsustainable Development in the Mekong: The Price of Hydropower' (2014) 12 *Consilience*; An example of the consequences of unbalanced and unsustainable regulation for economic activities can be the loss of flow and water quantity in the Mekong affecting the production capacity of hydropower projects and impacting the tourism activities such as cruises along the Mekong river, see Orasa Kongthong, 'Drought in Mekong River and Vulnerability of Livelihood. In Chiang Khan District Lower Mekong Basin Thailand' (Master of science, Lund University, May 2011) <https://d1wqtxts1xzle7.cloudfront.net/27904417/kongthong_orasa_thesis_2011.pdf?1347704735=&response-content-disposition=inline%3B+filename%3DDrought_in_Mekong_River_and_Vulnerabilit.pdf&Expires=1616022527&Signature=NTKIOx5FG01b26LSMZF6SzFhQaudinxEhTJfCc5mS72GJ4QqmQ0taJig7dG9US1dcRfCwRQdLDzVV-R3dIgbdpgbq9YhEKz3pT9AKwb~zCfWmURHUDDj5FRNrfhThijb7BBU6XVfNeNeGOfC7WPn32xlS~ZFbLbZeNR3gd07RhY6iOBgE-1l6pOpPd2yIemlzy90ZwEvny~ls6Vt3oHCCy9DbfQ0wtXWxOuvrjx~R1JneyPl4Jh8rCO4eX4UvcoWlmBjcBl2tEvooM4lUS5neC7vz6FgP3USimaYLxmXjNbX1IAVqIomvnqBD1FU3Qp6fuvZmX6vmLBwuYLCSOMiwg__&Key-Pair-Id=APKAJLOHF5GGSLRBV4ZA> accessed 12 March 2021, 41

these issues. It also often participates to implementing policies, in which it is linked to operationalising sustainable development objectives. The way international law considers transboundary issues can help advance a more integrated approach in its understanding, analysis and application to these issues.

Therefore, sustainable development policy calls for more integration as a crucial prerequisite to a more informed and balanced regulation of transboundary issues. The goal of integration calls for the inclusion of the different elements influencing a specific issue. But it also advances the need to highlight their interdependence and their possible mutually reinforcing and converging interactions. Integration could then bring a more informed, equitable and sustainable outcome to decision-making.

Integration can refer to the inclusion of a broader range of actors. It can promote what is referred to as the goal of inclusiveness and of leaving 'no one behind', both in terms of the participation to and of the benefits received from sustainable development.[16] Integration also implies the need to consider the connections and interactions between the plurality of actors, scales and fields. The need to highlight interactions within pluralism has been at the heart of sustainable development, specifically in the idea of the interdependent 'three pillars' of economic, environmental and social factors considered to inform each other and be integrated in policy making. Integration has therefore been put at the heart of policy to promote a more integrated sustainable development.

International law has a role to play in operationalising the objective of integration. International law is connected in many ways to the achievement of a more integrated sustainable development. More generally, international law is linked to the evolution and implementation of sustainable development policy. It is an important means by which its principles or objectives are concretised. For instance, the international cooperation and combined efforts towards fighting climate change has crystalized in many treaties and legal agreements, like the United Nations Framework Convention on Climate Change (UNFCCC).[17] In addition, international law plays key role in the regulation of issues of global or transboundary nature. Their cross-border nature qualifies international law as the closest and most adequate level at which to tackle these issues. It is therefore important to consider and understand the contribution that international law makes and can make to achieving integrated sustainable development.

Nevertheless, the objective of integration is challenging for the core theoretical conceptualisations of the international legal system. International law is based on limited

[16] Principle to 'leave no one behind', see 'Leave No One Behind' (*United Nations Sustainable Development Group*) <https://unsdg.un.org/2030-agenda/universal-values/leave-no-one-behind> accessed 2 March 2021

[17] United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC)

and well-established categories of actors, scales and legal regimes considered as ‘legal’, often related to State-State relations. The multiplication and diversification of normative actors, not always recognised as ‘legal’ by international legal theory, have put pressure on the traditional understanding of international law. In turn, mismatches between the reality of legal pluralism and the limitedly integrative and connected approach in legal theory have developed. The partial and fragmented legal frame generally used creates imbalances in the legal representation of all the actors, scales and regimes involved in a given issue. Such imbalances are manifested in the misrepresentation of actors, often linked to less influential or less legally authoritative scales and regimes. For example, the local communities or the regional actors can be considered secondary, as compared to the legally authoritative national, State-based level. Regimes with more legal links to traditionally recognised legal instruments, like States, will have more visibility than normatively influential documents. It is the case for instance between power purchase contracts from a hydropower project and the environmental and social impact reports against the same hydropower project from a Non-Governmental Organisation (NGO). In international law, the relationship of a contract is legally binding on the two parties and ruled by law. On the contrary, a report from a legally less authoritative actor or third party, like an NGO, is not legally binding. These unbalanced and partial representations, based on traditional international legal categories, reinforce the need for a more complete, diverse, integrative approach.

Transboundary issues can especially accentuate the gap between the law in practice and in theory. They can be the scene of tensions between the various actors, scales and regimes involved in the issue but that are not all considered legally valid or relevant. The cross-cutting dynamics and several jurisdictions involved are making more complex an informed and holistic regulation.

In order to address these shortcomings, recent studies have introduced various integrative approaches and narratives. These suggest how the international legal system can manage legal pluralism and the interconnections across multiple scales, actors and sectors. One approach receiving increasing attention is transnational law. It offers a method by which to adopt a more inclusive and cross-cutting approach. Transnational law promotes a unique approach focused on an understanding of the importance and influence of trans-category dynamics, including trans-border issues. These ‘trans’ dynamics could capture the full extent and accurate pool of actors, scales and regimes involved in a given issue. Most importantly, the integrative approach of transnational dynamics would indicate both the negative, but also positive, interactions and gaps between the diverse regulating elements, which all together are pivotal in creating balance and sustainability. The concept of transnational law therefore provides a promising approach to legal pluralism. It could constitute an effective means to promote a more

integrative approach and shed light on the contribution international law could make to promote integrated sustainable development.

However, transnational law is still a work-in-progress and in the early stages of its development. Studies dedicated to adopting a transnational law have developed. However, much remains to be understood, agreed upon and studied in practice for the concept. It needs to consolidate its potential as a suitable and effective integrative approach to transboundary issues. TNL is indeed challenging but has great potential in a transboundary context. Additional studies into transnational law are needed and advocated in the literature. Considering the strong development of TNL in the literature, a more practical study is especially needed regarding the application and insights of transnational law in specific contexts. The importance and heightened complexity of transboundary issues mentioned above make these issues a most fitting and practical test case for a transnational legal approach to be developed. This especially complex and representative set of issues can provide the context to understand and develop more in-depth transnational law. TNL could be used as a lens capturing more efficiently the plurality and interconnections within regulation to promote more integration.

The thesis therefore aims to build on the theoretical concept of transnational law, often considered in the context of the reflection on modern international law and pluralism. In building upon the early promise of transnational law, this thesis moves beyond current scholarship, to consider how transnational law might be applied, particularly within a transboundary context, to better understand international law's existing and potential contribution to the drive towards integrated sustainable development.

The thesis will develop the concept of transnational law, found under different forms in the existing literature. The main characteristics of the concept in theory will contribute to the design of an analytical framework to frame efficiently a transboundary issue. This analytical framework will also put TNL in a practical context and test its design in a case study. It will improve the development and understanding of the concept. The development of a TNL analytical framework could then potentially inform the design of a tool or methodology applicable to various transboundary issues and that could fill the existing gaps in the governance models of transboundary basin issues.

The transnational law approach developed in this thesis will suggest a broader and more pluralist approach to transboundary issues. It would include traditionally legal and non-legal elements and would consider the cross-cutting and diverse types of dynamics taking place. For instance, a transnational law approach could include as a normative influence the protests and claims of local communities over overseas projects affecting their socio-

environmental interest as well as creating economic concerns.[18] The adoption of this new approach would then create a more accurate representation of the legal environment of an issue and lead to a more informed, effective and integrated legal analysis. This improved mapping of the legal environment of the issue would offer a deeper insight into the diverse interactions, gaps, conflicts and synergies, occurring and influencing the legal environment. Through the more complete and diverse legal mapping of a given issue, a better understanding of the mutually reinforcing interlinkages can lead to supporting the 3 pillars of integrated sustainable development through international law.

The thesis will focus on developing the concept of transnational law in relation to the specific context of transboundary issues. As mentioned before, transboundary issues are crucial, recurrent, and representative of the challenge within sustainable development policy to have an adequate regulation of heightened pluralism and complex cross-cutting dynamics. The specific difficulties raised in transboundary issues touch on the classification of the actors, scales and regimes relevant to an issue. The traditional classifications tend to frame the regulating elements as being part of a single category, such as being part of one scale and jurisdiction, as being either traditionally legal or non-legal sources, or as being either solely economic, environmental or social in the nature of the issue. A more integrated, but also non-traditional nor compartmentalised, approach needs to be taken in policy and international law. Transnational law offers such an approach through its emphasis on cross-cutting normative elements. Transboundary issues are therefore a suitable test case for a TNL approach and a valuable learning experience to comprehend better how international law can contribute to integration.

Therefore, the thesis will consider the following inquiry into transnational law in a transboundary context, to guide a general reflection on the role and contribution that international law can make to promote a more integrated sustainable development:

‘Can a transnational law approach offer an effective means by which to capture the plurality of actors, scales and regimes and their interactions, and in turn deepen understanding of international law’s contribution to integrated sustainable development within a transboundary context, such as hydropower development on the Mekong river basin?’

The thesis will address this research question by conducting a doctrinal study of the current contribution of international law to the goal of integrated sustainable development and the contribution it should make. The legal analysis will consider specifically the position of legal notions related to integration, such as legal pluralism and

[18] See for example Thai communities’ claims for overseas projects ‘Xayaburi dam lawsuit (re Laos & Thailand)’ (*Business & Human Rights Resource Centre*) <www.business-humanrights.org/en/xayaburi-dam-lawsuit-re-laos-thailand> accessed 30 October 2019, para. 1 and para. 3-4

the conflict of laws. The thesis will develop on the legal theoretical concept of transnational law as the pivotal notion in the study of the international legal system and integration. The main sources of references in this context will include both primary and secondary legal sources, such as international treaties, general principles of international and legal reports, and key policy documents that have a key role in international law and on the goal of integration including such as the 2030 Agenda.[19] The doctrinal study, both developing on the theoretical understanding of transnational law and designing an analytical framework to guide a transnational law approach, will lead to and be completed by a pilot test.

The pilot test, or case study, will add a much needed and unique perspective to the inquiry into transnational law as a more practical, specific but insightful, staging and application of the concept. It will allow further exploration of transnational law by contextualising it. This will in turn enlighten a TNL approach, the characteristics, strengths and weaknesses of the concept when developed in a transboundary issue. Several authors have considered the contextualisation of transnational law as essential to move forward with the concept, both in theory and in a more practical use within the international legal system.[20] Therefore, the pilot test is building upon the examination of the concept of transnational law and using the specific context of transboundary issues. The case is then viewed through the lens of a transnational law analytical framework designed in the thesis in order to move beyond the theoretical discourse related to transnational law. The case study will both test and evaluate the concept of transnational law in the specific context of transboundary basin issues and it will suggest unique insights into the inquiry of international law and its contribution to integrated sustainable development.

This case study is a crucial step to understanding better the relationship between international law and the objective of integration set in sustainable development policy within transboundary issues. It presents in a new light the role and contribution of international law in relation to promoting an integrative regulation. The study of a specific transboundary issue is then crucial to consider and test a more efficient and appropriate approach to enlighten the specific features of transboundary issues, which is one of the most complex but widespread types of issues to integrate.

The case study that will be examined in the thesis is focused on the transboundary issue of the development of large hydropower projects on the Mekong River Basin. This

[19] UN General Assembly, resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' 70/1, 25 September 2015

[20] See for example Peer Zumbansen, 'Where the Wild Things Are: Journeys to Transnational Legal Order, and Back' (2016) 1 *UC Irvine Journal of International, Transnational and Comparative Law* 161, 189

case is representative of issues faced with pluralism and lack of integration, especially exacerbated in the context of a transboundary situation. This case study is key in the unique insights it can offer into the inquiry of a more sustainable practice of hydropower development. This is indeed a common concern in transboundary basins and central in the Mekong river basin. This subject-matter also relates to the various international laws, actors and scales that apply in this context.

Hydropower transboundary issues are relevant and representative as they are currently and rapidly growing, especially in developing countries. It is an important means to achieve renewable energy, economic development, poverty reduction and a perceived more environmental-friendly source of energy. Critics surrounding large dams point out the lack of integration and balance between economic, environmental and social interests, as well as the disconnections between scales and the different actors. These imbalances are creating unsustainable projects and potentially irreversible damages.

Specific issues related to pluralism and a lack of integration in transboundary basins are well represented in hydropower regulation. Oppositions of regimes and interests are deeply rooted in hydropower regulation already in national agendas and rules, which are the first influence on the regulation of hydropower in transboundary basins. In addition, oppositions can arise at the international level between the different riparian states in relation to the often-dissonant national priorities. For instance, upstream and downstream countries' needs and uses of water resources differ. The implantation of hydropower dams along a shared river can create conflicts when changing the flow and quantity of the river. The transboundary hydropower projects can also the increase the problems related to scale and range of regulation. These projects have a cross-border nature from the transboundary basins and from the impacts of large dams on rivers. It increases the potential for the misrepresentation of some actors and some interests. They would traditionally fall outside the range set to govern a national hydropower project within international law. International law cannot appropriately account for transboundary natural resources or for transboundary actors, which are governed by other scales especially the national one. Finally, hydropower governance also embodies the deep gap and characteristic imbalance between the three pillars of sustainable development. These projects often the focus on economic, investment and trade benefits at the expense of environmental and social interests, like fisheries or use of the river by nearby communities.

In the case of the Mekong river basin, the lack of integration of actors, scales and regimes involved in hydropower development is evident. This case study points out a partial and fragmented approach to regulating legal pluralism and the interlinkages between the various normative elements involved.

Hydropower regulation in the Mekong river basin displays a variety of affected scales. They develop their normative discourses on hydropower projects mostly independently while being disconnected from other scales. These scales and their related actors pursue certain interests which can develop independently. The riparian States are at the centre of hydropower decision-making and often consider the development of large dams a national issue, like for Laos and China. Local communities along the river are primarily represented through their State. So, despite being the most directly affected by the projects, the local scale and communities are then often less visible and normatively influential. The communities' participation in decision-making is often limited to the window defined by their own state, in terms of time, geographical space, representation of their more vulnerable status, and with regards to the specific needs of these populations. The regional scale, closest to the geographical basin level of regulation, holds a key position in hydropower development. This is especially visible and operated through the regional basin organisation Mekong River Commission (MRC). The MRC, and other basin level actors, present an increasingly diverse set of interests. However, the MRC's connection and influence on hydropower regulation is greatly dependent on the good faith engagement and cooperation of the riparian states. International actors and regimes also play a great role in hydropower development in the Mekong. But their influence and participation depend on the importance given to them within the basin, especially by the riparian states.

The scale of international law should be able to provide an overarching and unifying vision of the various actors, scales and regimes applying to hydropower projects. However, international law is generally viewed instead as maintaining a separation between the traditional legal actors and sources and the others mentioned above. Hydropower regulation in the Mekong river basin then displays a clear distinction and imbalance between States and national regulation promoting projects for economic benefits, using legal instruments such as international loans or energy concessions, and soft law recommendations on environmental and social interests, promoted by less authoritative actors like NGOs, regional groups or local communities. This partial account of what actors or scales are most legally authoritative, enforceable, or influential can lead to the lack of legal pluralism and integration mentioned earlier.

The fragmentation of the scales of regulations, positions of actors, and the diverging economic, environmental and social interests in hydropower projects is evident in the Mekong river basin. This fragmentated approach to the plural environment in the basin is creating a complex and imbalanced situation where States and economic and national interests are privileged. The patchwork of normative elements shows disconnections between elements considered either isolated from each other or as irreconcilable, like between the economic national priorities or the local and regional socio-environmental

interests. This partial and fragmented approach has crucial consequences in hydropower regulation in the basin because of the transboundary nature and impacts of the projects. The transboundary and trans-category nature of the plurality of actors, scales and regimes mentioned above are also not effectively represented and taken into account within either scale. For example, the local communities are not only represented mostly through the national scale and through their States, but the transboundary impact on communities on each side of a border cannot be considered in its entirety. Each community has to report to its own State and transboundary impacts of a national hydropower project on the Mekong will generally be ignored, as it goes beyond the national scale and jurisdiction. These gaps and fragmentation are highlighting an ineffective governance system for transboundary issues like hydropower development on transboundary river basins, which lead to devastating imbalances and unsustainable development.

The challenges faced in link with legal pluralism and with a fragmented legal approach in transboundary issues are well represented in the issue of hydropower development in the Mekong river basin. The transboundary nature of the shared river and the multi-dimensional implications of water regulation in hydropower create evident cross-cutting dynamics, across various scales, actors and regimes. The characteristically unsustainable and devastating effects of hydropower development on the socio-environmental aspects of the basin, for economic and energy purposes, illustrate the call for a more integrated and transboundary legal environment. The transnational law approach advanced in this thesis can rearticulate the challenges and opportunities occurring in the Mekong basin with a deeper understanding of the gaps, conflicts and synergies between the different normative elements influencing hydropower regulation. The approach promoted by transnational law could contribute to advancing more integrated sustainable development at the transboundary level, exemplified in transboundary basin issues.

The development of the inquiry into international law's contribution to integrated sustainable development will be unpacked through several key questions. These questions will guide the reflection on pivotal concepts of integration, legal pluralism and transnational law and the different dimensions of the general research question.

The thesis considers first the objective of integration, consecrated by sustainable development policy and instruments. The promotion of integration also creates a momentum to look more closely at its implementation, notably through international law. It can be formulated as a reflection on 'how has the objective of integration been placed at the centre of sustainable development policy to respond to global challenges of pluralism and how it prompts a reflection into the role of international law in promoting this goal?' The first chapter is therefore dedicated to considering the objective and the desired outcome of integrated sustainable development and what it entails. It examines the

process and justifications for promoting integration in sustainable development policy. Then, the chapter introduces the instruments developed for that purpose, especially the Sustainable Development Goals (SDGs) and integrative approaches like the nexus approach or Integrated Water Resources Management (IWRM). This will in turn lay out the importance of the consideration of pluralism and interconnections at the heart of integration. More specifically, it promotes the need to highlight the converging dynamics and synergies between the three pillars, the SDGs or the elements set as part of a nexus for instance, instead of perpetuating the idea of a disconnected approach and the exclusive or conflictual dynamics between them. The operationalisation of the objective of integration though these instruments and approaches call for a reflection on the role of international law in helping achieve integrated sustainable development.

From the drive to reflect on the role of international law to promote integration, the second chapter considers the current contribution made to this objective. The second chapter tackles the assessment of 'how have international legal theory and practice responded to the increasingly pluralist and fragmented nature of transboundary issues?' The chapter will also pose the reflection of 'how do hydropower transboundary issues illustrate the need for a more integrative legal approach?' First, this chapter will examine the attention given to legal pluralism and interconnection within international legal theory and practice until now. This will allow the inquiry to establish the current contribution of international law to integrated sustainable development and the gaps to be addressed in the system to make a more effective contribution. These gaps are then examined in relation to the issue of hydropower development on a transboundary river. The case study will demonstrate the lack of integration in international law between the diverse regimes, scales and actors influencing the legal environment of hydropower projects. The second chapter crucially reflects on the gaps in the contribution of international law towards a more integrated sustainable development. It points out detrimental consequences of a fragmented and limited approach to transboundary issues. The chapter shows that the misrepresentation, and then misled analysis, of the broader and more diverse legal environment of hydropower issues (as framed by a limited traditional international law) can cause a mismatching development and application of legal rules to the case. It can even create the reinforcement of dominant and authoritative legal sources and actors, such as States, and their interests, often economical. However, the chapter introduces promising developments, both in international legal practice and theory. It introduces the possibility of a more pluralist approach, which would be more sensitive to synergies and mutually reinforcing dynamics. These positive dynamics can fill the gaps of how traditional international law approaches transboundary issues and can guide the contribution to a more integrated approach.

The overall reflection on offering a more integrative approach within international law can be advanced through the specific concept of transnational law. The third chapter therefore considers the question ‘Can transnational law provide the type of pluralist, holistic and interconnected approach to various actors, scales and regimes, which is needed to advance sustainable development within a transboundary context?’ The chapter examines how the theoretical legal concept offers a more pluralist, holistic and interconnected approach to transboundary issues. It does so by engaging with the notion of the borders, boundaries and compartmentalisation found in and limiting the traditional international legal approach. The third chapter also considers how the concept of transnational law can be developed in an analytical framework to suggest a way to examine transboundary issues with an integrated, transnational law approach.

A final question formulated to unpack the inquiry into the contribution of international law to integrated sustainable development (with a transnational law approach) looks at the specific context of transboundary issues. Testing a transnational law approach within the legal environment of hydropower development on the Mekong river basin contributes to enlightening the key insights that can be gained from the concept for a more effective integrated application of international law in the context of transboundary issues. The fourth chapter will therefore ask ‘How can a transnational law analytical framework offer a more integrated way to approach and regulate transboundary issues, through the case study of hydropower developments in the Lower Mekong River Basin?’ This contextualisation will provide for more practical and illustrated insights into the valuable attributes of a transnational law approach.

This final chapter will be able to draw conclusions from the different elements presented in the previous chapters. The precedent chapters have touched upon the objective of integrated sustainable development and what this entails; the current contribution international law makes to this objective and the one it could make through the use of a transnational law approach, positioned as more pluralist, holistic and interconnected; and the study of this approach in the case of hydropower development in the Mekong river basin. The key insights gained from a transnational law approach, as well as the challenges it can face, can provide a clearer evaluation on the potential and limits of the concept of transnational law in providing a more integrated approach to legal environments. The consideration of a more general application and transferability of transnational law to other transboundary issues is also important. It will help understanding the broad contribution of international law and the possibility of future studies and case studies. The contribution of international law to integrated sustainable development can be made more effective by improving its approach to pluralism and interconnections within the complex legal environments it applies to, especially so in transboundary issues.

The thesis and its inquiry into the contribution of international law towards integrated sustainable development bring valuable insights into the current state of international law, into the growing need for more integration in policy and law, and for a more effective and balanced regulation of transboundary issues. In addition, more understanding of the concept of transnational law and of the specific legal environment of hydropower development on transboundary rivers, like the Mekong river basin, emerges from the study.

The outcomes of this research therefore shed a new light on the academic debates mentioned about integrated sustainable development and legal pluralism in international law. But it also brings a practical insight on the way hydropower development projects are regulated within a transboundary basin context. The association of the theoretical concept of transnational law and the specific contextualisation in a transboundary issue can offer unique insights into the way forward for international law and integration. The conclusions emerging from the study of a transnational law approach to transboundary issue could be taken further by developing an assessment tool to identify the current gaps in the international legal system pertaining to transboundary issues or to use as a basis for revising existing transboundary governance arrangements with the objective of integration in mind.

The overall reasoning and process of reflection is summarized in Diagram 1 below. This diagram reflects the work of the three first chapters. This overall outlook will be broken down into three parts to consider at the beginning of each chapter (1 to 3). It will participate to show their individual contributions to the research question and unfolding the process of reflection. The first part on the left of the diagram, corresponding to Chapter 1, will demonstrate the multiplication and diversification of actors, scales and regimes within sustainable development. This phenomenon can lead to unsustainability because of the diverse interests not balanced, which creates extreme trade-offs and privileges a certain interest over others. The grey arrow illustrates the overall objective of integrated sustainable development (ISD, green box) within policy to correct the imbalance and unsustainability mentioned before. This overall goal will need to create integration amongst the diverse actors, scales and regimes involved in sustainable development (small green arrow on the left).

The second part of the diagram, on the right hand, illustrates the relation of this objective to law and the contribution of international law to ISD (big green arrow on the right). This contribution of international law constitutes the research question of this research. International law also has to create or support integration amongst the same diversity of actors, scales and regimes, which is referred to legal pluralism within the legal discipline

(the full blue arrow ‘translates into’). A key challenge to the contribution of international law is its relation to legal pluralism, considered in Chapter 2 as inadapted or inaccurate (red arrow and red box on the right). Therefore, to answer this thesis’ research question, it is necessary to study the relation to legal pluralism. This thesis will explore this relation with the concept of Transnational Law (TNL) to better address legal pluralism and then provide more integration in the legal environment of an issue.

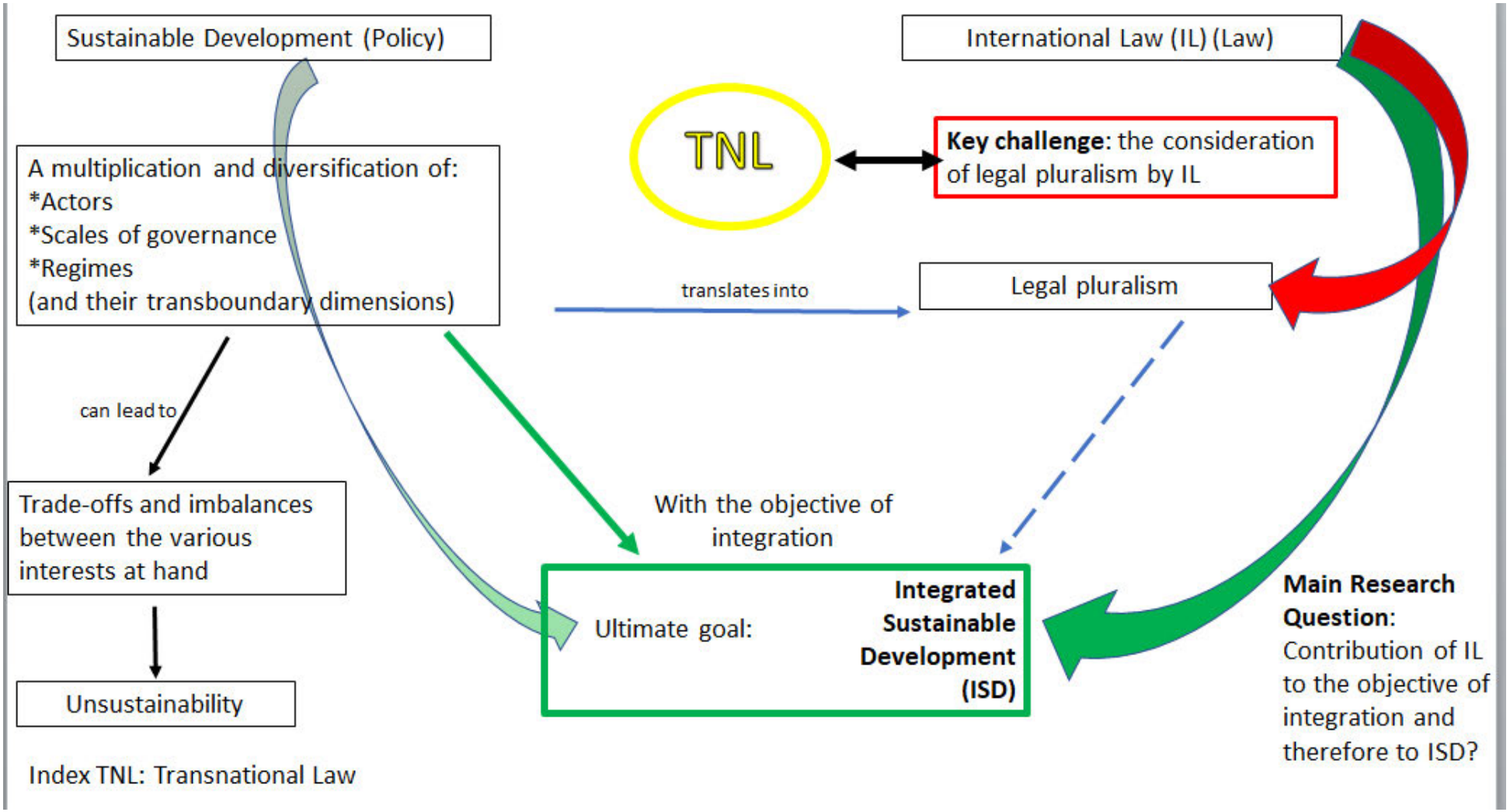

Diagram 1: Overall thesis diagram: The overall goal of Integrated Sustainable Development and the contribution of international law

Chapter 1: The promotion of integration within sustainable development: from the SDGs and nexus approach to transnational law

This chapter will examine the evolution of sustainable development policy towards the central objective of integration. This objective is meant to palliate the imbalances and tensions often occurring between the economic, environmental and social aspects of development and creating create global challenges. Integration is then expected to achieve a more sustainable regulation of increasingly complex issues. The momentum around integration and the changes it motivated in sustainable development policy also bring to the forefront the instruments meant to implement integration. Amongst these ways to achieve integrated sustainable development, the recognition of the role and suitability of international law is important in regulating complex issues and implementing such policies. As a summary of the process of reflection in this chapter, the diagram below can be used to consider the positioning of Integrated Sustainable Development (and of the objective of integration to reach it) as the ultimate goal. This goal is important because the alternative and consequences of a non-integrated approach to the many interests involved are extreme trade-offs and unsustainability.

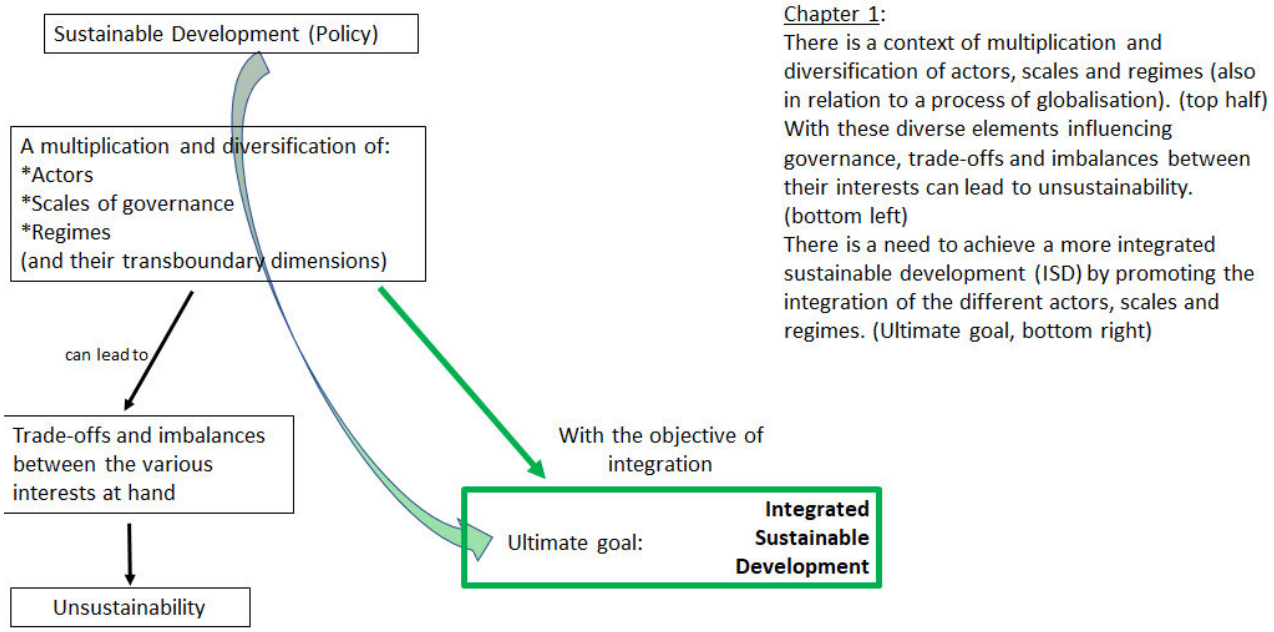

Diagram 2: Chapter 1: the goal of integrated sustainable development to manage pluralism and unsustainability

I- The evolution of the roles of economic, environment and social aspects of development in policy: the global challenges to sustainability and the need for a pluralist and interconnected approach

This section introduces the evolution of policy in promoting integration between the 3 pillars of economic, environmental and social fields. First, the description of the global challenges generally faced from the lack of integration and plurality in regulation will allow to introduce the drive and the reasoning behind the promotion of a more balanced, informed and sustainable development.

It is now well established that a one-dimensional development approach has failed to lead to a sustainable development. Until recently, policy choices have privileged economic growth and benefits as a way to achieve overall development. This economic drive for development has been conducted at the expense of the other two pillars of social and environmental concerns.[21] For example, the use of land and resources for industrial and urban development, or to develop crops for exportation, has generally led to an increase in the countries' income. However, it has also created considerable damages to the environment and to populations, such as deforestation affecting local populations and more generally the ecosystem of flora and fauna, as well as greenhouse gases or natural resources. A general consensus has come to recognise that 'while conventional development brings economic and social benefits, it also damages the environment and people who depend on it, this offsetting to a significant degree the benefits it creates'.[22] The costs on the environment and social aspects have been criticized and have questioned an only-economic take on sustainable development.[23] Sustainable development has since evolved with the growing concerns over environmental and social costs and with the advancement of these respective concerns in response to unfulfilled and dire needs for environmental and social protection.

Concerns for both environmental and social needs have therefore progressively gained importance within sustainable development policy and regulation. Environmental conferences and discussions have expanded from specific issues to more general and wide-ranging topics. International conference on waste disposal, water resources protection or carbon emissions have expanded to broad environment concerns with, for

[21] J. Gupta and C. Vegelin, 'Sustainable development goals and inclusive development' (2016) 16(2) *International Environmental Agreements: Politics, Law and Economics,* 434
[22] John C. Dernbach and Federico Cheever, 'Sustainable and its discontents' (2015) 4(2) *Transnational Environmental Law* 247, 252
[23] C. A. Scott, M. Kurian and J. L. Wescoat Jr., 'The Water-Energy-Food Nexus: Enhancing Adaptive Capacity to Complex Global Challenges' in Matthew Kurian and Reza Ardakanian (eds) *Governing the Nexus. Water, Soil and Waste Resources Considering Global Change* (Springer Link 2015) 15-38, 15

example, the 1992 Rio conference on the environment and development.[24] On the other hand, the attention given to individuals and human rights has also expanded in its range and topics. Subject areas such as gender equality and inclusiveness or a right to education are now widely studied, as well as the impact of such extended human rights on the regulation of development. Both social and environmental concerns have grown to be central and an integral part of development, as much as their economic counterpart. From these considerations, the realisation of a strong link between economic, environment and social aspects of development has been recognised and established for more than twenty years.[25] The consecration of these fields as the indivisible 'three pillars' of sustainable development, notably in the 1992 Rio Conference[26], has crystalized the acceptance of this threefold development. More recently, the 2012 UN Conference on Sustainable Development (Rio+20) outcome document 'The future we want' also confirmed the three pillars as all fundamental for sustainable development.[27] Therefore, there has been an effort within sustainable development policies to take into account the multi-dimensional nature of the issues it regulates. This implies to recognise the plurality of regimes, scales and actors involved in a single issue. To approach a complex developmental issue in an integrated way aims at acknowledging the plurality of fields, including economic, environmental and social interests, as well as the various actors it involves and scales at which regulation of the issue takes place. The notion of the three pillars also aims to addressing these facets of an issue in an integrated way and not separately.

[24] Daniel Bodansky, *The art and craft of international environmental law* (Harvard University Press 2010); 1992 UN Conference on Environment and Development (Earth Summit); Wladyslawa Luczka, 'Green Economy and bioeconomy concepts in the context of sustainable development' (2018) *Ekonomia i Srodowisko*, 9 'a continuous process focused on ensuring balance between the economic, environmental and social subsystems'

[25] I. Boas, F. Biermann and N. Kanie, 'Cross-sectoral strategies in global sustainability governance: towards a nexus approach' (2016) 16(3) *International Environmental Agreements: Politics and Economics,* 449; UN General Assembly, resolution 'Economic Development and the Conservation of Nature' 1831 (XVII), 18 December 1962. It considers that economic development cannot take place without consideration for natural resources and nature conservation.

[26] P. Birnie, A. Boyle and C. Redgwell, *International law and the environment* (Third Edition, *OUP* 2009), 53-54

[27] UN General Assembly, resolution 'The future we want' 66/288, 27 July 2012

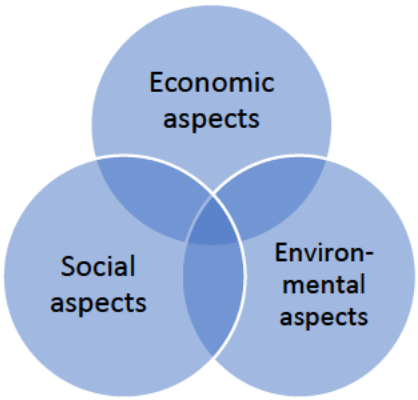

Diagram 3: The 'three pillars' of sustainable development

Despite the promotion of the 3 pillars and of a more pluralist approach to issues for sustainable development, challenges remain in policy. The entrenched idea that economic, environmental and social aspects are exclusive of each other and amounting to important and costly trade-offs, has created challenges to promoting the idea of integration and balance between the 3 pillars. The historically separate development of each field, with their respective policies and legal regimes for instance, has also participated to considering the three pillars as distinct or isolated. This mindset has made it complex to suggest a mutually beneficial or complementary view of the three fields, functioning very differently.

The difficulty of articulating an integrated approach to the plurality of interests within an issue limits the possibility to have an informed, balanced regulation. This remains an obstacle to promoting sustainable development. This gap in sustainable development policy has justified and motivated a greater emphasis on the interdependence of the 3 pillars and on the need for a more pluralist, holistic and interconnected approach. The idea of interactions and interdependence between the three fields then shifts the attention from their negative, exclusive and competing relationship. A more integrated outlook then suggests and highlights their potential synergies and mutually reinforcing potential. An example of the greater attention to interconnection and interdependence between the 3 pillars can be illustrated by the work developed on a more 'wedding cake' type of illustration, as compared to the Diagram 1 used above.[28] In this representation, the economy, society and the biosphere are goals promoted together and the realisation of

[28] Stockholm Resilience Centre, 'How food connects all the SDGs' (*Stockholm Resilience Centre*, n/a) <www.stockholmresilience.org/research/research-news/2016-06-14-how-food-connects-all-the-sdgs.html> accessed 27 May 2020 'The new illustration (…) (credit: Azote Images for Stockholm Resilience Centre, Stockholm University) is based on one of the iconic figures of the centre, "the wedding cake", developed by centre science director Carl Folke and others. It implies that economies and societies are seen as embedded parts of the biosphere. This model changes our paradigm for development, moving away from the current sectorial approach where social, economic, and ecological development are seen as separate parts. Now, we must transition toward a world logic where the economy serves society so that it evolves within the safe operating space of the planet.'

one is dependent on other goals within different categories. As opposed to Diagram 1, the interdependence and overlapping objectives of economic, social and environmental aspects are clear and fully part of development.

Diagram 4: The 'wedding cake model' representation of the SDGs

With time, sustainable development policy has focused on promoting the objective of integration to take into account all the fields, of economic, social and environmental concerns. From the idea that each of these fields are inherently exclusive or in competition with one another, the objective of integration has emphasized that the interconnections and positive linkages, such as a combined and synergetic goal between the three fields, are at the core of a more balanced and sustainable development.

II- Integration in sustainable development policy: the objective and the means to this end.

The objective of integration is at the centre of sustainable development as a *sine qua non* condition and a desired outcome for an informed and balanced development.[29] This section will introduce the importance given to integration, what it entails and how it is operationalize through policy instruments. Finally, the section will consider what this objective of integrated sustainable development implies for international law.

A-The objective of integration: the requirement of a pluralist, holistic and interconnected approach to regulate global complex issues

Integration is one of the key principles at the root of the 2030 Agenda, promoted by Rio+20, and currently under implementation by the international community. The concept of integration is considered by authors as the main principle of sustainable development

[29] O. Varis, K. Enckell and M. Keskinen, 'Integrated water resources management: horizontal and vertical explorations and the 'water in all policies' approach' (2014) 30(3) *International Journal of Water Resources Development* 433, 433

[30], one of the key principles[31], or at least as an important concept derived from the main principles of sustainable development[32]. Therefore, it is recognized within policy and among scholars that integration should be at the centre of sustainable development, if not be the centre of sustainable development.[33]

Integration aims to reduce the negative trade-offs and contradictions that can arise from pursuing various policies of development, in isolation from the others, where the different interests can be potentially competing.[34] With greater integration, less counterproductive, adverse effects of the plurality and fragmentation of sustainable development might be felt. Greater understanding, coherence and therefore, efficiency are expected[35] from integrating the three pillars and from a more general integration. As Landberg points out, this is not an easy task but 'it must be accomplished for the sake of a sound and sustainable development'.[36] Despite integration being a widely accepted concept in sustainable development and its desired effect being clear[37], it remains a complex and multi-dimensional concept, as well as being challenging to implement and evaluate. No clear definition is set for the concept of integration in global sustainable development literature or in international law.[38] Various definitions of integration have been considered by scholars with the aim to be more specific on what is to be integrated and the criteria of its realisation.[39] The following paragraph will therefore briefly address some definitions and facets of integration and the meaning used in the present research.

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[30] J. Pittock, K. Hussey and S. Dovers, 'Justifying, extending and applying "nexus" thinking in the quest for sustainable development' in Jamie Pittock, Karen Hussey and Stephen Dovers *Climate, Energy and water* (CUP 2015), 'The fundamental tenet of sustainable development remains: policy integration and co-ordination across sectors to attend to linkages and interdependencies';
Klaus Bosselmann, *The principle of sustainability: transforming law and governance* (2nd Edition, *Routledge* 2016), 61

[31] Alhaji B. M. Marong, 'From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development' (2003) 16 *Georgetown International Environmental Law Review*, 60 and 24

[32] Ibid 59; Rakhyun E. Kim, 'The nexus between international law and the sustainable development goals' (2016) 25(1) *Review of European, Comparative & International Environmental Law* 15, 25

[33] Marong (n 31) 63

[34] F. Biermann, N. Kanie and R. E. Kim, 'Global governance by goal-setting: the novel approach of the UN Sustainable Development Goals' (2017) 26-27 *Current Opinion in Environmental Sustainability*, 28

[35] J. Tosun and J. Leininger, 'Governing the Interlinkages between the Sustainable Development Goals: Approaches to Attain Policy Integration' (2017) 1(9) *Global Challenges*

[36] Sophie Landberg, 'Sustainable development of water resources in the Mekong River Basin: Legal and policy implications of dams in the regional context' (2012) 5(1) *Journal of East Asia and International Law*, 258

[37] Bodansky (n 24) 33

[38] Casey Stevens, 'Scales of integration for sustainable development governance' (2018) 25(1) *International Journal of Sustainable Development & World Ecology*, 1

[39] Helen Briassoulis, *Policy Integration for Complex Environmental Problems. The Example of Mediterranean Desertification* (Routledge 2017), 55-56, 'The object of integration can be studied along various dimensions, such as vertical (integrating environmental concerns into sectors), horizontal (issue-based and intersectoral integration), thematic/substantive (integration of social,

The first type of integration introduced here is the principle of 'policy' integration. Policy integration has been defined by Briassoulis as aiming to achieve at the same time 'one or more goals, such as efficient and effective environmental protection, socio-economic cohesion, smooth and equitable service delivery, or sustainable development more generally'.[40] Policy integration can be thought as implementing simultaneously two or more policies, relating to different fields or 'thematics'[41], for instance economics and environment. Its overall aim is then to avoid conflicts between the different policies pursued. Then, despite the relative uncertainty surrounding how to achieve and evaluate policy integration, various components can play a role and indicate the degree of convergence and complementarity between policies.[42] In turn, this can help identify if the various directions taken would achieve policy integration.[43] 'Policy integration' is often the concept referred to within sustainable development[44], most likely due to the importance given to integrating the policy fields of the three pillars.

Other types of integration have been explored by scholars and have broadened the understanding and scope of what this objective means within sustainable development. Integration can reside in a focus on vertical integration. Vertical integration emphasizes on the adequate implementation of global policies within the national context, from top to bottom or from the largest scale of regulation to the smallest.[45] On the other hand, horizontal integration aims to ensure that integration is achieved between regimes, actors or categories on the same level.[46] For example, horizontal integration makes sure the decision from one actor or within one field is considered by other actors and fields. A coherence and unity at one level can then be achieved. Finally, another interesting type of integration in the context of sustainable development, recently at the centre of policymaking, addresses the integration of all actors and beneficiaries of development. The clear goal of 'no one left behind'[47], and the progressive recognition of the numerous and diverse of actors involved in these issues, require of sustainable development to integrate all types of actors (States, NGOs, international institutions, communities…), actively trying to participate in achieving sustainable development. But this type of

environmental and economic dimensions, of sector strategies), spatial (integration of the same and across spatial levels), temporal, procedural (administrative jurisdictions, instruments, coordination, cooperation and subsidiarity, capacity for integration), methodological (harmonization/synthesis of different assessment methods, tools and terminologies, information sharing), and conceptual (terminologies).'

[40] Ibid 50

[41] Ibid 64

[42] Ibid

[43] Ibid 57

[44] Stevens (n 38) 1

[45] A. Persson, N. Weitz, and M. Nilsson, 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization' (2016) 25(1) *Review of European, Comparative & International Environmental Law*

[46] Varis, Enckell and Keskinen (n 29) 433

[47] 2030 Agenda (n 19), Preamble

integration also emphasizes on including all beneficiaries, especially vulnerable ones (children, indigenous people, women, developing countries…). This type of integration is more specifically referred to as 'inclusive' development.[48]

In summary, there are multiple ways to understand and define the objective integration within sustainable development. It can refer to the inclusion of all actors, across different scales and between various fields (economic, environmental and others), within one or more sectors (policy, law, science and more).

The need for integration within sustainable development is gaining importance and priority. Its assumed benefits of coherence and synergy are viewed as a precondition to realize the 'three pillars' vision and a sustainable development. Integration can however refer to different aspects of inclusion. The present research will refer to integration as a general terminology, bearing in mind that the concept is manifold and can include the integration of policy instruments, space and regulatory scale, both vertically and horizontally, and especially actors, with a priority of inclusiveness in the 2030 Agenda. It can be noted that further study might be needed to consider in more depth one type of integration or another within the present inquiry.

It is worth mentioning that, apart from its crystallization in official documents and roadmaps of sustainable development policy, the implementation of integration can already be observed. Crossovers and joint works are operated by some institutions, fora and conferences as well as through substantive principles. Some institutions, also due to the nature of their mandate, have included several aspects of sustainable development and referred to more than one of the pillars. For example, the United Nations Industrial Development Organization (UNIDO) and the Food and Agriculture Organization (FAO) are partnering on the theme of development and creating joint activities where both of their actions are combined and mutually reinforcing.[49] Part of the work of integration within sustainable development is done through substantive concepts and instruments. These concepts or principles are typically broad, multi-disciplinary, multi-actors and multi-scalar. Whether they were meant to be used throughout different fields or their scope extended beyond the original intention and discipline they emerged from, these principles can be found in several contexts. An example of multi-disciplinary concept to create integration are the precautionary principle and preventive principle.[50] Both concepts are initially

[48] Karin Arts, 'Inclusive sustainable development: a human rights perspective' (2017) 24 *Current opinion in environmental sustainability* 58-62, 58

[49] 'Partnerships with international development organizations' (UNIDO) <https://www.unido.org/our-focus/cross-cutting-services/partnerships-prosperity/partnerships-international-development-organizations> accessed 12 March 2021

[50] Regarding the precautionary principle see James Cameron and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment' (1991) 14 *Boston College International and Comparative Law Review* 1, 4; regarding the preventive principle see Philippe Sands and Jacqueline Peel, *Principles of*

cornerstones of environmental law but have also started to become more widely recognised as a principle of law.

Importantly, the promotion of integration within sustainable development policy has greatly relied on the key documents of the Millennium Developments Goals (MDGs) and Sustainable Development Goals (SDGs).[51] These successive agendas, respectively from 2000 to 2015 and 2015 to 2030, are the flagship instruments meant to bring about integration within sustainable development. They both articulate goals that both embody and represent integrated sustainable development and their implementation has also given rise to approaches implementing or developing the objective of integration in a larger spectrum.

B- Integration in sustainable development through the instruments of Sustainable Development Goals and other integrative approaches

The Sustainable Development Goals and other integrative approaches have been at the heart of the operationalization of the objective of integration, in both theory and practice. These instruments have highlighted and emphasized the diversity of priorities in sustainable development and their complex interlinkages. This has, in turn, helped to discern key clusters of integration and synergies between the parts and overall, so as to promote integration.

1/The SDGs: an ambitious instrument to achieve integrated sustainable development

In September 2015, the resolution 'Transforming our world: the 2030 Agenda for Sustainable Development' adopted the new goals for sustainable development policies.[52] The SDGs formulate 'a universal call to action to end poverty, protect the planet, and ensure that peace and prosperity will be enjoyed by all'.[53] As Janouskova et al. phrase it, the SDGs contribute to 'further mainstream sustainable development at all levels, integrating economic, social, and environmental aspects and recognizing their interlinkages, so as to achieve sustainable development in all its dimensions'.[54] The

International environmental law (CUP 2012), 200-201, see also the cases Iron Rhine Arbitration, Belgium v Netherlands, Award, ICGJ 373 (PCA 2005), 24th May 2005, Permanent Court of Arbitration [PCA] (Iron Rhine case); International Court of Justice (2010) Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay). International Court of Justice General List No. 135. Also available at http://www.icj-cij.org/docket/files/135/15877.pdf

[51] MDGs see United Nations General Assembly, 'United Nations Millennium Declaration' (2000) A/RES/55/2

[52] 2030 Agenda (n 19)

[53] S. Janouskova, T. Hak and B. Moldan, 'Global SDGs Assessments: Helping or Confusing Indicators?' (2018) 10(5) *Sustainability,* 4*;* J. Alcamo, C. Grundy and J. Scharlemann, 'Interactions among the sustainable development goals…and why they are important' (*University of Sussex and Institute of Development Studies, Sussex, UK*, 2018) <http://sro.sussex.ac.uk/id/eprint/77086/> accessed 27 May 2020, 1

[54] Janouskova, Hak and Moldan (n 53) 2

Agenda is composed of 17 goals, 169 targets and 232 indicators[55]. The SDGs themselves are built on the Millennium Development Goals (MDGs) and consider their successes and what was left to achieve.[56]

Ludovica Chiussi notes the SDGs are the 'means and end to sustainability'.[57] Following this assertion, it could be said that the SDGs are the means and end to sustainable development[58], and to one of its key objectives presented above, integration. The following part will examine first the SDGs as the 'end', with the mission to achieve integrated sustainable development. The second part will introduce how the SDGs are the instrument fostering integration as an action plan.

On the one hand, the SDGs are, through the role given to them, an end in themselves to achieving sustainable development in an integrated way. The preamble of the Agenda emphasizes that the SDGs 'are integrated and indivisible and balance the three dimensions of sustainable development: the economic, social and environment'.[59] This statement hints at the two aspects of integration mentioned in the previous section, considering the fundamental three pillars and a more general idea of integration. The SDGs are associated with integration on many levels: as their mission and goal; and within their structure, in an explicit or implicit way.

The Agenda has for mission to create integration and therefore participate to achieving (integrated) sustainable development. The process of creating the SDGs has shown a serious commitment of States and other institutions to the objective.[60] Then, the SDGs being operationalized in themselves would be the fulfilment of integrated sustainable development.

In addition, the structure of the Agenda itself reflects integration. The diversity of priorities set and the desire to tackle them with a single action agenda, is an embodiment of the pluralist and holistic approach of integration.[61] In addition to the form, the content, or substance, of the Agenda is crafted to explicitly or implicitly induce integration.[62] A

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[55] For the actualised list of SDG goals and targets, see United Nations, 'The 17 Goals' <https://sdgs.un.org/goals> accessed 2 March 2021. See the indicators, as of the refinement of the indicators list in March 2018. See United Nations General Assembly, 'Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development' (A/RES/71/313), Annex.
[56] 2030 Agenda (n 19) Preamble
[57] Ludovica Chiussi, 'The UN 2030 Agenda on Sustainable Development: Talking the talk, walking the walk?' (2016) *La Comunita Internazionale*, 49-70
[58] To the extent of sustainable development pursuing sustainability, in the most general sense. Some authors have argued that sustainable does not refer to sustainability and sustainability should be the actual objective to thrive for, but this will not be addressed here.
[59] 2030 Agenda (n 19) Preamble
[60] First example of this commitment is the unanimous vote of the States at United Nations General Assembly, see 'L'assemblée générale adopte un Programme de développement durable ambitieux pour « transformer notre monde » d'ici à 15 ans' (United Nations, 25 September 2015) <https://www.un.org/press/fr/2015/ag11688.doc.htm> accessed 11 March 2021
[61] Kim (n 32) 17
[62] Alcamo, Grundy and Scharlemann, (n 53) 23-24

statement in the text of the Agenda reminds the interrelations and interconnectedness of the issues dealt with in sustainable development.[63] In this sense, the document asserts that the general 'call for integrated solutions' is the new approach needed for sustainable development policy.[64] Quantitatively, the importance given to integration can also be hinted by the recurrence of the word 'integrated' (and related semantics, like 'integral'), used in the Introduction and Declaration of the 2030 Agenda on ten occasions. In contrast, the United Nations Millennium Declaration for the MDGs made no mention of the word.[65] In general, the MDGs, also due to their less diverse priorities, have been considered less committed towards integration than the SDGs.[66]

In addition to its overall structure, integration in the 2030 Agenda is most importantly created through the goals themselves. In their formulation, the term 'integrated' (and related semantics) is used five times, once respectively in the SDGs 6, 11, 12, 13 and 15. While acknowledging that other terms could indicate integration, the formulation is used limitedly. This can suggest that the integration of SDGs does not rely mainly on an explicit requirement within their wording. An implicit integration based on existing synergies, rather than formulated one, could be reflecting the integrated approach embedded in the overall Agenda[67], which considers the interconnections and cross-overs between the goals.[68] According to Le Blanc, 'the more goals and targets refer to one another, the easier integration arguably is, as development agencies concerned with a specific goal (e.g. energy or water) will have to take into account targets that refer to other goals in designing, implementing and monitoring their work'.[69] For instance, the SDG 17 on the means of implementation is a goal which relates to the implementation of each of the SDGs. It creates strong ties with the rest of the Agenda and therefore contributes to the Agenda's integration. Based on the idea that integration within the SDGs relies mostly on inherent synergies created between the goals, the following part will look at the way the Agenda emphasizes interlinkages as the means to foster integration. The Preamble of the Agenda formulates for the rest of the document that 'the interlinkages and integrated nature of the Sustainable Development Goals are of crucial importance in ensuring that

[63] 2030 Agenda (n 19)
[64] Ibid 5
[65] See United Nations General Assembly, 'United Nations Millennium Declaration' (2000) A/RES/55/2
[66] Boas, Biermann and Kanie (n 25) 450; M. Stafford-Smith, D. Griggs, O. Gaffney, F. Ullah, B. Reyers, N. Kanie, B. Stigson, P. Shrivastava, M. Leach, D. O'Connell, 'Integration: the key to implementing the Sustainable Development Goals' (2017) 12(6) *Sustainability Science*, 912
[67] 2030 Agenda (n 19) 6
[68] Briassoulis (n 39) 59-60
[69] David Le Blanc, 'Sustainable Development Goals and policy integration in the Nexus' in Felix Dodds and Jamie Bartram *The Water, Food, Energy and Climate Nexus. Challenges and an agenda for action* (Routledge 2016), 47

the purpose of the new Agenda is realized'.[70] Several studies[71] on the SDGs have revealed deeper implicit levels of interlinkages creating integration between different goals, targets and indicators[72]. These studies have evidenced, often more clearly than in the Agenda, links between topics, cross-implementation, common targets or the mention of other SDGs for example. [73] An interesting illustration of it is Le Blanc's research that uses a network theory to visually and quantitatively represent the different links between the SDGs and their depths.[74] This research establishes a number of strong, direct or indirect links between SDGs determining the most 'central' SDGs (that is, an SDG with the most links to the other SDGs), the more 'isolated' SDGs and SDGs relating strongly to each other in a sub-group or cluster. This groundwork included not only SDGs but their targets. These are often thought to be the crucial links of integration and interconnectedness between the SDGs.[75] Finally, this research is valuable in its uncovering of linkages between SDGs and targets, in the overall structure and through sub-groupings. It is also important in highlighting that, in adopting a certain perspective, one configuration of integration is exposed.[76] This study does not represent all links and synergies that can exist between all the SDGs. But Le Blanc has proved that new links and synergies can be evidenced by taking other fields' perspectives and by focusing on some sub-groups of the Agenda. In summary, the SDGs' Agenda and studies on interconnections create integration through the understanding and emphasis placed on the interlinkages within and between the SDGs. These specific instruments are a way to create more connection in each decision-making.

However, the SDGs have been criticized in their ability to effectively convey integration, as a means and as an end in itself. The thesis will introduce some of these critics so as to clarify to what extent the SDGs can indeed create integration.

First, the thematic integration and interlinkages between the SDGs are perceived as weak or lacking explicitness.[77] Le Blanc observes that regarding its wording, there is very little link already established between the goals of climate, land, energy and water, for

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[70] 2030 Agenda (n 19)
[71] See for example J A Pedrosa-Garcia, 'Mapping Synergies and Tradeoffs in the Sustainable Development Goals Network: A Case Study from Jordan'(2016) *UNESCWA Working papers E/ESCWA/SDD/2017/WP.2* <https://www.unescwa.org/sites/www.unescwa.org/files/page_attachments/synergies-tradeoffs-sdgs-network-jordan-advance-copy-en_0.pdf> accessed 2 March 2021; M. Nilsson, D. Griggs and M. Visbeck, 'Policy: map the interactions between Sustainable Development Goals' (2016) 534(7607) *Nature* 320, para. 4; Bhaduri, Bogardi et al. (n 6) 7
[72] Ibid 2
[73] Nilsson, Griggs and Visbeck (n 71) para. 4
[74] David Le Blanc, 'Towards integration at last? The sustainable development goals as a network of targets' (2015) UNDESA Working Paper No.41 ST/ESA2015/DWP/141
[75] Alcamo, Grundy and Scharlemann, (n 53) 2
[76] Le Blanc, 'Sustainable Development Goals' (n 69)
[77] Boas, Biermann and Kanie (n 25) 450; Arts (n 48) section 'Concluding remarks'

example.[78] However, the goals mentioned by Le Blanc are considered to be one of the most common cluster and nexus of interconnected interests among the SDGs. Even targets and indicators do not make mention of 'interlinkages' and 'synergies' with other SDGs. Stafford-Smith et al. notice that 'the implementation targets are largely silent about interlinkages and interdependencies among goals'.[79] In addition, the congruence between goals, which can be indicative of policy integration according to Briassoulis, can however be meaningless if it is based on vague wording and large scope of the goals and targets. These seemingly converging objectives can then fail to develop real integration.[80] Le Blanc notes that the SDGs do not, or poorly, reflect the links that are evidenced when goals are grouped by the most common associations used in the literature.[81] Secondly, the SDGs' Agenda divides opinions over its ambition and real value. Persson et al. note that 'some actors see a task of implementing a set of unrealistic and sprawling goals with no clear definition of sustainability guiding them'.[82] While others see the Agenda in a more ambitious, integrative and comprehensive light, the division between the different actors can weaken the importance of the SDGs in creating integration.[83] Its mission, but also its role as instrument and benchmark tool, can prove difficult.

In summary, it is clear that the 2030 Agenda and the SDGs aim to convey integration within sustainable development as a means and an end. It is designed to focus on interlinkages between different goals. However, the consideration of the SDGs must be nuanced with regards to their ability to deliver on integrated sustainable development. Without adhering to a more critical view of the SDGs as the main instrument of sustainable development action, being aware of the limitation of the SDGs is important. In the context of the pursuit of integration and of the consideration of the role of international law in fulfilling this objective, the idea that complementary tools or approaches might be needed to achieve the SDGs and integrated sustainable development. Indeed, the use of other integrative approaches has been discussed extensively in sustainable development and has attracted interest in order to contribute to integration. Among one of them, Le Blanc concludes that 'many concrete approaches have been developed in recent years to

[78] Le Blanc, 'Sustainable Development Goals' (n 69) 50; Arts (n 48) section 'Inclusive development, human rights and the environment'

[79] Stafford-Smith, Griggs et al. (n 66) 912

[80] Briassoulis (n 39) 59-60; Joachim H. Spangenberg, 'Hot air or comprehensive progress? A critical assessment of the SDGs' (2017) 25(4) *Sustainable Development*, section 'Method', para. 2: 'the International Council for Science (ICSU) and the International Social Science Council (ISSC) found only 29% of the 169 targets to be well defined and based on the latest scientific evidence, while 54% were classified as needing more work and 17% as weak or non-essential'

[81] Le Blanc, 'Sustainable Development Goals' (n 69) 55

[82] Persson, Weitz, and Nilsson (n 45)

[83] Ibid

visualize critical links, trade-offs and synergies of the Nexus, they will undoubtedly prove useful in years to come'.[84]

2/ The nexus approach and other integrative approaches to the SDGs and sustainable development: a complementary instrument towards integration?

In this thesis, integrative approaches refer to visions or frameworks developed to help interpret and organise elements or objectives, here of sustainable development, so that it enhances their synergies and interlinkages, and in turn participates to integration.[85] These approaches, developed within sustainable development policies or scholarship, are numerous and have different scopes, focuses and effects. Integrative approaches are omnipresent in the discussion of integration within sustainable development.[86] The following part will briefly address some of the most common integrative approaches and establish a basic comparison in how they convey integration. It will introduce Integrated Water Resources Management (IWRM), the nexus approach and the Water-Energy-Food nexus (WEF), and the ecosystem approach. This section considers the broad nature of some of the concepts and the nuances of each approach. The second part will then consider how the SDGs relate to integrative approaches and how this affects the objective of integration within sustainable development.

(a)The Integrated Water Resources Management (IWRM)

Integrated Water Resources Management (IWRM) is a policy that has been first adopted in the water sector and then gained interest in the broader context of sustainable development. This approach is considered to have originated and been formulated in the 1992 Dublin Principles.[87] The Global Water Partnership (GWP) most notably defines IWRM as 'a process which promotes the coordinated development and management of water, land and related resources in order to maximise economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems and the environment'.[88] IWRM is integrated first in its physical, water-centred approach. It aims at considering the water resource as a unit, across its cyclic nature and often transboundary scale (as a river basin). This unit also includes the consideration of physically connected elements (such as the ecosystem, the non-confined groundwater resource linked to the main resource, or the land). In addition, IWRM is integrated in its regulation and

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[84] Le Blanc, 'Sustainable Development Goals' (n 69) 55

[85] Scott, Kurian and Wescoat Jr. (n 23)16

[86] Varis, Enckell and Keskinen (n 29) 433

[87] D. Benson, A. K. Gain and J. J. Rouillard, 'Water governance in a comparative perspective: from IWRM to a 'nexus' approach?' (2015) 8(1) *Water Alternatives*, 758; Dublin Statement on Water and Sustainable Development (adopted 31 January 1992), International Conference on Water and the Environment (ICWE), Dublin, Ireland 26-31 January 1992.

[88] Global Water Partnership, 'What is IWRM?', (*GWP*, last edited 12/7/2011) available at <https://www.gwp.org/en/GWP-CEE/about/why/what-is-iwrm/> accessed 6 August 2018

management of the water resource. It focuses not only on the environmental, but also economic and social aspects of the water resource.[89] This twofold physical and abstract integration created within IWRM is based on a scientific rationale considering elements as inherently connected and influential for the regulation of the water resource. In its formulation by the GWP, IWRM is connected to sustainable development with the reference to 'sustainability', to the three pillars of economy, social and environmental aspects to be balanced, and to its central goal of integration.[90] IWRM is commonly used in water-related issues and was even crystalized in SDG 6 on water. The target 6.5, and its related indicators 6.5.1 and 6.5.2, are meant to implement this integrative approach to achieve the overall SDGs and sustainable development.[91] In addition, the integrative approach of IWRM can be related to other connected topics and SDGs, such as SDG 13 on climate change, SDG 14 on life under water, SDG 15 on land.

The IWRM approach is said to pre-date the currently prominent nexus approach.[92] The literature has recognised the great resemblance and commonalities between the two approaches. Perceived limitations in its scope and implementation have kept IWRM from being more unanimously and broadly used to convey integration within sustainable development. First and foremost, its approach is focused on water resources, despite its link to other fields, such as environment or climate change. This could limit the holistic, system vision adopted by the SDGs and sustainable development. Secondly, the integration created through IWRM could be adopting a more environmental-biased approach. IWRM might not weight on an equal footing with water the other elements considered, such as the social or economic aspects or land use.[93] Other critics summarized by Kurian point out the lack of political dimension within IWRM.[94] Political and institutional insights are, possibly on purpose, limited in this approach. This can separate IWRM from important aspects influencing policies and implementation, such as the political borders and boundaries influencing the regulation of water resources. The nexus approach is said to correct this aspect of IWRM's integrative approach by adopting a governance perspective, focused on synergies and the concept of trade-offs. Finally,

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[89] Mathew Kurian, 'The water-energy-food nexus: trade-offs, thresholds and transdisciplinary approaches to sustainable development' (2017) 68 *Environmental Science & Policy*, 97
[90] Varis, Enckell and Keskinen (n 29) 435-436
[91] SDG target 6.5: 'By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate', 6.5.1 : 'Degree of integrated water resources management implementation (0-100)', 6.5.2 : 'Proportion of transboundary basin area with an operational arrangement for water cooperation'

[92] Felix Dodds and Jamie Bartram, '1-The history of the Nexus at the intergovernmental level' in Felix Dodds and Jamie Bartram (eds), *The Water, Food Energy and Climate Nexus*. *Challenges and an agenda for action* (Earthscan Routledge 2016), 17
[93] A. Endo, I. Tsurita, K. Burnett and P. M. Orencio, 'A review of the current state of research on the water, energy, and food nexus' (2017) 11 *Journal of Hydrology: Regional Studies,* 22
[94] Kurian (n 89) 97

Pittock highlights the difficulty to implement IWRM in practice due to its unclear nature.[95] In brief, IWRM is a useful and insightful approach into an integrated regulation of water resources and other related aspects of development. The idea of the integrity of a resource, physically and with other abstract aspects, can help convey integration in regulation of various topics within sustainable development. However, some limitations are perceived in how integrative and balanced this integrative approach can be.

(b)The nexus approach

Firstly, the link between the nexus approach and IWRM is worth mentioning as the nexus has been presented as a 'natural extension' of the IWRM as its later version, in terms of conceptual framings.[96] Several common elements have been noted between them. Also, some of the critics of IWRM made above have fed the development of the concept of nexus. One of the biggest modifications considered with the approach of nexus has been focusing on broadening its scope. The focus of the nexus approach has switched from 'watersheds to problem-sheds'[97], which is in essence more 'multi-centric' than water-centric.[98] The nexus also includes more political aspects, such as policies and established constituencies, which influence the management of water resources and other issues.[99]

However, the nexus approach is itself not a single, uniform concept.[100] Variations of the nexus approach have developed under different forms since the 1980s.[101] Defining and using the nexus can first benefit from drawing attention to the generic notion of nexus approach and its specificities. Then, the thesis will address the current most commonly used form of nexus, the Water-Energy-Food nexus.

From its Latin root, nexus is ordinarily thought as a connection, a tie between two or more elements. Despite not having a clear definition, a nexus is considered by the literature 'to describe a set of interrelated activities and their linkages and to place a boundary around them, providing a frame within which a particular problem can be addressed'.[102] Von Braun, in his study of the nexus, also draws attention to the nature of the concept as being

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[95] Pittock, Hussey and Dovers (n 30) 'IWRM is, by its very definition, combining nexus language with the broader objectives of sustainable development, IWRM is a somewhat nebulous concept that has proven hard to implement in practice.'

[96] Pittock, Hussey and Dovers (n 30) 'In many ways, conceptual framing using a nexus 'approach' is a natural extension of the earlier, well-known concept of Integrated Water resource Management (IWRM).'

[97] Mike Muller, 'The 'Nexus' As a Step Back towards a More Coherent Water Resource Management Paradigm' (2015) 8(1) *Water Alternatives*, 689

[98] Benson, Gain and Rouillard (n 87) 767

[99] Muller (n 97) 689

[100] Endo, Tsurita, et al. (n 93)

[101] Ibid*;* Dodds and Bartram (n 92)

[102] Muller (n 97) 686; Boas, Biermann and Kanie (n 25) section '2.The nexus between policy domains'; Endo, Tsurita, et al. (n 93) 21

a perspective or an approach that lays out a framework.[103] He clarifies the role of this framework by stating that 'frameworks organize, form boundaries around the enquiry, set up general relationship among categories and dimensions, and define the scope and levels of enquiry. They do not explain or predict; rather they organize the diagnostic enquiry'.[104] The nexus would then be a way to describe, organise or analyse various elements rather than a set of rules or method of management that convey integration.

Several characteristics of a nexus can be distinguished as conveying integration, in a seemingly better way than with IWRM. First, the nexus's initial focus is to ensure the security of resources, which includes a political dimension. This is represented mostly in the use of trade-offs. According to Kurian and his extensive study of trade-offs, trade-offs help to consider other dimensions of sustainable development issues and resource protection.[105] Secondly, the nexus emphasizes on integration and interlinkages[106] and does so in a multi-centric way, where all elements are on an equal footing. The scale of a nexus approach is considered larger in scope and potentially geographically bigger, as it is not limited to the water resource's level. For Von Braun, it can even be linked to the scientific 'systems theory'. In this approach, the interconnections are made while 'not limiting itself to the specific constituent parts of the whole in isolation from the rest of the system'.[107] It is worth mentioning that the nexus has faced some critics on its ability to convey integration and a holistic approach. Pittock et al. highlight that the reflection on the connections within sustainable development is often restricted to two or three sectors and ignore the need for a more holistic approach.[108] Indeed, a nexus focuses on the interlinkages between certain elements, highlighting their specific interconnection. This 'integrative' approach could then be reproducing a more partial and fragmented vision that is often criticized within sustainable development. This partial representation can however present a more interconnected and comprehensive frame, in terms of manoeuvrability and practicality. It is even considered as a 'pedagogical tool' to help evidence, comprehend and enhance interlinkages, trade-offs and synergies within sustainable development.[109] As Muller summarizes, 'the value of the generic concept of a nexus is that it provides a

[103] J. Von Braun and A. Mirzabaev, 'Nexus Scientific Research. Theory and approach serving sustainable development' in Felix Dodds and Jamie Bartram (eds) *The Water, Food, Energy and Climate Nexus. Challenges and an agenda for action* (Routledge 2016)
[104] Ibid 61
[105] Kurian (n 89) 105 and 101
[106] Benson, Gain and Rouillard (n 87)
[107] Von Braun and Mirzabaev (n 103) 58

[108] Pittock, Hussey and Dovers (n 30) 'What is the benefit of restricting our thinking to two or three sectors when we know that important connections exist with other sectors, and that a holistic, systems approach is optimal?'
[109] Ibid 'thinking about individual sectors and their relationships to each other is easier, more amenable to systematic analysis and can be applied more readily in policy and investment decision making'

structured form in which a complex problem can be described and addressed'.[110] Pittock concludes that:

> In essence, efforts to pursue sustainable development are a matter of co-ordination and integration, and 'unpacking' the integration challenge into two or three sectors through a nexus approach exposes where the fundamental disjunctures between policy spheres lie, as well as where existing or new integration tools could be used to achieve better outcomes.[111]

In the case of the SDGs, the nexus approach can evidence the interlinkages between goals, targets and indicators and participate to navigating their trade-offs.[112] Indeed, the nexus approach, preceding the creation of the SDGs, has guided the new agenda for sustainable development. Dodds and Bartram, as well as Le Blanc, agree to note that the nexus approach is not fully transpiring within the SDGs agenda and that the SDGs do not reflect all the links identified with the nexus literature.[113] However, the nexus is seen as a guide and complementary instrument to implement the SDGs and achieve integrated sustainable development.[114] Notably the nexus approach is for example 'one of the lenses through which the GSDR [Global Sustainable Development Report] has approached the SDGs' in their review.[115]

(c)The WEF Nexus

In addition to its generic definition, the nexus approach is often considered through the Water-Energy-Food nexus approach.[116] These three fields are considered among the SDGs with the strongest interconnection.[117] With the fields they address, many commonalities can be found between the WEF nexus and the IWRM integrative approach.

Modern issues' increased pressure on resources, such as water, energy and food, has made a priority for countries to secure their access to such resources.[118] Water, energy and food have inherent connections, where food and energy production requires water and where producing clean water requires energy, for example. Considering this

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[110] Muller (n 97) 686
[111] Pittock, Hussey and Dovers (n 30)
[112] K. J. Bowen, N. A. Cradock-Henry, F. Koch, J. Patterson, T. Häyhä, J. Vogt and F. Barbi, 'Implementing the "Sustainable Development Goals": towards addressing three key governance challenges - collective action, trade-offs, and accountability' (2017) 26 *Current Opinion in Environmental Sustainability* 90, 92
[113] Dodds and Bartram (n 92) 34; Le Blanc, 'Towards integration at last?' (n 74) 14
[114] Paula Caballero Gomez, 'Foreword' in Felix Dodds and Jamie Bartram *The Water, Food, Energy and Climate Nexus. Challenges and an agenda for action* (Routledge 2016), xxiii and xxiv

[115] United Nations, 'Global Sustainable Development Report 2016' (*Department of Economic and Social Affairs*, New York, July 2016) <https://sustainabledevelopment.un.org/content/documents/2328Global%20Sustainable%20development%20report%202016%20(final).pdf> accessed 11 March 2021, xii

[116] Boas, Biermann and Kanie (n 25) 452
[117] SDGs 13, 7, 6, 2 and 3; Tosun and Leininger (n 35) 4
[118] Louis Lebel and Boripat Lebel, 'Nexus narratives and resource insecurities in the Mekong Region' (2018) 90 *Environmental Science & Policy* 164, 164

inherent link, the increased pressure on each resource can lead to more trade-offs between the three fields, conflicts of interests and, therefore, losses.[119] To provide a more balanced and equitable reflection on the trade-offs occurring, it is important to evidence and strengthen the interlinkages between water, food and energy. The interconnections emphasized would show the synergies and mutual benefits to joint development of these resources. These interlinkages have been contemplated through the notion of WEF security nexus, which officially gained momentum at the 2011 Nexus Conference at Bonn, built on an advocacy for green economy.[120] It was followed-up by the 2014 Chapel Hill Nexus Conference that widened the interest and application of the nexus beyond the connected security of economic and environmental interests.[121]

Despite their connection, water, energy and food have largely developed their fields and policies in relative independence from each other. This has created and entrenched a lack of integration between the three fields.[122] Their interests are often perceived as competing and exclusive. Even in the SDGs agenda, the individual goals for water, for energy and for food have no evident, or clearly drawn, interlinkages between them.[123] The strong interconnection asserted by many authors is essentially evidenced and enhanced when looking specifically at these three fields, in a nexus. The study by Le Blanc, mentioned above, demonstrates the difference between the weak connection made between the three fields within the broader SDGs agenda and the intense interlinkages shared when using a WEF nexus approach. For Dodds and Bartram, the WEF nexus approach is conveyed in the food, climate and especially water objectives of the SDGs. But the energy SDG has not made this connection with the other fields explicit.[124] Then, the WEF nexus approach can prove useful to evidence and reinforce the interlinkages and integration between water, energy and food and limit the imbalanced, negative trade-offs between them.[125] As previously introduced, the focus on a smaller group can offer a partial vision, as opposed to a holistic, truly integrative approach to sustainable development. However, the concept of nexus and WEF nexus allow an in-depth study of interlinkages and build a comprehensive way of reading them. Policy integration in the 2030 Agenda can be built through the holistic reading and the interconnections of key

[119] Endo, Tsurita, et al. (n 93); K. Hussey and J. Pittock, 'The energy-water nexus: Managing the links between energy and water for a sustainable future' (2012) 17(1) *Ecology and Society*, 2
[120] Role of the nexus and connections between the three fields, see Von Braun and Mirzabaev (n 103) 58; Stockholm Environment Institute, 'Bonn 2011 Conference The Water Energy and Food Security Nexus Solutions for the Green Energy, 16-18 November 2011, 'Understanding the Nexus Background paper for the Bonn2011 Nexus Conference', <www.water-energy-food.org/uploads/media/understanding_the_nexus.pdf> accessed 28 May 2020
[121] Conference 'Nexus 2014: Water, Food, Climate and Energy Conference', University of North Carolina, Chapel Hill, USA, 3-7 March 2014.
[122] Hussey and Pittock (n 119) 2
[123] Le Blanc, 'Towards integration at last?' (n 74) 14
[124] Dodds and Bartram (n 92)
[125] Bowen, Cradock-Henry et al. (n 112), 92

nodes in the SDGs. And the WEF 'has been seen as a central connection to sustainable development'.[126] In addition, despite most of the attention directed on the WEF nexus, the concept is not limited to these three fields. According to Boas et al., the concept of nexus has the potential to extend to all the SDGs and it could therefore bring an integrative approach to all goals and to sustainable development.[127]

(d)Ecosystem approach

Another relevant integrative approach to mention in the context of sustainable development is the concept of ecosystem approach. The term was coined by Tansley in 1935.[128] Similar to the other approaches, it points out the dynamics and interlinkages between different elements at the heart of sustainable development.[129] It addresses the complex relations within natural environments and does so, originally, from a scientific and ecological standpoint. The ecosystem approach is mostly used in the domain of conservation. Tansley considers the concept as an integrative, systems approach gathering 'the whole complex of physical factors forming what we call the environment of the biome - the habitat factors in the widest sense'.[130] Complex natural systems and related contexts can be observed and explained through this interconnected lens.[131] Natural phenomena (like the succession and phases of change in the ecosystems), as well as the focus on ecosystems balance or 'equilibrium', are at the centre of the ecosystems approach. This paradigm is able to lay out very complex interrelations and be a tool for integrative understanding by delimiting a spatial environment in which to study ecosystems.[132] In this aspect, it is similar to IWRM, with a possible watershed or basin level focus to help understand transboundary and interrelated aspects of a given issue.[133]

Regarding its link with sustainable development and the SDGs agenda, the term 'ecosystem' is present in the SDG 15 on conservation of biodiversity and ecosystems.[134] Despite the term being widely used in the sustainable development vocabulary, the approach itself has been questioned on some points. As introduced by O'Neill, concerns about its focus on equilibrium and stability, as well as other issues, have limited the integrative nature of the ecosystems approach. Its position can be seen as biased towards

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[126] Briassoulis (n 39) 74

[127] Boas, Biermann and Kanie (n 25) 452

[128] Arthur G. Tansley, 'The use and abuse of vegetational concepts and terms' (1935) 16(3) *Ecology* 284-307

[129] Vito De Lucia, 'Competing narratives and complex genealogies: the ecosystem approach in international environmental law' (2015) 27(1) *Journal of Environmental Law*, section 3.2.3

[130] Tansley (n 128)

[131] Ibid 300

[132] Robert V. O'Neill, 'Is It Time to Bury the Ecosystem Concept? (with Full Military Honors, of Course!) 1' (2001) 82(12) *Ecology*, 3276

[133] Ibid 3277

[134] SDG 15 'Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss'

a more environmental-based approach, where the environment and its protection are at the centre of the concerns. For example, most often, human systems or activities are not considered part of the ecosystem *per se* but referred to as an outside influence on it.[135] However, the ecosystem approach is still very much part of the discussion on sustainable development and the idea to bring an ecology-oriented approach, with a greater consideration for nature as a connected system, remains. Bhaduri et al. mention that the WEF nexus needs to consider the importance of ecosystems and of nature in order to fulfil the needs of humans, but also of the environment.[136] The WEF nexus could then benefit from using the ecosystem approach's perspective. Drawing on the ecosystem approach, the authors also suggest the benefits of using an ecosystem-based approach to 'bring the elements of energy, food and water into a single viewpoint, and can help mitigate the trade-offs while generating co-benefits'.[137]

Integrative approaches	Physical Scale	Initial or dominant context /focus	Consid-eration of the 3 pillars	Overall, Holistic Approach	Cited in the SDGs/ Agenda 2030	SDGs involved (directly or indirectly)
IWRM	Watershed	Water Environm-ent	☑	☑, contested as limited	SDG 6	SDG 6, 15, 13 Indirectly: 7, 3, 2, 1, 16, 14…
Nexus	Not geographically limited	Generic Natural resources security	☑	☑		Potentially all
WEF nexus	Not geographically limited	From green economy to generic	☑	☑, contested as limited		SDG 6, 7, 2 Indirectly: 15, 13, 12
Ecosystem	Ecosystem scale	Environ-ment	☑	☑, contested as limited	SDG 2; 6; 14; 15	SDG 13, 15, 14

Table 1: Comparative tab of integrative approaches used in sustainable development policy

In brief, this part has presented four different integrative approaches used in sustainable development policies. As exposed, some integrative approaches are more prominent at times and they can vary in the priority they set, for example on one resource like water. They can also use a specific angle to tackle interrelations, like an

[135] O'Neill (n 132)
[136] A. Bhaduri, C. Ringler, I. Dombrowski, R. Mohtar and W. Scheumann, 'Sustainability in the water-energy-food nexus' (2015) 40(5-6) *Water International* 723, 725
[137] Ibid 726

environmental perspective. But they all embody the pursuit of policy integration. Therefore, they participate to, as well as are emblematic of, a momentum around this objective of integration within sustainable development. As perspectives revealing synergies and trade-offs between certain fields, they contribute to understanding and reinforcing integration. In their relation to the SDGs, all these integrative approaches seem *prima facie* to be compatible, if not complementary, with the SDGs. The synergies they highlight and their interconnected vision, from various standpoints, are common features. Most integrative approaches pre-date the SDGs, have guided their creation, explicitly or not. They can be considered key to the Agenda and to broader sustainable development policy.

The current thesis is looking at the operationalisation of the objective of integration within sustainable development. This implementation has been considered for policy, through the instruments of the SDGs and integrative approaches. The study of implementation also needs to consider the contribution of law and most specifically, international law. This contribution can be related to facilitating or participating to the realisation of the SDGs and of integrative approaches, which are key policy instruments meant to approach and frame integration.[138] Similarly, international law will aim to provide an appropriate frame for integrated sustainable development, through a more fitted approach. This approach would need to adequately consider the diverse, holistic and interconnected nature of the issues presented. As observed with policy, international law would need to mitigate the extreme trade-offs occurring and leaving behind the idea that economic, environmental and social aspects are mostly competing and exclusive. International law must increase synergies and mutually beneficial interconnections with the appropriate approach, arrangements and instruments.[139]

III- From policy to international law: the role of international law in operationalising the objective of integration

The objective of integration at the centre of sustainable development policy, and its instruments mentioned above, requires an extended inquiry into its adoption and operationalization within and through different disciplines, such as science and law. This inquiry raises the question of the connection between sustainable development policy and international law, which plays a role in regulating global issues and in implementing policy decisions.

A- The inter-disciplinary process of operationalising integrated sustainable development: from science to policy and international law

[138] Von Braun and Mirzabaev (n 103) 63
[139] Bhaduri, Ringler et al. (n 136) 726

The following section will be built on the explanation and rationale that policy, including sustainable development policy, requires or should consider a certain adaptation. To be efficiently operationalised and implemented within other fields influencing sustainable development and society, policy objectives need to examine another discipline's internal functioning. This adaptation has been expressed for different disciplines, like policy, science and law, in the diagram below, as a process of implementation of integration to a given issue.

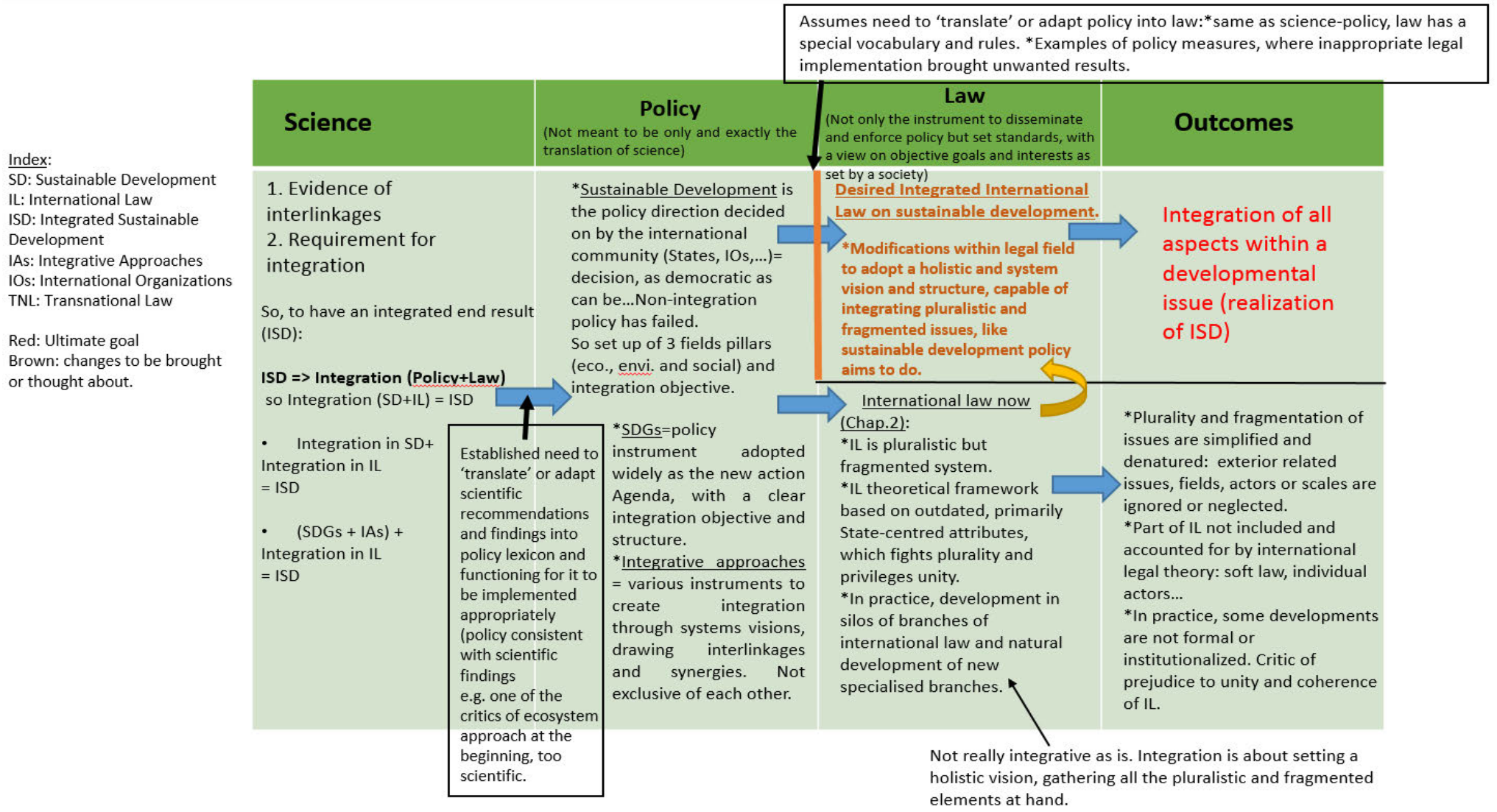

Diagram 5: From science to policy to law: the translation of the objective of integrated sustainable development

This argument assumes that part of the way a policy is developed, adopted, and then implemented to produce effects on an issue (here 'Outcomes') goes through the simplified process of science development, policy development and finally law development, before producing final outcomes and regulating an issue a certain way.

In the context of sustainable development, the first stage is the (scientific) observation of the inherent interdependence and interconnectedness of elements, like water, energy and food. It has spurred the requirement for integration of every one of these elements influencing a given issue (in the diagram, the need for Integrated Sustainable Development, or ISD, is therefore the outcome sought). For instance, the scientific demand for reflecting unity and interconnectedness can lead to recommendations on the need to regulate water-related issues at the watershed or basin-level. This aims to accurately reflect the natural unity of the resource, which affects the resource's functioning and regulation, both on a physical and a conceptual level. Sustainable development policy has been interested in anchoring its decisions on sound scientific realities and recommendations (in the case of climate change for example).[140] Based in part on the scientific recommendation to promote integration, policy has made this objective one of its priorities and central principle (in the diagram, where ISD = Integration Policy/Integration SD policy).[141] With that goal in mind, as presented previously, the SDGs and integrated approaches are both policy tools created to build integrated sustainable development (In the diagram, Integration SD = (SDGs + IAs)). The diagram then suggests that the next step of the process to integrated sustainable development is to look at law, implementing in most part what has been developed and sought after by science and policy.

It is worth noting that following this process implies a simplified vision of the relations between science, policy and law and of the development from decision-making to implementation and to the desired outcomes. The step mentioned here between policy and law is the focus of this section and assumes a simplified vision of law itself. The role of law is here studied as an instrument used to disseminate, implement policies or regulate issues, here linked to sustainable development.[142] However, this definition can limit law to a tool following policy decisions. This position is suggested by some scholars presenting law as used in part to realize policies, which are themselves the result or reflection of the democratic expression of society itself.[143] Law thereby preserves and

[140] Paul Cairney, 'The Science of Policymaking' in Paul Cairney *The Politics of Evidence-Based Policy Making* (Palgrave 2016), 2; Kurian (n 89)
[141] The SDGs indicators are supposed to be the translators and communications means between the policy goals and targets and their anchoring into scientific and practical indicators, see Janouskova, Hak and Moldan (n 53) 3
[142] Bosselmann (n 30) 43
[143] Martti Koskenniemi, 'What is International Law For?' in Malcolm D. Evans (ed.) International Law (Third Edition, *OUP* 2010), 40

promotes a certain order, following bigger political choices. Marong considers it as an 'approach to sustainable development [treating] it as an overarching societal objective towards the realization of which law has an important role to play'.[144] Another possible vision of law presents it as a gateway and keeper of values, which should not be affected by the changes of policies and morals.[145] This thesis does not consider one or the other position to be exclusive. It uses the instrumental function of law as a starting argument to study the adequacy and compatibility between the policies to be achieved and the most common tool for implementation, law.[146]

After addressing the overall framework of the diagram, particular attention will be given to the so-called 'steps' between the fields of science, policy and law (represented with the blue arrows in the diagram). Each system of science, policy and law are unique, for example in their distinct vocabulary and rationale. Their distinctiveness imply that a certain level of adaptation and alterations might be needed when moving from one to the other.[147] Research, like Cairney's[148], has pointed out the need for policy (on sustainable development) to be carefully and appropriately based on and adapted from scientific observations and recommendations. Similarly, policy and law also require adaptation to appropriately transfer and use a policy into law, despite their often close relation (for instance between international environmental policy and law[149]). There are indeed instances when policies have failed to create the results expected once crystalized or adopted into legal instruments.[150] This is why the question of adaptation of the objective of integration, and of the policy instruments addressed, into international law is necessary. International law should be compatible and suitable to best implement integrated sustainable development. (In the diagram, Integration IL = ISD).[151]

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[144] Marong (n 31) 61

[145] Ibid 55

[146] To consider an introduction to the different perspectives taken on the role and nature of law and international law, see Roger Cotterrell (ed), *Law in Social Theory* (Ashgate Publishing Ltd, 2006) introduction; De Lucia (n 129) section 4

[147] Janouskova, Hak and Moldan (n 53); Mathew Kurian and Reza Ardakanian, 'The Nexus Approach to Governance of Environmental Resources Considering Global Change' in Mathew Kurian and Reza Ardakanian (eds) *Governing the Nexus. Water, Soil and Waste Resources Considering Global Change* (Springer Link 2015)

[148] Cairney (n 140); Mathew Kurian and Reza Ardakanian, 'Policy Is Policy and Science Is Science: Shall the Twain Ever Meet?' in in Mathew Kurian and Reza Ardakanian (eds) *Governing the Nexus. Water, Soil and Waste Resources Considering Global Change* (Springer Link 2015)

[149] Bodansky (n 24) 14

[150] The need to be careful of policy transfer into other disciplines, like law can be seen in Diane Stone, Learning Lessons and Transferring Policy across Time, Space and Disciplines (1999) 19(1) *Politics* 51

[151] Marong (n 31) 22

B- Operationalizing integration within law and international law: considering the legal of the value SDGs and integrative approaches and their relation to law

Law has a role to play in the implementation of policies of sustainable development, based on scientific recommendations and the aim to achieve integration.[152] Considering the differences between each discipline, the question of adapting integration and tools of integration to the legal discipline is important. Therefore, there is a need to briefly address the status and effects of the SDGs and integrative approaches within international law, to consider if there is the need for adaptation for the policy of integration.

Regarding the use and application of policy into law, the legal status of the concept of sustainable development has been long discussed and still is debated.[153] The overall majority of scholars and policymakers do not recognize it as a true legal concept.[154] Marong summarizes the various and diverging views from the international community as follows:

> First, many scholars argue that sustainable development is too vague a concept and too ambiguous in meaning for it to have normative status. Secondly, some are of the view that sustainable development has acquired a place in the international law lexicon, and therefore the relevant question is not whether sustainable development is law, but rather how to apply it in specific practical situations. (…) A third view characterizes sustainable development as a rule of customary international law, while a fourth posits that the concept does not satisfy the tests of custom at international law and is at best an interstitial norm.[155]

More research on the subject has been done and is still being conducted to clarify the status of sustainable development, and thus of the SDGs, within or in relation to international law. This topic is mentioned here to consider the legal value and direct applicability of policy concepts and especially tools, like the SDGs, within international law.[156]

The legal value and effect of the SDGs have also been subject to discussions and divided opinions. On the one hand, the SDGs are part of an action plan to implement the policy objectives of sustainable development. For Biermann et al., the SDGs do not have

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[152] E. Fisher, B. Lange, E. Scotford and C. Carlarne, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21(1) *Journal of Environmental Law*, part 3(3)
[153] Marong (n 31) 29; Alistair Rieu-Clarke, 'A fresh approach to international law in the field of sustainable development: what lessons from the law of international watercourses?' (Ph.D. thesis, University of Dundee 2004)
[154] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *European Journal of International Law* 377, 378; Charlotte Ku, 'Fragmentation in International Law and Governance: Understanding the Sum of the Parts' in Cedric Ryngaert, Erik J. Molenaar and Sarah Nouwen (eds), *What's Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill Nijhoff 2015), 428; Dernbach and Cheever (n 22) 251
[155] Marong (n 31) 44
[156] Rakhyun E. Kim (n 32) 21

any link with the international legal system (besides following its general principles[157]) and do not have, or intend to have, legal force.[158] This is supported by the UN website on sustainable development asserting that the SDGs are not legally binding.[159] However, Le Blanc notes that they are often given a normative character considering that they are the result of wide participations and intergovernmental discussions.[160] Persson et al. assert that the SDGs can be seen 'as a set of norms at the softest end of the 'hard-to-soft' continuum', based on criteria of obligation, precision and delegation.[161] This blurs the line between the legal and political nature of the SDGs, despite the low level of legal impact from a 'softer' type of law. A more direct legal status or effect cannot be agreed on and the use of the SDGs within the legal field would then most likely require an adaptation into legal terms and structure.

With respect to integrated approaches, it can also be considered that they have no or very little legal force. Despite their commonalities and their common objective of integration, the consensus behind each approach is limited. Their definitions are still evolving and discussed, which reduces their potential for a consistent, universal adoption of these approaches as legally binding.

So, sustainable development policy, the SDGs and integrative approaches in general, appear to have no clear, direct and formal legal effect within the international legal system. In order to appropriately promote integration within international law, these tools would need to be adapted into legal lexicon, for example. This is represented in the diagram by the orange delimitation simulated between policy and law. The reflection on the legal value and effect of the SDGs is important because of the implementation of integrated sustainable development through law. Their limited or questioned impact within law prompts a reflection on 'the role law might play in [the SDGs and integration's] realization' and therefore, integrated sustainable development.[162] To summarize, there is a need to find a way to adapt integration within the legal field, which will be the main focus of the present research.

Conclusion

The international community has expressed a universal desire for sustainable development to become integrated. It refers to the integration of the three pillars of economic, social and environmental aspects and more broadly to include all actors, scales

[157] Rakhyun E. Kim (n 32) 15
[158] Biermann, Kanie and Kim (n 34) introduction
[159] 'The Sustainable Development Agenda' (*United Nations*), available at <www.un.org/sustainabledevelopment/development-agenda/> accessed 28 May 2020
[160] Le Blanc, 'Sustainable Development Goals' (n 69) 50
[161] Persson, Weitz, and Nilsson (n 45) 60-61; Rakhyun E. Kim (n 32) 16
[162] Marong (n 31) 22

and legal regimes involved in such issues. This commitment and momentum for action has materialized in the SDGs and the use of integrative approaches. These policy tools draw from different perspectives, but all highlight the importance of including a plurality of elements and their interlinkages. Implementing such a vision relies not only on scientifically based decision-making but also on adequate legal implementation. Law has a role to play to implement and operationalize such policies and to realize the commitment to integrate everything and everyone within sustainable development. Considering the specificity of law and the debatable legal impact of the policy tools within international law, attention must be paid to considering a suited approach to this objective within international law.

Chapter 2: International law and the development of legal pluralism

'Les nations souveraines du passé ne sont plus le cadre où peuvent se résoudre les problèmes du présent'[163] *Jean Monet*

The socio-legal context of sustainable development has changed, with increasingly complex, pluralist, and interconnected issues. Within this context, the objective of integration set in sustainable development has developed a more fitted approach to these issues. A reflection on the relation between international law and integration is needed as law plays a special role in the implementation of policy. Its influence on the operationalisation of integrated sustainable development needs to be studied more in depth. Similarly to the requirements for policy integration, international law's approach also needs to frame adequately the diversity, integrity and interconnectedness of the issues regulated.

This chapter will examine the concept of integration, and the related concept of pluralism, within traditional international law. It will consider the change of legal context and legal theory in response to these concepts. Then, the chapter will examine the position of traditional legal theory on legal pluralism and the challenges it creates for the current international legal system. Finally, the chapter will address the theoretical adaptations promoted to manage legal pluralism and will briefly present their limitations. It will then introduce practical developments in international law which open the reflection on more adequate and pluralist theoretical approach in international law.

[163] Jean Monnet, *Memoirs* (Librairie Arthème Fayard, Paris, 1976) 617

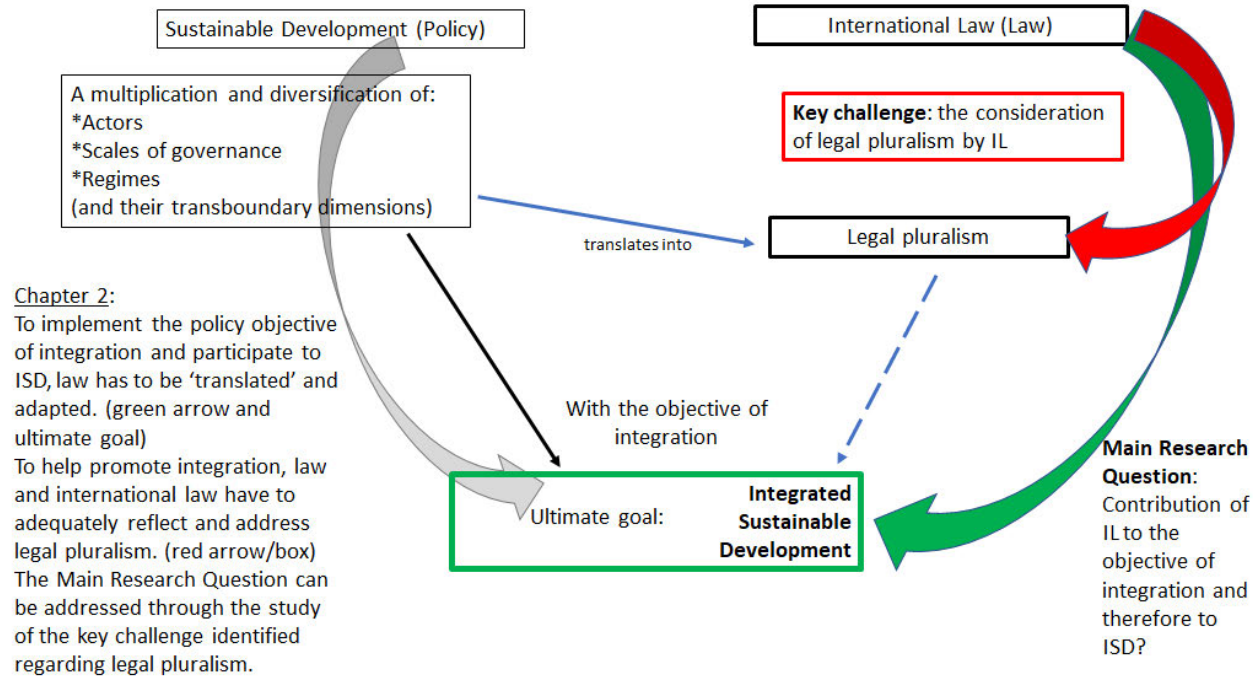

Diagram 6: Chapter 2: The participation of law and international law to the objective of integrated sustainable development and its relation to its own legal pluralism.

I- The development of legal pluralism in international legal practice: the emergence of a diversity of interconnected actors, scales and legal regimes

This section will consider the development of the phenomenon of pluralism in international law. The thesis will consider how law in practice has evolved in relation to legal pluralism and interconnections. With the overall objective of integration in mind, this inquiry will allow the thesis to consider the transformation of international law in the context of globalization and sustainable development policy. This transformation in practice follows the natural extension of various actors, scales and legal regimes. Changes then need to be reflected by the law in theory for a more sustainable and harmonious development of international law.

A- Globalisation and the transformation of the socio-legal context with more pluralist and interconnected issues

Globalisation is not a recent phenomenon. It has occupied a growing place and had an important impact on the legal sphere.[164] The new realities of globalisation have deeply changed the nature of issues dealt with by international law and have extended the range of actors, scales and legal regimes to be reflected in the legal system.

[164] Paul Schiff Berman, 'From International Law to Law and Globalization' (2005) 43 *Columbia Journal of Transnational Law*

Globalisation can be used to generally describe a process of transformation and complexification of issues, in terms of the elements they involve and the dynamics they create. This phenomenon is especially associated with issues moving from being mostly national and international issues, to more global and transboundary ones.[165] The context of globalisation implies the consideration of new and diversified inputs at the heart of pluralist issues. They count increasingly different players such as individuals, multinational companies or non-state organisations. These issues also occur at various scales and often in a transboundary way. Finally, globalised issues involve a variety of different topics.

Globalisation has brought important changes to the social context of issues to be regulated by international law, therefore changing the legal context.[166] The subject of globalisation is complicated and delicate. Therefore, the current thesis will only consider the phenomenon for its implications for the legal system, especially as it develops legal pluralism and dynamics.[167] The multiplication and diversification of actors, scales and legal regimes challenge the way international law tackles and applies to these issues. In this sense, globalisation brings changes and a destabilisation of the existing legal system.[168] However, globalisation is also perceived as an unstoppable and 'inexorable force' that changes legal issues in practice, and therefore the way they must be dealt with in international law.[169] International law is now faced with the complexity of addressing these 'multi-dimensional, multi-sector, and multi-level issues like sustainable development, environmental protection, and the economic and general well-being of individuals'.[170]

A common example mentioned to illustrate the phenomenon of globalisation relates to the economy. The globalised economy can refer to the amplified economic interactions occurring across and beyond the national and international levels, between States but also between individuals, and in an interconnected way beyond borders.[171] Trade relations outside of a specific country are not new. However, the interactions between people, locations and regulations to conduct such activities have multiplied and diversified. Each national economy is considered to be interconnected and to be influenced at a global level

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[165] Anne-Marie Slaughter, 'Breaking out: The proliferation of actors in the international system' in Yves Dezalay and Bryant G. Garth (eds), *Global Prescriptions. The production, exportation, and importation of a new legal orthodoxy* (1st edition, The University of Michigan Press 2002), 20
[166] William Twining, Globalisation and legal theory (*CUP 2000*), 50-51
[167] Roger Cotterrell, 'Transnational communities and the concept of law' (2008) 21(1) *Ratio Juris,* introduction
[168] Saskia Sassen, 'The State and Globalization: Denationalized Participation' (2003) 25 *Michigan Journal of International Law*

[169] Slaughter 'Breaking out' (n 165) 13
[170] Ku (n 154) 420
[171] Detlef Von Daniels, *The Concept of Law from a Transnational Perspective* (1st edition, Ashgate 2010), 56; Twining (n 166) 4 and 161

as well. For example, international trade and investment laws have developed with globalisation to consider trade relationships on a global scale and to regulate economic benefits or the free movement of goods, for example.[172]

Another example of the blur of the notion of borders, and of the promotion of global topics beyond the national scale, is climate change and international environment law. International law has gradually recognised the limitations to the efficiency of national jurisdiction in dealing with global or transboundary issues.[173] The scale of the issues, as well as the actors affected and the implications for other fields, have led international environmental law to develop and become a globalised and particular field of international law, beyond the original national jurisdiction.

In summary, international law has developed sporadically to respond and match the evolution and the characteristics of the situations it applies to.[174] As considered above, the new reality within international law has led to what authors refer to as the development of 'functional' legal regimes.[175] These regimes develop to focus on providing specialised regulation to emerging transboundary issues, with their own set of actors, scales and rules.[176]

Events, such as World Wars and colonialism, have stimulated the creation of new international rules that consider individuals as a subject of international law, separate from the State.[177] For example, concerns have developed regarding 'minorities, human rights, and the genocide convention, and the administration of colonial or non-self-governing peoples'.[178] Since then, international law has progressively addressed in some fields the involvement of parties that have been impacted or shown an interest. This can be seen in recent direct inclusion of individuals in judgements by the International Criminal Court. This is also the case for the inclusion of individuals in foreign investor-State claims in the

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[172] Peter Van den Bossche, 'Economic globalisation and the law of the WTO' in Peter Van den Bossche and Werner Zdouc (eds) *The Law and Policy of the World Trade Organization. Text, Cases and Materials* (4th edition, CUP 2017), 4; In a similar reflection, the economic field can be considered the most practical and concrete transnational legal field see Wolf Heydebrand, 'From globalisation of law to law under globalisation' (2001) 117 *Adapting Legal Cultures*, 119

[173] Elena Blanco and Jona Razzaque, *Globalisation and Natural Resources Law: Challenges, Key Issues and Perspectives* (Edward Elgar, 2011), 2

[174] Sylvia I. Karlsson-Vinkhuyzen and Antto Vihma, 'Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework' (2009) 3(4) *Regulation & Governance*; Von Daniels (n 171)

[175] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 247; Lars Viellechner, 'Responsive legal pluralism: The emergence of transnational conflicts law' (2015) 6(2) *Transnational Legal Theory* 312, 314

[176] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999

[177] Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press 1956) 'I agree that states are not the only subjects of international law'

[178] Ibid

International Centre for Settlement of Investment Disputes.[179] Other forms of non-State involvement have been expanding within international law, like with 'international bodies, nongovernmental organizations ("NGOs"), multinational corporations and industry groups, indigenous communities, transnational terrorists, networks of activists, and so on'.[180] Some of these new, non-state actors have been fully recognised and integrated as actors of the international legal system, like international organisations. An example of recognition and integration can be the development of legal responsibility of international organisations engaged in international law. The Draft Articles on the Responsibility of International Organizations (ARIO) were drafted by the ILC in 2011, similar to the already existing Articles on State Responsibility.[181] But in general, this practice-based and functional development has challenged the traditional legal conceptualisations centred on the State and legal categories created.[182] International legal scholars notice that 'the multiscalar character of various globalization processes (…) [does] not fit into older conceptions of hierarchies of scale or conceptions of nested hierarchies' of international law.[183] The examples above all show the development in practice of elements important for regulation which go beyond the initial categories created by international legal theory.

In brief, the reality of a globalised world has brought deep and fast changes to the socio-legal context and to international law. This transformation of the way international law applies creates, slowly but inexorably, a gap between the theory of law and how the world has since become diverse and complex.[184] This transformation motivates the pursuit of integration. International legal theory has to be evaluated to consider the social world it applies to. An opportunity for reflection on international law is offered with the increasingly globalised world and the related aim of integration within sustainable development.[185] At the centre of this transformation is the concept of legal pluralism and new interactions created within international law.

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[179] 'About ICSID: Overview', <https://icsid.worldbank.org/About/ICSID> accessed 11 March 2021
[180] Berman 'Global Legal Pluralism' (n 180) 1175; Paul Schiff Berman, 'A pluralist approach to international law' (2007) 32 *Yale Journal of International Law* 301, 303
[181] Draft articles on the responsibility of international organizations, in in Report of the International Law Commission on the Work of Its Sixty-third session, UN Doc. A/66/10 (2011) *Yearbook of the International Law Commission*, vol. II, Part Two. (ARIO) <https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf> accessed 11 March 2021; Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 11 March 2021
[182] Anne Van Aaken, 'Defragmentation of public international law through interpretation: A methodological proposal' (2009) 16(2) *Indiana Journal of Global Legal Studies* 483, 487-488
[183] Sassen (n 168)
[184] Veerle Heyvaert, 'The Transnationalisation of Law: Rethinking Law through Transnational Environmental Regulation' (2017) 6(2) *Transnational Environmental Law*, 223
[185] Ibid 217

B- The growing phenomenon of legal pluralism and the transformation in practice of international law

The development of international legal practice, in response to globalisation, needs to be addressed and internalized within legal theory. This development will avoid disparate and incoherent legal evolutions. The consideration of the growing diversity of actors, scales and topics within issues, referred to as legal pluralism, is especially at the centre of international law's reflection on whether it is suitable to frame complex issues and to promote integration.

The term 'legal pluralism' has been used by scholars to describe international law as being 'shaped by multiple sets of legal norms'.[186] The combination of legal regimes captured by the term 'pluralism' refers to several aspects within a regime, and in the legal system, including a diversity of fields, different categories of law, of actors, as well as various scales. These aspects of legal pluralism in international law will be addressed thereafter, to get a broad understanding of what this notion is and what it encompasses.

First, legal pluralism includes a diversity of topics of international law.[187] A given issue can involve several fields of international law at the same time. Sustainable development is the prime example of a topic that is at the junction of several fields, such as economic law, environmental and human rights law.

Secondly, legal pluralism refers to various types or categories of legal instruments. Snyder lists in a general way all the forms that 'law', or more broadly instruments having a normative influence, can take and all of which are captured by the notion of legal pluralism.

> These include the familiar constitutions, legislation, treaties, and case law produced and enforced by nation states; the rules and institutions of public international law; the relatively "hard" (elaborately formulated and officially enforced) law created by transnational structures such as the European Union and the World Trade Organisation; but also many kinds of "soft" (not so formulated or enforced) law or regulation varying in authoritativeness, precision and regulatory effectiveness and produced from public and private sources.[188]

[186] Pieter Bekker and Thomas Innes, 'The Under-Appreciated Role of Curial Settlement in International Law Norm-Making: Using Transnational Law and Diffusion Studies to Re-Assess the Status of Prior Decisions' in Cedric Ryngaert (ed) *What's Wrong with International Law?* (Liber Amicorum A. H. A. Soons, Brill Nijhoff 2015); Roger Cotterrell, 'Still Afraid of Legal Pluralism? Encountering Santi Romano' (2020) 45(2) *Law & Social Inquiry*, introduction para 2; Viellechner (n 175) 314

[187] Nele Matz-Lück, '7-Norm Interpretation across International Regimes: Competences and Legitimacy' in Margaret A. Young (ed), *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012)

[188] Cotterrell, 'Transnational communities' (n 167) section '1. Varieties of Transnational Regulation'

Legal pluralism can refer to the influence of these different types of instruments on a given topic, regardless of their distinct definitions and legal statuses in international legal theory.[189]

Thirdly, legal pluralism can refer to the multitude of actors (and beneficiaries) of legal regimes and of international law. More and more individuals, communities, non-governmental organisations and private actors are participating in globalisation and international legal issues.[190] With globalisation, international law faces a multiplication and diversification of the actors participating in issues and, therefore, to be considered in the legal environment of such issue.

Finally, legal pluralism in international law designates the diversity of normative scales which influence an issue and apply in the legal environment. This diversity refers in addition to other scales than the national and international levels. Legal pluralism links a given issue to the possible regulations existing at the national and international levels but also at the local or global levels or in a transboundary way, for instance.

Legal pluralism in international law refers to the phenomenon of multiplication and diversification of the actors, normative scales and legal regimes constituting the legal environment of an issue. So, legal pluralism designates the diverse and extending scope within the legal environment of an issue. In turn, the establishment of this diverse legal environment itself determines the way international legal rules are combined and will regulate the issue. Legal pluralism accounts for diversity and thus brings about reflection on the combination of all these legally influential elements. It also leads to studying how these elements interact with each other and, in turn, influence the overall legal environment they make up. Ku describes legal pluralism as making 'connections between the local and the global, the individual and the institutional, and the national and the transnational, but not necessarily in a linear or hierarchical way'.[191] Legal pluralism does not set a hierarchy among the plurality of norms, actors and scales it includes.[192] However, the notion of legal pluralism is captured by and positioned within the international legal system. This framing of legal plurality is based on a more traditionally compartmentalised and hierarchised vision of law and legal environments.

II- Facing legal pluralism and fragmentation: the challenges to the traditional theory of international law and its categories

[189] Oren Perez, 'Fuzzy law: a theory of quasi-legal systems' (2015) 28(2) *Canadian Journal of Law & Jurisprudence* 343, 355
[190] Berman 'A pluralist approach to international law' (n 180) 302

[191] Ku (n 154) 420
[192] Viellechner (n 175)

Facing the phenomena of legal pluralism and fragmentation, the system of international law is challenged in its foundations. International law, as traditionally linked to the State, sees the emergence of more actors, scales and legal regimes. With it arises the need for a holistic and pluralist approach in regulating issues, in order to accurately represent and analyse issues and promote legal integration.

A- The traditional centrality of the State in international law and the binary divides and legal categories at the heart of international law

Initially, international law has been developed in dependence and relation to the State. Its basic concepts, divides, and legal categories can be traced back to the State conduct and national law.

Regarding the consideration of actors within international law, the State is at the base and centre of the system.[193] The Peace Treaty of Westphalia in 1648 is said to mark the consecration of State sovereignty in international law.[194] It has made the State the centre and authority on its territory and in international law. Sovereignty is a key concept of international law, referred to most notably in the United Nations Charter.[195] States are the primary actors and subjects of the system.[196] International law was, and still is, set to be the law between states.[197] The creation, acceptance and enforcement of international rules were, and are still to a certain extent, dependent on the State's decision. For example, until recently, individuals could only bring investment-related claims against another State through the diplomatic representation from their home State, as they did not have an international legal personality.[198] This illustrates the absolute dominance of States as subjects and actors within the international legal sphere, directly and indirectly.

Regarding the scales at which the legal system operates, a certain polarisation is established following law developed at either the international or national level. By definition, what is not national and within the sole sovereign State jurisdiction tackles issues with other States and is therefore international. This divide, based on the State, is more or less clearly distinguished. It at the heart of the notions of monism or dualism in

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[193] Berman 'A pluralist approach to international law' (n 180) 309-310
[194] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *The International History Review* 569
[195] United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, (adopted 24 October 1945), article 2 (1)
[196] Stephen Hall, 'Researching International Law', in Mike McConville and Wing Hong Chui (eds) Research Methods for Law, 2007, 186
[197] Craig Scott, "Transnational Law' as Proto-Concept: Three Conceptions' (2009) 10(6-7) *German Law Journal*, 862; Berman 'Global Legal Pluralism' (n 180) 1175
[198] Michael W. Reisman, '22- The Future of International Investment Law and Arbitration' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012), 280; The same goes for corporations to a certain extent, see Nehal Bhuta, '6- The Role International Actors Other Than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012), 74-75

national legal systems, prominently part of legal education and theory.[199] These notions determine if international law requires an active acceptance and transposition into national legislation before becoming binding within the domestic system, making the division between international and national scales stricter. Another example is customary international law, which does not require a formal consent or ratification from the State to be automatically binding on all States. However, customary international law could still be derogated to by a State if it has been a persistent objector to the rule in question.[200] In this configuration of international law, States still have a certain control of what rules apply to them at the global level. They can then maintain the separation between international law and national law. This polarisation is entrenched in legal history and very much still part of legal theory.

In terms of the regimes and instruments of international law as traditionally conceived, the State remains the reference for international legal categories. The law developed at the international level is decided upon by States and often mirrors the national legal system or concepts at a broader scale.[201] This transfer of national law includes the divide between a private law and a public law, even if this divide is less distinct in international law.[202] Certain topics or fields also remain marked by the notion of separation of jurisdiction between the international and national level. Fields such as international trade and investment legal regimes are long-established global fields. On the contrary, international environment law, and to a certain extent human rights law, can be seen as still developing or young and to rely on their national counterparts, recognition and enforcement.[203]

In summary, international law reflects a reality at the time of the creation and development of its rules. During the development and premises of international law, the State was seen as the centre of gravity and unit of measurement of international law, even beyond its borders. In terms of the formally acknowledged actors, main scales and legal regimes' functioning, international law is initially built around the State. These set categories allow the international legal system to sort and establish what can be considered international law and non-international law. Currently applied fundamental conceptualisations and categories are based on these past realities. However, the world has been rapidly changing and globalising. These categories inherently limit the

[199] Andrew C. Byrnes and Catherine M. Renshaw, 'Within the State' in D. Moeckli, S. Shah, D.J. Harris and S. Sivakumaran (eds) *International Human Rights Law* (OUP 2014), 460
[200] James A. Green, *The Persistent Objector Rule in International Law* (OUP 2016)
[201] Stephen J. Turner, 'The use of 'macro' legal analysis in the understanding and development of global environmental governance' (2017) 6(2) *Transnational Environmental Law*, 243
[202] Zumbansen, 'Where the Wild Things Are' (n 20) 161 and 164
[203] Francesco Francioni, 'Realism, Utopia, and the Future of International Environmental Law' (1 May 2012) EUI Working Papers LAW no 2012/11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2068656> accessed 30 May 2020, 44

international legal system's ability to the increasingly diverse and numerous actors, scales and legal regimes in pluralist issues and the new socio-legal context. The growing phenomenon of legal pluralism is creating a challenge and reflection of these fundamental characteristics of traditional international theory and disrupting the compartmentalised and State-based legal theory.

B- The theoretical debates surrounding the acceptance of legal pluralism in international law and the negative approach of legal fragmentation

The developments of the socio-legal context have challenged the legal categories and established divides between international law and national law. This evolution has sometimes been perceived as an 'invasion of the domestic realm of the national state'[204], and overstepping a jurisdiction and authority originally given by the States. However, the effects of international law on and into the national legal system are deemed inevitable and are accepted by a majority of scholars.[205] Absolute State authority and territorial jurisdiction as the centres and sole references of the international legal system is no longer adequate.[206] Law is 'part of a society that itself cannot sufficiently be captured by reference to national or de-nationalized boundaries' and other categories set previously.[207] More and more issues are becoming de-territorialized due to inherently transboundary topics, such as environmental law or issues touching several communities across borders. The previous classification of monist or dualist systems, where a country can determine its sole capacity over an issue and limit the intervention of international law, is even questioned as this clear divide has faded within issues.[208]

While legal pluralism as a phenomenon is widely accepted by the literature, the concept divides the literature on its potential implications for legal theory and practice. Some authors recognize a value to legal pluralism and the importance of the diversity and complexity brought about by the involvement of a multitude of elements. The ILC has considered pluralism to be 'as a constitutive value of the [legal] system'.[209] However,

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[204] Jessup (n 177)
[205] Cheryl Saunders, '2- International Regimes and Domestic Arrangements: A View from Inside Out' in Margaret A. Young (ed), *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012), 83

[206] Paul Schiff Berman, 'The evolution of global legal pluralism' in in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational legal theory. Theorising Across Disciplines* (Elgar 2016),153
[207] Peer Zumbansen, 'Defining the space of transnational law: Legal theory, global governance, and legal pluralism' (2012) 21 *Transnat'l L. & Contemp. Probs.*, 325
[208] These notions remain important in legal education but are increasingly considered outdated, see Viellechner (n 175)
[209] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006

international legal theory is much divided on the 'obverse'[210] notion related to legal pluralism, which is legal fragmentation. The consideration of legal pluralism in international law is most often associated with the study of legal fragmentation and its consequences for the legal system, widely thought to be negative.[211]

Legal fragmentation is a common phenomenon accompanying the multiplication of actors, scales and legal regimes and managing more, potentially diverging, interests. The concept of legal fragmentation is a widely debated notion. There are different types of fragmentation, such as fragmentation within a field or between two or more, or between a field and general international law.[212] Legal theory has mostly shown caution towards legal fragmentation. The challenges it raises for the international legal system has generally viewed negatively.

The International Law Commission was assigned the task to study this phenomenon which resulted in the 2006 Report on 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law'.[213]

First, the report defines fragmentation as 'the emergence of specialized and relatively autonomous spheres of social action and structure' to more appropriately fit the issue they regulate.[214] In the legal field, fragmentation 'results in the separation of certain subsystems from (…) [general international] law'.[215] In addition, it results in the development of associated specific rules, rational and actors. Therefore, 'societal fragmentation impacts upon law in a manner such that the political regulation of differentiated societal spheres requires the parcelling out of the issue-specific policy-arenas, which, for their part, juridify themselves'.[216] These specific fields' development and degree of fragmentation with general international law varies. For instance, international maritime law is considered well-established and complete, while international environmental law often remains to be unanimously accepted as a legal regime.[217] Most often, legal fragmentation is seen as enabling the development of specific regimes and

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[210] J. Gray, C. Holley and R. Rayfuse, *Trans-jurisdictional Water Law and Governance* (1st edition, Routledge 2016), 27
[211] Gupta and Bavinck consider that 'while pluralism is often seen as a positive phenomenon, fragmentation is a negative concept denoting incoherence in international law as opposed to unity', see Joyeeta Gupta and Maarten Bavinck, 'Towards an elaborated theory of legal pluralism and aquatic resources' (2014) 11 *Current Opinion in Environmental Sustainability* 86
[212] Harro Van Asselt, *The Fragmentation of Global Climate Governance. Consequences and Management of Regime Interactions* (Edward Elgar 2014), 35-36
[213] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006
[214] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 11
[215] Ewelina Cala-Wacinkieqicz, 'International Law between Division (Fragmentation) and Unity (Constitutionalisation): Law of Divisions or Law beyond Boundaries' (2015) 12 *US-China Law Review* 768
[216] Fischer-Lescano and Teubner (n 176) 1009
[217] Fisher, Lange et al. (n 152) part 2(1)

'their own procedural norms on law-making, law-recognition and legal sanctions', '[fortifying] themselves as auto-constitutional regimes' with their own functioning.[218] The specific branches of international are fragmented both vertically, by detaching from general international law, but also horizontally, as the branches evolve in 'relative ignorance of legislative and institutional activities in the adjoining fields'.[219] They are perceived as being 'self-contained regimes'.[220]

The ILC report highlights two theoretical stances regarding legal fragmentation and its effect on the legal system.[221] Most of the literature considers fragmentation as having negative effects while a growing dissenting opinion focuses on the natural and beneficial side of the phenomenon.[222]

Fragmentation entails 'the immense difficulty of ensuring coordination and consistency within such a diffuse and multi-layered system'.[223] Scholars have pointed out that fragmentation within international law could lead to competing interests, overlapping jurisdictions and conflicts between the branches of international law.[224] Incoherencies between branches of international law, and also with general international law, could and have led to problems of deeper fragmentation, forum-shopping, and undermining the overall structure and cornerstone principles of law such as clarity and certainty.[225] Ladeur also notes that specialized branches are fragmented in their action and jurisdiction and might not be appropriate in dealing with global problems such as climate change.[226]

On the other hand, some authors have looked at fragmentation as a positive phenomenon.[227] It is sometimes viewed as a natural fact[228] and can be 'value-free'[229], neither positive nor negative but natural. As such, fragmentation can be considered more

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[218] Fischer-Lescano and Teubner (n 176) 1015

[219] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006; Turner (n 201) 243; Van Asselt (n 212) 3

[220] Fischer-Lescano and Teubner (n 176) 1015

[221] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 12; Van Asselt (n 212) 39-42

[222] Turner (n 201) 245

[223] Birnie, Boyle and Redgwell (n 26)

[224] Viellechner (n 175) 322; Turner (n 201) 243 and 245

[225] Matz-Lück (n 187); Cotterrell, 'Still Afraid of Legal Pluralism?' (n 186) Introduction, para. 4; Anthony Colangelo, 'A systems theory of fragmentation and harmonization' (2016) 49(1) *New York University Journal of International Law and Politic*

[226] Karl-Heinz Ladeur, 'The emergence of global administrative law and transnational regulation' (2012) 3(3) *Transnational legal theory*

[227] Turner (n 201) 245

[228] Cala-Wacinkieqicz (n 215)

[229] Fariborz Zelli and Harro Van Asselt, 'Introduction: The institutional fragmentation of global environmental governance: Causes, consequences, and responses' (2013) 13(3) *Global environmental politics* 1, 3

evidently as a 'growing feature of law in general'.[230] Fragmentation, perceived as one of the biggest threats to international law might actually be a counterintuitive but important step towards evolution of the legal system.[231] In this view, legal fragmentation is a counterpart of the diversification and multiplication of international legal regimes. Going further, legal fragmentation is considered to bring benefits, such as embracing the reality, both diverse and fragmented, of law and of a globalised world. Gupta and Bavinck consider that fragmentation 'is positive in that it indicates a diversity of norms, issues and interests, and could lead to diffusion of good ideas'.[232] This perspective was cautiously articulated in the ILC in 2006 but it is considered as widely accepted since, as presented by Broude.[233] Authors like Burke-White participate to reversing the prejudice towards legal fragmentation.[234] From a negative development and a 'threat to the legal system as we know it', the author defends that the system 'rather is being transformed into a pluralist system'.[235] For him, this phenomenon can even strengthen international law instead of weakening it.[236] Following on this, Matz-Lück has said that 'diversification and specialisation, including the development of 'branches' (…), is a necessary part of a modern and reflective international legal system'.[237] In their view, legal fragmentation is no longer a phenomenon that legal theory has to fight and solve. But it could potentially give rise to benefits and a stronger and more accurate international legal pluralist system.

The evolution of both theoretical positions on legal fragmentation and the more neutral summary of the ILC have allowed international legal theory to examine more in-depth the problematics raised by the expansion and acceptance of legal pluralism and fragmentation in the legal system and what it entails for the founding principles of international law.

C- The challenges to the founding principles of international law and to the role of the State: the destabilisation of traditional international law through legal pluralism and fragmentation

[230] Roger Cotterrell, 'What Is Transnational Law?' (2012) 37(2) *Law & Social Inquiry*, 503; Colangelo (n 225) 6
[231] Colangelo (n 225)
[232] Gupta and Bavinck (n 211)
[233] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 15; Tomer Broude, 'Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law' (2013) 27(2) *Temple International & Comparative Law Journal*, 280
[234] William Burke-White, 'International legal pluralism' (2003) 25 *Michigan Journal of International Law* 963, 963. His commentary challenges the assumption of fragmentation happening (instead the system is becoming more pluralist). It also challenges fragmentation being bad. The legal order can be strengthened by the emergence of pluralism.
[235] Ibid
[236] Colangelo (n 225) 6
[237] Matz-Lück (n 187) 205

International legal theory has first engaged with the idea of legal pluralism and fragmentation in order to decide if these growing phenomena were or were not to be internalised. Then, it has considered more in depth the potential impact on the existing system when embraced as a natural feature and development in the discipline. Legal theory has tried to assess how legal pluralism and fragmentation might affect law and the role of State in international law.[238] The evaluation of these potential impacts has also divided opinions as to how the inexorable acceptance of pluralism and fragmentation will transform international law. Several core characteristics of international law are challenged by the adaptation of legal theory to legal pluralism. Emerging challenges question the various set characteristics: 'the conditions of specialization'[239] of branches of international law, the centrality and importance of the States, the diversification and expansion of non-State, informal actors and the inadequacy of the divides of traditional international law with national law or between private and public issues, for instance.

Most importantly, legal pluralism and fragmentation challenge the position of State within international law.[240] As already mentioned, fundamental elements of international law related to the State have been destabilized overtime in their centrality and importance for the system. Zumbansen and other scholars are adamant about the need 'to deconstruct the various law-state associations' to match more accurately the reality on the ground.[241] Among these law-state associations, the author mentions the attachment to territoriality and to the notion of state-nation.[242] The challenge of State-centrism has gone further for some scholars raising the issue of State consent at the heart of treaty regime and international rules.[243] In the context of rapidly changing legal regimes and decisions to be made, the absolute need for the consent of State can sometimes appear as a burden to the flexible and smooth operation of international law.[244] Furthermore, authors have even studied the possible disappearance or obsolescence of the State within international law.[245] For Slaughter, this necessary transformation of the State in international law is 'nothing less than a basic rethinking of what "the state" is'.[246] An important element will be to observe the movements and exchanges between the State and its counterparts. Slaughter notes that State and non-state authorities 'will engage in both conflict and cooperation. And they will gradually construct a very different body of international

[238] Slaughter 'Breaking out' (n 165)
[239] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006
[240] Slaughter 'Breaking out' (n 165) 13
[241] Zumbansen, 'Defining the space of transnational law' (n 207) 311
[242] Ibid 308
[243] Giorgio Bongiovanni, 'Global constitutionalism and legal theory: a preliminary analysis' (2014) 1(2) *Soft Power*, 184
[244] Matz-Lück (n 187)
[245] Heyvaert (n 184) 215
[246] Slaughter 'Breaking out' (n 165) 14-15

rules'.[247] The author then defends the existence of the State but deems necessary the disturbance and rethinking of its functioning and mindset. The State needs to create space for legal pluralism, other actors and sources of normativity.[248] For other authors, further studies are adopting a less transformative position on the essence of the State. Despite the changes required on how the State is considered in international law, it is not 'dying or should be deemed unimportant'.[249]

Furthermore, the literature points out that the viability of traditional international law resides not only on State-related characteristics and divides but on core values guiding the development of the system. International legal theory highly values the coherence and unity of the system.[250] The ILC notes that 'coherence is valued positively owing to the connection it has with predictability and legal security'.[251] Predictability and legal security are central requirements in both international and national legal systems.[252] They are often presented to be incompatible with the instability and changes within modern international law and issues. Legal fragmentation and specialised branches of international law can present a challenge or threat to the coherence and unity of the system.[253] These branches of international law are highly flexible and adapting to the dynamics of a specific regulatory area, its rationale, rules and processes.[254] The changes in some fields, like environment, are constant and entail that a fixed framework with boundaries is hard to set, if not impossible.[255] Another example is the multiplication of institutions and judicial organs of international law. 'At an institutional level, the proliferation of implementation organs (…) for specific treaty-regimes has given rise to a concern over deviating jurisprudence and forum-shopping', which also participates in a lack of predictability and legal certainty.[256] In this configuration of likely divergent or conflictual interpretations, Cassese wonders if having many courts would then 'impair the functioning of the law'.[257]

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[247] Ibid 14-15
[248] Ibid
[249] Berman 'Global Legal Pluralism' (n 180) 1180
[250] Van Aaken (n 182) 485
[251] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 248
[252] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 248; Heyvaert (n 184) 222
[253] Marjan Ajevski, 'Fragmentation in International Human Rights Law – Beyond Conflicts of Laws' (2014) 32(2) *Nordic Journal of Human Rights* 87
[254] See International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 11; Turner (n 201) 243; Fischer-Lescano and Teubner (n 176) 1006
[255] Peer Zumbansen, 'Transnational law, Evolving' in Jan Smits (ed.), *Encyclopedia of Comparative Law* (2nd ed., 2012, Edward Elgar)
[256] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 247
[257] Antonio Cassese, '48- Gathering Up the Main Threads' in Antonio Cassese (ed), *Realizing Utopia. The Future of International Law* (OUP 2012), 669

In addition, the criteria of what qualifies as law in international law is now blurred. Laws created outside of a direct or indirect link with a sovereign power (the State or an actor with delegated sovereign power) are now considered part of or influencing the international legal system. First, it shows a challenge of the State-centric characteristic of the traditional system.[258] This can also create instability and incoherence as to what is legality, what is considered binding or not, and what belongs to the legal system or not. The traditional creation process and the nature of an international laws are challenged by legal fragmentation and plurality.[259] In that view, the challenges of pluralism and fragmentation have fed what Zumbansen describes as 'today's lament about the law's loss of unity in the global context'.[260]

Nonetheless, for Bhuta, this situation of crisis and self-reflection of international law is due to an epocal shift of the 'paradigm in international order'.[261] The author suggests that it does call into question the fundamental principles of international law, but it also helps determine if the basis of the system is solid and coherent.[262] However, Colangelo notes that the alternative to accepting fragmentation as part of international law is 'to have a frozen system, capable only of regulating what was traditionally encompassed' and that will leave outside the rest.[263] This could bring in turn disharmony and conflicts within the system. This crisis can have an eye-opening effect on the reality of international law. Suhardiman and Giordano state more directly that '"legal pluralism is a fact. Legal centralism is a myth, an ideal, a claim, an illusion"'.[264] This challenge to consider legal pluralism and fragmentation as part of the legal system requires from legal theory 'to find new ways to interpret and manage legal complexity juristically'.[265] New theoretical concepts or understanding will have to be found to deal with this new complexity. These solutions need to allow international legal theory to reflect the inevitable changes occurring in international law, while preserving or adapting its theoretical core conceptualisations and values.

III- The theoretical attempts to include legal pluralism and practical developments into legal theory

The following section will introduce conceptual developments of international legal theory which have engaged with the impacts of legal pluralism and fragmentation

[258] Gunther Teubner, 'The two faces of Janus: rethinking legal pluralism' (1991) 13 *Cardozo Law Review* 1443
[259] Perez (n 189) 343
[260] Zumbansen, 'Defining the space of transnational law' (n 207) 306
[261] Bhuta (n 198) 62
[262] Ibid
[263] Colangelo (n 225) 6
[264] Diana Suhardiman and Mark Giordano, 'Legal plurality: An analysis of power interplay in Mekong hydropower' (2014) 104(5) *Annals of the Association of American Geographers* 973, 975
[265] Cotterrell 'What Is Transnational Law?' (n 230) 504

addressed above. The section will consider two diverging theoretical responses of 'sovereigntist territorialism' and 'universalist harmonization'.[266] Both terms illustrate the attempts taken in legal theory to include the idea of legal pluralism in international law. Most importantly, they seek to manage the negative effects and challenges mentioned previously in relation to legal fragmentation. However, the section will more specifically consider how these theories can be viewed as only managerial and not as integrative ways to consider legal pluralism. It will reflect on lingering negative perception of legal pluralism. This perception transpires in the analysis made of multi-dimensional issues and the limited efficiency of this analysis. Finally, the section will present the development in practice of synergies and mutually reinforcing convergences among the plurality of international legal regimes. This importantly draws attention on the possibility of positive interactions through legal pluralism. These interactions can then contribute to a more integrated, and not fragmented, approach in international law.

A- General legal theoretical responses to legal pluralism and fragmentation: 'sovereigntist territorialism' and 'universalist harmonization' (Berman 2006)

International legal theory has tried to develop theoretical responses to the challenge presented by legal pluralism and fragmentation to international law's core conceptualisations and values. Both these theories have attracted a wide interest and can be broadly referred to as what Paul Berman calls 'sovereigntist territorialism' or 'universalist harmonization'.[267] Another description of these approaches can be of a more defensive or progressist approach, as described by Heyvaert.[268]

To respond to the theoretical and practical challenges felt in international law, legal theory has leaned over two major schools.[269] These approaches are not the only ones adopted in the literature nor the only possible responses to pluralism and fragmentation. [270] They represent two extremes of a spectrum of responses. Both theories will be discussed following the terminology and insights from Berman, using two terms to address the various and nuanced responses, towards one or the other theoretical approaches. He has referred to these ways of addressing the new pluralist and fragmented international law as 'sovereigntist territorialism' and 'universalist harmonization'.[271] Other scholars have also discussed at length these positions and will also be introduced as references, despite the nuances they might have with Berman's thoughts. Faced with a destabilization of the

[266] The two terms are coined by Berman 'Global Legal Pluralism' (n 180)
[267] Berman 'Global Legal Pluralism' (n 180)
[268] Heyvaert (n 184)
[269] Bhuta (n 198) 62 and 71
[270] Berman 'Global Legal Pluralism' (n 180) 1164
[271] Ibid

basic concepts of international law and the State, legal theorists generally either decide to reassert territoriality or to push for universal harmonization.[272]

The first theoretical solution presented by the literature is the 'sovereigntist territorialism'. Both of these terms refer to notions linked to the State and are traditional conceptualisations of international law. Heyvaert qualifies this response as 'defensive' and compares it to resealing Pandora's box by 'reassert[ing] the traditional boundaries of law'.[273] The main purpose and appeal of this defensive answer is that it 'avoid[s] the disruption that accompanies attempts at reconceptualisation; they preserve the relevance of generations of legal knowledge and praxis; and imbue decision making with continuity and, hence, predictability'.[274] The notion of sovereigntist territorialism and its response to pluralism can be more nuanced. It can then aim to 'safeguard the formal divisions between law and non-law with an awareness of the de facto similarities between legal and non-legal norms'.[275] This nuance looks to preserve the existing classifications and divides, while being aware of interconnections and adopting a more flexible approach.

The second approach can be one of 'universalist harmonization'. This solution is discussed a lot by the literature and has attracted more interest to tackle pluralism and fragmentation. It is due to the fact that it appears less conservative and 'repressive (…) [than to attempt] to reclaim law'.[276] It aims to establish a common set of global homogenous rules. Universalist harmonization can be associated with two discourses of the literature. One is the notion that 'calls for harmonization of norms, more treaties, the construction of international governing bodies, and the creation of "world law"'.[277] It can be associated with 'global law'.[278] Scholars have also addressed a second understanding of this approach through constitutionalisation. For Bongiovanni, 'the term *global constitutionalism* refers to a theoretical proposal that, with sometimes very different nuances, argues, in a descriptive and normative sense, for the progressive development of the processes of constitutionalization of supranational law'. [279] It would 'develop "centralized institutions" while "specifying a hierarchy among rules or adjudicators."', mirroring the national legal system's hierarchy.[280] For the author, it aims to achieve coherence and unity in the international legal system through a 'new phase of

[272] Ibid 1179-1180
[273] Heyvaert (n 184) 222
[274] Ibid
[275] Ibid
[276] Heyvaert (n 184) 233
[277] Berman 'Global Legal Pluralism' (n 180) 1163
[278] Global law is a term associated with the growing regulation of international law at the global level and for global issues. Its scale would be broader than international, as it connects everyone and everything, and englobes other scales of regulation. See Rafael Domingo, *The New Global Law* (CUP 2010) xviii
[279] Bongiovanni (n 243) 172
[280] Ibid 177

supranational law'.[281] Both of these aspects of a solution to legal pluralism embrace a shift away from focusing on the State, the national scale and other traditional legal categories. Both the development of a global law, which could be quite disruptive to the legal system, or the development of global constitutionalism, which could essentially recreate a legal system at a broader scale, argue that legal theory should reflect on its relation to the State for a more global approach.

Both theories of 'sovereigntist territorialism' and 'universalist harmonization' have gained attention from legal theory and practice in their goal of reclaiming a unity and coherence of the legal system.

B- The unsuccessful and reductive theoretical approaches to deal with legal pluralism: the partial and inaccurate representation of modern international law

The use of 'universalist harmonization' or 'sovereigntist territorialism' approaches has attempted to set a general direction for the theoretical engagement with and the management of legal pluralism. Both approaches have tried to safeguard coherence and predictability in international law through a controlled and determined move forward or backwards. But these two theories present limits and gaps in their way of including legal pluralism and of adapting legal theory and the legal system. Scholars have then questioned these opposite streams of thought, and the rationale at the root of their objectives. This section will present first the reductive vision that both theories convey, with regards to the complex and interconnected set of actors, scales and regimes in reality. Secondly, the section will give examples against the feasibility and desirability of implementing these theories into international law. Then, the section will show the limitations of these theories to make sense of this plurality with the general values and traditional rationale of the international legal system. This will be done by looking at the conflict of laws and the inefficiency in dealing with much more diverse and cross-category conflicts. Finally, the two theories will be considered not only as inefficient and reductive to integrate pluralism in legal theory but, more importantly, as working against plurality. The section will have presented how both territorialism and constitutionalism are inadapted approaches to legal pluralism and the need for another response to make sense of plurality within legal theory.

Both theories set a reductive approach of international law through their general affiliation with either State characteristics or with the supranational level. In its report on fragmentation, the ILC indicated that taking a view solely focused on international or national law or scale is inefficient or inadequate to deal appropriately with transboundary

[281] Ibid 177 and 173-4

issues.[282] This would also be the case for legal theories privileging an international or a national perspective. These complex, modern, often transboundary, issues often include non-traditional legal elements, such as non-legal actors, non-law or cross-category elements, like transborder dynamics. These elements, emerging from accepting legal pluralism, need to be appropriately recognised, included and part of the analysis and regulation by international law.

Constitutionalism and territorialism both adopt a reductive approach to the plurality of actors present in modern issues. The former aims to focus on a superior or supranational actor, defining what is global law and being the reference in this legal system.[283] The latter focuses on the legal actors linked to the State and to the national scale, leaving out everyone else. Many actors, such as non-legal actors or cross-category actors, would not be all represented through neither theoretical approach.

In addition, both approaches of legal theory have a reductive view of the plurality of laws influencing modern issues. Territorialism would indeed refer to laws in the traditional sense, as being made by the State or coming from the delegation of State power. Constitutionalism often refers to a similar structure as within States, with a supranational superior actor, through which norm creation, implementation and articulation would go and refer to. So, despite being broadly accepted as having a certain normative influence or authority, non-traditional types of regulation, such as 'soft' law, could be partially accounted for in these approaches.[284] Separate norm-making by actors not recognised as having legal legitimacy and authority (as set by both approaches of the system) would then be overlooked as legal or influencing. Ignoring such elements of regulation, influencing modern issues beyond their traditionally non-binding effect, is considered reductive and 'not a useful strategy' to tackle legal pluralism and fragmentation.[285]

Both constitutionalism and territorialism refer to a specific, reductive scale of regulation and focus, the global or supranational level and the national level. Both of their boundary and border settings are not useful or accurate in a modern, transborder issue.[286] For climate change, the national level is insufficient in dealing with these cross-border issues, but the global level is inadapted to local or regional specificities of these issues. The idea of supranationalism or global law is less evident to view as reductive than for territorialism. However, interestingly, the scale of regulation of global law can display similar flaws to the territorialist approach. Zumbansen warns the promotion of global law as 'a mere extension or translation of nation-state-based doctrine onto a rudimentarily defined sphere 'beyond'

[282] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 244
[283] Bongiovanni (n 243)
[284] Ibid 181
[285] Berman 'A pluralist approach to international law' (n 180) 302
[286] Heyvaert (n 184) 223

or ‘outside’ the nation state’.[287] Then, this approach would not really consider cross-category and transboundary dynamics. Both theoretical approaches can therefore be considered as reductive in their approach of the scales of regulation in modern, multi-dimensional and often transboundary, issues. The unwillingness to tackle the specificities of pluralism and the impacts of transnationalisation of modern issues increases the gap between the law on the books and reality.[288] Actually, such reductive approaches could, against purpose, affect the credibility, efficiency and accuracy of international law.

Furthermore, after asserting the reductive scope of both constitutionalism and territorialism, the feasibility and desirability of such theoretical approaches can be addressed. Regarding the feasibility and desirability of the ‘sovereigntist territorialism’, Berman notes that in a globalised world, it is impossible to close yourself to external influence and that, even so, the benefits from such an influence would also be lost.[289] This includes the influence from non-state actors, international bodies or communities. The absence of it would challenge the representability, legitimacy and efficiency of the rules produced. Then, territorialism might not be attractive or feasible in today’s globalised and interconnected world. For constitutionalism, a key problem of feasibility arises regarding the lack of a superior, supranational authority to refer to in international law.[290] The suggestion that international law might already be equipped with such an authority, such as the International Court of Justice (ICJ), has been contested and dismissed by authors like Odermatt, considering the viability of this idea.[291] This crucial element to the implementation of constitutionalism makes the theory disputable in terms of its feasibility. These two illustrations have presented some of the limits faced by the two theories in their aim to convey a unitary rationality for international law, as well as to regulate issues more in accordance with the pluralist and fragmented system.

Theoretical flaws of both approaches transpire in the resolution of conflicts of laws. In traditional international law, conflicts can occur between two formal rules with the same subject-matter or same subject bound by them.[292] The conflicts of laws, mainly in adjudicatory decisions, is dealt with by answering the question of which law or rule is applicable to a certain issue, or onto a certain subject, that naturally involves several legal regimes, scales and actors. In a system without a hierarchy of norms[293], but eager to

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[287] Zumbansen, ‘Neither ‘public’ nor ‘private’’ (n 287) 51
[288] Heyvaert (n 184) 223

[289] Berman ‘Global Legal Pluralism’ (n 180) 1182-1190
[290] Viellechner (n 175) 322
[291] Jed Odermatt, ‘A Farewell to Fragmentation: Reassertion and Convergences in International Law’ (2016) 14(3) *International Journal of Constitutional Law* 776
[292] International Law Commission, ‘Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law’ UNGAR A/CN.4/L.682 13 April 2006, 17 section B. 2.
[293] United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, (adopted 24 October 1945) article 38

preserve coherence and unity, rationales and conflict-rules are established to try to answer the question of the law applicable and to avoid conflict over which law is applicable. In the international legal system, this is most notably done in the Vienna Convention on the Law of Treaties, where conflicts between treaties are dealt with through several technical approaches. In this context, sovereigntist territorialism and universalist harmonization theories are used in practice to give priority to rules with the greatest link to either sovereign power or to a global rule that supersedes specific regimes' rules. Therefore, judicial bodies might privilege one rule over another and settle a dispute in a way that is not consistent with the reality and the multidimensional nature of the case but conveys certainty and predictability.

However, Fischer-Lescano points out that a new type of conflicts of law is emerging, with the diversification of sources of law or influencing regulatory elements.[294] These types of inter-systemic and cross-categories conflicts cannot be resolved with a traditional system of conflict resolution. The entrenched separation made between law and non-law institutionalises a partial vision of pluralist issues. Each dispute, and the possible conflicts of laws within it, are much more diverse and complex. Then, Dunoff and Koskennniemi defend that 'the complexities associated with regime interaction cannot be resolved by technical or managerial responses', like the reference to rules of conflicts such as the Vienna Convention on the Law of Treaties (VCLT).[295] Conflicts of law within modern transboundary issues cannot be fully and appropriately analysed and solved by reference to the theories of constitutionalism or territorialism.

In addition, Dunoff explains that 'at a deeper level, the problem highlighted by litigations involving regime interaction is that at present there is no widely accepted redemptive narrative that sets out a vision of a perfected, or redeemed, international order, and that gives meaning to the norms embedded within that order'.[296] This refers to the general, overarching way for international law to function, according to background rules and principles set and agreed upon. The current 'redemptive narrative' mentioned is based on traditional conceptualisations of law, which have been described as reductive. The reference to these ''metarationality', or overarching principles of authority' within traditional international law cannot help courts integrating the pluralism of modern transboundary issues.[297] It then cannot solve the conflicts of law arising there. Indeed, the ILC concludes that 'no homogenous, hierarchical meta-system is realistically available to do away with

[294] Fischer-Lescano and Teubner (n 176)
[295] Jeffrey L. Dunoff, '5- A New Approach to Regime Interaction' in Margaret A. Young (ed), *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012), 154;
Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)
[296] Dunoff (n 295) 154
[297] Ibid

such [conflicts of a plurality of laws] problems'.[298] The pursuit of coherence and predictability and the realities of pluralism 'will point in different directions'.[299] Constitutionalism and territorialism will both generally privilege coherence and predictability, as core values of international law, at the expense of accepting and including pluralism.

The limited success of constitutionalism and territorialism in including legal pluralism within legal theory lies in the reductive and inefficient approach to diversity and to complex transboundary issues. But for Berman, these theories and the quest for coherence and unity in international law goes beyond being inadapted. These theories not only avoid the issue of diversity and pluralism[300] but work against it in essence.[301] While it appears more evident with the territorialist approach, universalism also 'inevitably erases diversity'.[302] Universalism could suppress the least majoritarian or least powerful voices by designating a uniform, overarching rule prioritised over more specific or dissenting rules.[303] Therefore, diversity is treated by both these visions as creating challenges and complexity to be solved and eliminated. This position is contradictory to embracing legal pluralism and fragmentation as part of modern international law. Berman exposes that 'arguably the desire to "solve" hybridity problems is precisely what has made conflict of laws such a conceptually dissatisfying field for so long'.[304] The consideration that plurality leads to conflicts and competition between norms reflects the deeply rooted negative perception of legal fragmentation and the challenges it brings for traditional legal conceptualisations. It is not to say that conflicts of laws do not occur and cannot be resolved with the existing priority approaches. However, this constitutes a reductive and negative view of diversity and legal pluralism. Indeed, 'regime interaction is a much broader issue than conflict prevention and resolution'.[305] Dunoff states that these interactions have a 'highly dynamic character' but legal theory focuses primarily on what he calls the 'transactional' interaction, only addressing the clashes and conflicts of legal regimes.[306] Contrastively, the author gives numerous examples of 'relational' interactions, as every day, non-conflictual relations occurring between legal regimes.[307]

Therefore, both approaches developed by legal theory to integrate legal pluralism and fragmentation in the legal system seem to fail to capture accurately these phenomena.

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[298] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 249
[299] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 16 and 249
[300] Perez (n 189) 343
[301] Berman 'Global Legal Pluralism' (n 180) 1159
[302] Berman 'Global Legal Pluralism' (n 180) 1190
[303] Berman 'The evolution of global legal pluralism' (n 206)
[304] Berman 'Global Legal Pluralism' (n 180) 1192
[305] Matz-Lück (n 187) 210
[306] Dunoff (n 295) 155-158
[307] Ibid 137

While handling the potential negative impacts on the traditional legal conceptualisations and values, these approaches manage and limit the diversity of actors, scales and legal regimes created. The adaptation and reflection on international legal theory suggested by these approaches with regards to the increasingly pluralist issues is then restricted. The limits of both dominant theories have been presented in the literature on Transnational Environmental Law or Regulation. It associates the defensive responses to linking systems to pre-existing categories rather than consider the challenges and tensions that transnational issues create for legal regulation. The second dominant theory acknowledges the 'destabilization of law' and searches adaptative approaches but still refers to 'conventional attributes and functionalities' of international law. Heyvaert considers that the first two answers 'may bring short-term relief, but they are hardly sustainable attempts at problem solving'.[308] She concludes by saying that 'ultimately, the main shortcoming of boundary-drawing exercises [and theories] is that they tend to ignore or displace, rather than truly resolve, the tensions caused by transnationalization' and globalisation.[309] Finally, the literature presents a third way of theoretically considering pluralism in a 'more inclusive reconceptualisation of law'. [310] This third, non-dominant, position would be a pluralist approach that presents more advantages for regulating transboundary issues and for reforming international legal theory.[311] The section above has presented the complexity and broader scope of regimes interactions than what is captured by traditional international law and traditional conflicts of law. With the understanding that diversity goes beyond what is included by the international legal system as it is, Dunoff calls for a 'richer understanding of international regimes than offered by the dominant approach'.[312]

Following these insights into the inadequate place given to legal pluralism in legal theory and its 'pluralist' approaches, Berman suggests the way forward for legal theory. The author calls upon 'scholars seeking to understand the multifaceted role of law in an era of globalization (…) [to] take seriously the insights of legal pluralism'.[313] This statement warns against the superficial position of the two theories above, which only cautiously managed or smoothed out pluralism. Berman recognises the 'messy' nature of pluralism or hybridity but emphasizes the sine qua non nature of it in the globalized and 'deterritorialized world', where transboundary and cross-category actors, scales and regimes apply to a given issue.[314] He notes that 'In such a world, universal harmonization

[308] Heyvaert (n 184) 233
[309] Ibid 223
[310] T. Etty, V. Heyvaert, C. Carlarne, D. Farber, B. Huber and J. van Zeben, 'The Maturing of Transnational Environmental law' (2017) 6(2) *Transnational Environmental Journal* 193, 196
[311] Berman 'Global Legal Pluralism' (n 180) 1164
[312] Dunoff (n 295) 158
[313] Berman 'Global Legal Pluralism' (n 180) 1169
[314] Berman 'Global Legal Pluralism' (n 180) 1235-36

is unlikely to be fully achievable even if it were normatively desirable.' Similarly, sovereigntist territorialism is 'impractical' and no reflective of pluralism. As mentioned in the previous section, legal pluralism is a reality and Berman tasks 'international legal scholars to develop, evaluate, and improve the mechanisms, institutions, and practices for managing such hybridity'.[315] Heyvaert also considers unquestionable that 'the most obvious way of dealing with the plurality of law is, simply, to bear it'.[316]

To accept plurality instead of eliminating it, international legal theory will have to dedicate more understanding and analysis of the diverse legal regimes, actors and scales at hand within pluralism. It will also have to focus on every type of interactions they trigger, beyond conflicts of law. The ILC itself recognised that 'the whole complex of inter-regime relations is presently a legal black hole'.[317] Scholars have shown the awareness of the limitations of traditional theories and conceptualisations of international law and the need to challenge them.[318] The growing interest of the literature for alternative legal approaches to pluralism demonstrate that a third option is available to international law, by considering the diversity of interactions between legal regimes beyond conflictual and negative assumptions.

In summary, this section has presented the limited success of international legal theory at including legal pluralism within its core values and conceptualisations. It also has failed to embrace the multiplication and diversification of legal actors, scales and regimes outside of traditionally framed law. Despite the growing acceptance of pluralism and fragmentation as part of international law, the focus of legal theory remains on the disrupting occurrences of fragmentation and conflicts of law. The objective of theoretical approaches then focuses on the need to manage these through the sorting out or hierarchisation of diversity. However, this perspective is not actually embracing legal pluralism, not accurately reflecting the changes in the socio-legal context governed nor is it aligning with the objective of integration. Legal theory is preserving core legal values and conceptualisations in the face of the changes brought about by legal pluralism and fragmentation. This has made it difficult to truly adapt and reflect on the natural and inexorable phenomenon of globalisation and diversification. Berman considers that most legal approaches have not really viewed all regulating elements collectively nor in a pluralist approach.[319] Legal theory appears unable to account for and to map every aspect, actors, scale and legal regimes.[320] International legal practice, on the other hand, has already seen evolutions related to legal pluralism. It has importantly evidenced

[315] Ibid
[316] Heyvaert (n 184) 231
[317] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 253
[318] See for example Van Asselt (n 212) 253
[319] Berman 'Global Legal Pluralism' (n 180) 1196
[320] Sassen (n 168) 1149

positive interactions, convergences, and synergies between a variety of normative elements, linked to traditional international law or developing outside it.

C- The potential for positive, converging interactions within legal pluralism in international law: integrated developments in practice

The following section will consider various instances of converging interactions developing in practice between the plurality of legal actors, scales and regimes in international law. This will show that legal pluralism and fragmentation do not always bring about conflicts of norms or a disruption to fundamental legal values. Convergences and synergies are also dynamics occurring in a legal pluralist and fragmented world. These interactions can be considered positive in that they allow a simultaneous or combined application of different legal regimes and a mutually beneficial association of different elements.[321]

An example of positive interactions that developed overtime, with the objective of integration and the idea of possible positive dynamics, is the interlinkages between the three pillars of sustainable development. Indeed, human rights and environmental legal regimes are commonly considered to share positive interactions, with often converging or mutually reinforcing interests. However, other less evident positive interactions have been considered and promoted, when departing from the idea of exclusivity and competition between the three pillars. A more diverse array of interactions, including both negative and positive, have been explored between these two fields and economic law.[322] The interactions between the three fields are no longer only seen as conflictual and negative but also possibly positive and converging. These positive interlinkages between the three pillars are at the centre of the rationale of integration and mutually fulfilling interests within sustainable development.

This section will address the perception of and the focus on negative fragmentation of international law, rooted in legal theory. This position often directs the attention towards a partial representation of all the dynamics happening in practice, especially positive ones. In turn, this section will consider converging interactions that present the possibility of beneficial legal pluralism. Then, these interactions introduce a capacity to promote integration. Therefore, the need for theoretical approach that would account for these interactions is advocated as crucial to the acceptance of legal pluralism and to integration. To consider a possible broader approach to legal pluralism and to converging interactions, this section will focus on the dynamics between various regimes in general international

[321] Odermatt strikingly raises the point that international legal theory 'tends to assume that a move towards greater convergence is a desirable aim in international law, but this normative claim is never fully elaborated upon'. Odermatt (n 291) 780
[322] Marong (n 31) 63

law, more specifically economic, environmental and human rights legal regimes. As noted previously, globalisation and legal pluralism have led to a multiplication and diversification of the sources, actors and scales of legal regimes. It has led to an internal transformation of international law and of legal regimes. These unique changes have been studied more extensively within each legal field, but this section will focus on their influence on the dynamics of general international law and on inter-regimes' interactions.

The following examples will first mention convergences which have been introduced in formal 'hard law' in each legal regime. This will point out the recognition and the crystallization of these interlinkages within the frame of traditional international legal system. Additional examples will address converging informal 'soft law' instances. It will show that legal pluralism, expanding outside of traditional international law, is participating to positive interactions in international law, and not only to negative fragmentation. Finally, the section will mention how the variety of actors among international legal regimes are also congregating. They also participate in practice to a more integrated and still coherent legal system.

1/Positive interactions amongst diverse 'hard law' instruments in international law

Some of the converging interactions between legal regimes can be found in their formal, 'hard law' documents, such as treaties. These documents being at the core of each field, their influence creates deeply rooted positive interactions. They can also push each field to considerations which can combine approaches from various fields. It positions the legal regimes not in isolation or in autonomy from each other, but it highlights diversity and formal links between them.

This is the case for example within some investment agreements or contracts. In these binding documents some environmental protection national laws and regulations can be referenced.[323] These considerations set in the documents can create potential exceptions and limits to the freedom of investors. These associations seem to oppose both legal fields that sometimes lead to investment disputes between the application of both regimes.[324] But it also shows the inclusion of environmental considerations within the investment field. It could also create a balancing and trade-off exercise to apply both measures and combine harmoniously the two carried out by investors, the State or by arbitrators in disputes. It is important to point out that the application of the two, possibly competitive, regimes can also bring, if not converging, compatible interactions.[325] The

[323] See examples in Natasha Affolder, 'Looking for Law in Unusual Places: Cross-Border Diffusion of Environmental Norms' (2018) 7(3) *Transnational Environmental Law*, introduction; Francioni (n 203) 442

[324] Attila Tanzi, 'International Law and Foreign Investment in Hydroelectric Industry: a Multidimensional Analysis' in Eric de Brabandere and Tarcisio Gazzini (eds), *Foreign Investment in the Energy Sector. Balancing Private and Public Interests* (Brill Nijhoff 2014)

[325] Ibid

need for a non-conflictual and hopefully balanced outcome is often at the centre of dispute settlement.

In international environmental treaties, economic mechanisms or approaches are increasingly used as a system of incentives or enforcement for environmental measures. In the Kyoto protocol, an innovative carbon trading system was created to use market mechanisms and investment to incentivise parties to the protocol to reduce their carbon emissions.[326] This eco-environmental hybrid mechanism has combined approaches from the two legal regimes to create a mutually beneficial and positive dynamic. And it has since been reproduced for example in the European Union.[327] The efficiency of trade measures in forcing compliance of States or companies for example is a great asset to environmental measures.[328] The use of these links between trade and environment within environmental agreements highlights the possible convergence and the synergy to explore and exploit.

International human rights law has also increasingly promoted rights to the environment in its treaties and influential documents.[329] The overall 'greening' of international human rights legal regime has created convergences in the application of international environmental law and human rights law.[330] Their provisions can be mutually reinforcing and borrow the other's rationale, scope, and mechanisms to advance its own application, like with the 'right to a healthy environment' for example.[331]

The converging interactions observed within legal pluralism participate to embracing diversity and creating more integration into international legal practice. Their introduction within the formal, core provisions of legal regimes is including legal pluralism within each field, systematizing diversity and convergences within the international legal system.

2/Positive interactions amongst diverse 'soft law' instruments in international law

Positive interactions and functional rapprochement are also built through the development of soft law. Soft law developments are generally not identified as a formal

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[326] UNFCCC, Kyoto Protocol to the United Nations Framework Convention on Climate Change adopted at COP3 in Kyoto, Japan, on 11 December 1997 (UNTS vol 2303, 162)
[327] EU Emissions Trade System (EU ETS), Directive 2003/87/EC (13 October 2003), establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, official Journal of the European Union L. 275/32
[328] Cinnamon Pinon Carlarne, 'Good climate governance: only a fragmented system of international law away?' (2008) 30(4) *Law & Policy* 450, 467
[329] See for example, 'Human rights and the environment' (adopted 12 April 2011) UNGA Res A/HRC/RES/16/11 <https://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.RES.16.11_en.pdf> accessed 12 March 2021
[330] Susan Borràs, 'New Transitions from Human Rights to the Environment to the Rights of Nature' (2016) 5(1) *Transnational Environment Law*, 117; Alan Boyle, 'Human rights and the Environment: Where Next?' (2012) 23(3) *European Journal of International Law*, 1
[331] Boyle (n 330) 1. For the right to a healthy environment see Borràs (n 330) 116

and institutionalised development of international law, contrary to the hard law convergences integrated in legal regimes. However, the positive interactions and convergence they create also influence the overall practice of international law and certain legal regimes. These soft law instruments could also possibly crystalize into hard law later on.[332]

The first example of positive interactions between soft laws and rationales of each field refers to convergences between human rights and environmental legal regimes. Their convergence and positive interactions are linked to a certain interdependence to their realisation or to their promotion. The realisation of some human rights, like the right to drinking water is dependent on the realisation of a healthy environment or securing the related environmental condition or resource. The promotion of the need for a protected and improved water resource is pushed forward by its relation with vital needs and rights of humans. The human right to health or to life are both dependent on the environment or at least the space which is the environment.[333]

An example of soft law instruments where investment and environmental legal regimes interact are the notions of green funds and green economy.[334] These mechanisms have in common that they can be mutually beneficial for economic and environmental legal regimes. They both incentivise and finance green or environmental-friendly infrastructures, projects or consumer habits while using economic and investment system and interests benefiting economic actors. These combined approaches or mechanisms, borrowing from each legal field, try to establish a converging and mutually reinforcing tool to realize the objectives of both legal regimes.[335]

In addition, many soft law instruments have engaged with the need for and possibility of convergences between the international investment and human rights regimes.[336] Several guidelines, among which the UN Business and Human Rights Guidelines, have addressed the compatibility, and even convergence, between the two legal fields, often thought of as separate and competitive.[337] While these two fields were generally pinned down against

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[332] Cotterrell 'What Is Transnational Law?' (n 230) 509; Van Asselt (n 212) 208
[333] Rakhyun E. Kim (n 32) 22
[334] Gautaum Indu and P.C. Kavidayal, 'Green Economy: A challenge to inclusive and equitable growth' (2017) 18(1&2) *Environment Conservation Journal,* 137 and 138; UNEP, 'Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication' (*UNEP* 2011) <https://sustainabledevelopment.un.org/content/documents/126GER_synthesis_en.pdf> accessed 12 March 2021, 9; Luczka (n 24) 11; P.K. Mishra, 'Green Economy: A Panacea for Sustainable Development and Poverty Reduction' (2017) 8(1) *Journal of International Economics* 19
[335] Boyle (n 330); Ben Boer (ed), *Environmental Law Dimensions of Human Rights* (OUP 2015)

[336] Yannick Radi (ed) *Research Handbook on Human Rights and Investment* (Edward Elgar, 2018)
[337] United Nations, 'Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011)

each other, new common grounds were found for each field to influence and infiltrate the other.[338] Some of these guiding instruments are voluntary or coming from authoritative but non-legal sources. However, they create mechanisms and approaches used in both legal fields, merging rules about human rights and investments. Concepts such as corporate social responsibility have become hybrid tools that integrate the consideration of both fields. In this case, it aims to ensure the conduct of business and investment consistent with, and even participating to, the protection of human rights and social interests.[339] Another type of concept considered is (socially) responsible investment, which also explores the combination and possible synergies to create between the two different legal regimes.[340]

The final example illustrating convergence and positive interactions from legal pluralism is the concept of Environmental Impact Assessment (EIA). It can regroup the three legal regimes mentioned and aspects of both soft and hard law. The EIA is both a duty and general principle recognised firstly in international environmental law and used in investment and human rights fields.[341] Although it is not a duty in the latter two fields, EIAs are frequently considered as a condition for loan and investment or as a way to evaluate impacts on social aspects.[342] Despite a varying content, the tool of EIA generally refers to economic, social and environmental aspects, so as to determine the most investment and socio-environmental cost-effective option for a given project.[343] This mechanism first leads to the consideration of all three legal regimes, and then brings to light the possible concomitant application of the different of regimes. EIAs tackle both positive and negative interactions between regimes and their impacts for the overall project. By that, EIAs inform and lay the ground for a balanced decision regarding a project and the involvement of all three regimes.

<www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 30 October 2019

[338] Martti Koskenniemi and Päivi Leino, 'Fragmentation of international law? Postmodern anxieties' (2002) 15(3) Leiden Journal of International Law 553, 570

[339] Several definitions are available, see some examples in Kim Jensen, 'Bridging International Human Rights, Trade and Investment Law' Conference Report – Ottawa, Canada (*Centre for International Governance Innovation*, January 2017), 4; A. McWilliams, D. S. Siegel and P. M. Wright, 'Corporate Social Responsibility: Strategic Implications' (2006) 43(1) *Journal of Management Studies* 1, 1

[340] 'What is responsible investment?' (*United Nations Principles of Responsible Investment*) <https://www.unpri.org/an-introduction-to-responsible-investment/what-is-responsible-investment/4780.article> accessed 12 March 2021

[341] Tseming Yang, 'The Emergence of the Environmental Impact Assessment Duty as a Global Legal Norm and General Principle of Law' (2018-2019) 525 *Hastings Law Review*

[342] L. Campbell, D. Suhardiman, M. Giordano, P. McCornick, 'Environmental impact assessment: Theory, practice and its implications for the Mekong hydropower debate', (2015) 4 *International Journal of Water Governance* 93, 94

[343] Landberg (n 36) 257; B. Boer, P. Hirsch, F. Johns, B. Saul and N. Scurrah (eds) *The Mekong: A socio-legal approach to river basin development* (Routledge 2015), 49

Soft law instruments can therefore build and strengthen converging interactions between a diversity of legal regimes, even when these regimes are initially considered independent, competing or exclusive of each other. These informal converging approaches and instruments are providing a more flexible and adaptable, yet influential, way to exploit common means or ends between the various regimes to create interconnections between them.

3/The convergences amongst the diverse stakeholders in international law

The disruptive perception of legal pluralism and fragmentation entrenched in legal theory also concerns the multiplication and diversification of actors and beneficiaries of international law. These new participants to sustainable development governance are mainly developing outside of traditional legal categories. The possible negative impacts and interactions between the various actors included are linked to the authority of the State and the sources of formal law. Questions of authority, institutionalisation and legitimacy are frequently asked in link with the idea of source of international law. They try to consider how to classify and formalise the actors emerging outside of beside the State.

However, despite this pluralism, the fragmentation and competition of interests may not be as common or considerable as the number of actors developing. Positive interactions between various stakeholders of international law can be seen through actors who participate in several legal regimes and scales. They can create convergences between the different fields by bridging and balancing the different interests they represent. In addition, different actors can share similar interests, objectives or roles across regimes and create consistency or cross-fertilization. Finally, several legal regimes have introduced more attention to non-State actors, including individuals' participation, consideration for their rights or access to legal remedies for example. This practical evolution of international legal regimes creates a more widespread acceptance of informal normative actors in the legal system. Then, it is blurring the strict opposition between the legitimate, institutionalised, and main State actor and other actors. This generalised tendency to have less strict legal categories sorting the actors of the international legal system can help minimise direct oppositions and conflicts amongst the plurality of actors.

For example, both international environmental law and human rights law share a great consideration for vulnerable populations and minorities. For example, in the two regimes, the importance in terms of human and environmental rights of indigenous people have been at the heart of the legal regimes' development and converging interactions. Often, rules regarding indigenous population, now also developing as a specific part of international law, regroups both aspects of environment and human rights.[344]

[344] Commission on Environmental, Economic and Social Policy, 'Indigenous Peoples, Customary & Environmental Laws & Human Rights' (*IUCN*) <https://www.iucn.org/commissions/commission-

Another example can consider the extended scope of legal personality in international law, although distinct from human rights and the recognition as a human. It has been a way for other legal fields than human rights to actively include non-State stakeholders and to grant them rights, duties or privileges. This is the case in international investment law, which, similarly to the development of human rights, allowed legal personality, rights and access to courts to individuals (here investors).[345] Previously, these actors could only be represented and heard through their diplomatic relation by their State.

Secondly, and in a more indirect way, the use of legal personality to include a non-State actor and to create a recipient of rights which are not entrusted in the State, is the legal personality given to rivers.[346] This legal personality does not make rivers humans with human rights. However, the rationale here is to promote diverse non-State stakeholders for a direct application of rights, and here environmental protection. It can be considered a way that the human rights legal regime has influenced and converged with other specific regimes, such as international law on water resources. In a similar fashion, Bolivia and Ecuador have promoted in their constitution nature's rights or even referenced 'Mother Earth', allying human rights and environmental protection.[347]

Various new actors of international law are gradually promoted and included through these new approaches. This illustrated the practical development of international law beyond the strict categories established in theory. It also shows the connected nature of such evolutions between legal regimes. It also introduces the progressive convergence in terms of the involvement of diverse actors in international law. These actors can, as mentioned above, show similar or concomitant interests and gather to build converging or concomitant drives in the legal system. The convergences among various actors have contributed to dressing the picture of a possible positive legal pluralism and fragmentation in international law.

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environmental-economic-and-social-policy/our-work/indigenous-peoples-customary-environmental-laws-human-rights#:~:text=For%20indigenous%20peoples%2C%20their%20human,in%20all%20aspects%20of%20work.> 13 March 2021, para. 3; United Nations, United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGAR 61/295. <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 12 March 2021

[345] The ICSID involves investors in their arbitration or conciliation, see 'About ICSID: Overview', <https://icsid.worldbank.org/About/ICSID> accessed 11 March 2021

[346] G. Eckstein, A. D'andrea, V. Marshall, E. O'Donnell, J. Talbot-Jones, D. Curran and K. O'Bryan, 'Conferring legal personality on the world's rivers: A brief intellectual assessment' (2019) 44 *Water International;* Bosselmann (n 30) Chapter 3

[347] For Ecuador see Louis Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) *Transnational Environmental Law* 401, 423; for Bolivia see 'Bolivia (Plurinational State of) 2009' (Constitute Project, OUP) <https://www.constituteproject.org/constitution/Bolivia_2009?lang=en.> accessed 11 March 2021, Preamble or Borràs (n 330) 114

In general, the converging interactions, occurring in hard and soft law instruments developed in practice, as well as with the consideration of other actors than the State, have shown an overall progress of positive legal pluralism and interactions. Contrary to the lingering negative or cautious perception in legal theory, legal pluralism and fragmentation have shown in practice that a diversity of actors, scales and regimes can be considered concurrently. Moreover, synergies between them are even possible and developing. Legal pluralism can be accepted in international legal practice and can create overall convergences and positive interactions, across legal regimes and actors.

This insight into the practical transformation of international law adopting and adapting to legal pluralism contributes to a reflection on international legal theory considered above. This shows the inadequacy of traditional legal theory, and other manageable approaches, to capture the positive and integrative interactions which are achievable and occurring. Therefore, a reflection on international legal theory is needed to focus on its ability to capture legal pluralism as a whole and allow a more general consideration of dynamics and interactions, both negative and positive.[348]

Conclusion

Globalisation has changed the socio-legal landscape in which international law applies. The legal system was previously only considered as a system with State centric legal categories, strict binary divides and fundamental values of unity and predictability. With legal pluralism and fragmentation, the diversity and dynamic nature of issues tackled by international law have extended beyond the traditional conceptualisations of the system. They have thus questioned the system's ability and suitability to approach them. Traditional legal theory has therefore struggled to keep pace with legal diversity and to provide a holistic and overarching framework that sufficiently encompasses all the actors, scales and regimes.

The overall negative or managerial position of legal theory towards legal pluralism has led to focus on potential conflicts of norms and fragmentation of international law. This approach has left positive interactions and convergences under-appreciated in theory. Indeed, the acceptance of plurality of actors, scales and regimes influencing complex, often transboundary issues, means accepting multiple links and interactions between these governing elements. The more assertions over the same issue, the more possibilities of friction there is.[349] However, in practice, international legal regimes have also shown signs of convergences and interconnections. Some of these positive interactions come from the strategy to draw on links between fields instead of focusing

[348] Turner (n 201) 251
[349] Berman 'A pluralist approach to international law' (n 180) 320

what separates them.[350] These interactions are making possible the non-conflictual integration of a variety of other regimes, actors and scales in international law. The mismatch between this development of legal practice and its recognition and acceptance in international legal theory highlights a significant a gap. This gap can cause imbalances in law and unequal outcomes. It is then leaving out of governance part of the normative elements involved or is prioritizing formally recognised law. The shortcomings of international legal theory in relation to legal pluralism prevent the accurate representation, analysis and regulation of issues by international law.

The cautious approach of traditional international legal theory is essentially that 'too many cooks spoil the broth', especially those developing outside formally recognised legal categories. This idea or paradigm is however evolving with practice.[351] The study of legal pluralism and its possible positive interactions in international law, both in theory and practice, can guide the reflection on an approach of international law adapted to legal pluralism and to the needs of the new socio-legal context presented above. In turn, this inquiry can contribute to considering the suitability of international law to promote the objective of integration set for sustainable development in the previous chapter.

The reflection to be conducted on a different approach to international law will be guided in the next chapter by the concept of Transnational law. This approach focuses on a holistic approach to the plurality and interconnections within international law, beyond its traditional categories.

[350] Dunoff (n 295) 169
[351] Slaughter 'Breaking out' (n 165)

Chapter 3: The concept of Transnational law: a pluralist, holistic and interconnected approach to address diversity in international law

The previous chapters have described the growing pluralism and cross-cutting dynamics developing within sustainable development issues and in international law. This phenomenon has mostly given rise to caution, distrust or even rejection in legal theory regarding the associated fragmentation endangering the unity, coherence and predictability of the international legal system. The gradual acceptance of these phenomena as part of international law has led to an inquiry into legal theory and has brought about strategies to manage the potential negative effects of fragmentation while introducing diversity. These managing strategies have not really addressed core mismatches when accepting pluralism and the potential positive impacts of it. So, the overall theoretical inquiry of this thesis must look at concepts which could embrace holistically the inevitable pluralism and fragmentation within the international legal system.[352] Arguably one of the most promising concepts in this regard is that of transnational law. This chapter will therefore focus on the concept of transnational law and ask whether it could bring a new approach to the use of modern international legal system and pluralism.

In this chapter, the origins of transnational law and how transnational law fits with other current international legal theoretical frameworks or terminologies will be considered. Then, after considering the development of various definitions given to the concept, the chapter will lay out its essential characteristics. These essential characteristics of transnational law will determine the approach conveyed by the concept. The second section will then elaborate an innovative analytical framework to approach pluralist legal environments, based on the understanding presented of transnational law and its approach. The model developed will be framed as a conceptual space, expressing the various actors, scales and regimes' normative influences as legal discourses capable of capturing the various interactions highlighted in this context.

[352] Zumbansen 'Transnational law, Evolving' (n 255) 902

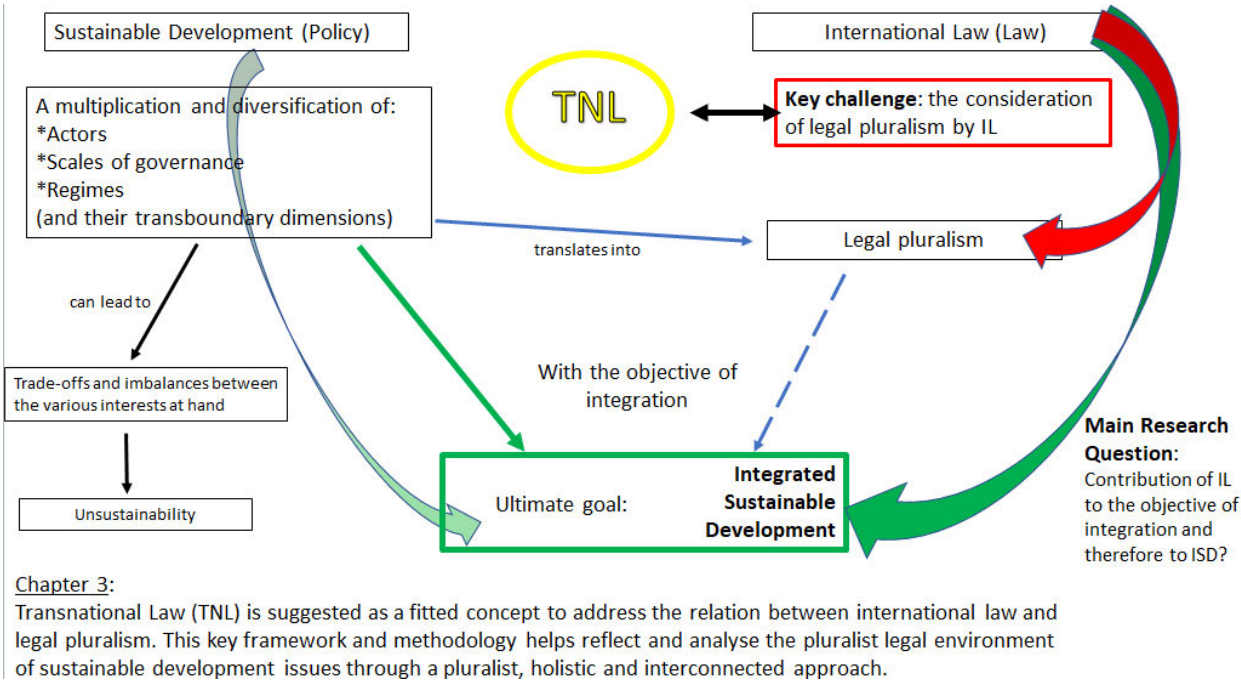

Diagram 7: Chapter 3: the use of Transnational law for international law to better address legal pluralism and allow for an improved contribution to integrated sustainable development.

I- The concept of Transnational Law: an evolving notion with the potential to provide a more pluralist approach and account for the normative elements outside of traditional international law

Transnational law (TNL) is a concept reintroduced in modern international legal theory, which aims to address the challenges and opportunities posted by legal pluralism and fragmentation in international law. The definition of TNL can be explored in different ways, in relation to its nature, its constitutive characteristics and core essence. From the study of these different elements giving life to TNL, the concept is here considered as fitted notion to advance an adequate pluralist, holistic and interconnected approach to modern international legal theory.

A- The introduction of the concept of Transnational Law in modern international legal debates on pluralism by Philip Jessup

The mismatch between international legal theory and practical issues has created the opportunity and the need for new theoretical concepts to emerge. These different approaches display the aim of introducing a more holistic and pluralist approach within the legal system. One of such theoretical developments and inquiries is the concept of transnational law.

1/The (re)introduction of the concept of transnational law: the need to explore a more pluralist and broader theoretical approach than interstate law

First, in a straightforward sense, the word 'transnational' refers to something that is 'across' or 'beyond' from an initial element. It has both a spatial connotation of extending further and outside boundaries and an abstract notion of exceeding and going beyond categories. In the legal context, the notion of 'transnational' has been used to emphasize the transboundary and dynamic character of legal regimes, and other system of rules, taking place outside and beyond traditional legal categories.[353] These traditional categories of international law have been introduced in the previous chapter as referring for instance to soft and hard law; scales and jurisdiction divides between national and international law; State and non-State actors; and the divide between fields such as environmental law or human rights law. This notion of TNL illustrates the concern for traditional international law and beyond, integrating the plurality of normative elements within an overall vision of law and of modern issues.

Previous approaches to law and regulation can be presented as transnational systems of rules. These instances, of canon law and *lex mercatoria*, can illustrate the transboundary nature mentioned here.[354] Canon law has indeed shown characteristics of application outside of a specific territorial sovereignty or possessing no link to the State.[355] It was a system of rules and laws linked to Christianity and the centre of its authority vested in the Pope and generally located in Rome. The aura and scale of application of this canon law was transboundary and applied all over Europe, without using defined borders to its implementation. *Lex mercatoria* is an old system of rules which regulated 'free' transboundary trade in Europe. The transboundary circulation of goods and the many interactions across and beyond borders can provide interesting parallels to transnational law. Both of these governance systems were not related to States and evolved in between public and private spheres of regulation. Then, Zumbansen highlights that *lex mercatoria* might provide interesting parallels in relation to 'its multi-layered and hybrid nature, in particular as regards the interpenetration of public and private modes of norm creation and norm enforcement in this area'.[356] Both of these legal systems present characteristics which can exemplify the concept of transnational law in modern international legal theory, especially for its transboundary functioning. Berman also uses these examples of smaller or bigger units than the State, such as guilds, cities or even the clergy as the basis for transnational non-state governance.[357] The author also shows that such non-state normative system, sometimes not related to established borders or boundaries, continue

[353] Scott (n 197) 866
[354] Peer Zumbansen, 'Transnational legal pluralism' (2010) 1(2) *Transnational Legal Theory* 141, 160; Von Daniels (n 171) 54
[355] Von Daniels (n 171) 54
[356] Zumbansen 'Transnational legal pluralism' (n 354) 160
[357] Berman 'A pluralist approach to international law' (n 180) 312

to develop their own rules. He mentions ethnic groups rulemaking, social customs or even corporate bylaws. These examples illustrate past and present developments of non-state, often transboundary and cross categories systems of governance. They can help to consider the concept of transnational law, situated across and beyond the traditional categories of the State.

In 1956, Philip Jessup notably repopularised the terminology of 'transnational law' in legal theory to address trends emerging in modern international law. Its aim is to present a different, desirable approach to law. 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'.[358] The author specifies that such cases 'may involve individuals, corporations, states, organizations of states, or other groups'.[359] In this vision, Jessup makes a clear distinction between using 'transnational law' instead of 'international law'. This purposely avoids the common association with interstate law, between or among States, which was challenged after World War II.[360] On the contrary, transnational law includes law across and beyond states, combining various scales, actors and regimes involved in regulating an issue.[361] As Fisher formulates it, transnational law is not international law 'with a sexier title'[362] but the use of transnational law marks a departure from traditional international legal theory towards a new and more inclusive pluralist approach.

2/The broader context of various 'redemptive'[363] legal concepts: a search for more pluralist approaches to modern international issues

As shown in the previous chapter, the consideration of the concept of transnational law is part of a broader reflection in modern international legal theory to formulate new integrative approaches answering the phenomena of legal pluralism. It is insightful to examine how some of these notions focus on similar characteristics as transnational law. The characteristics emphasized by TNL and these notions will help inform the research on particular features frequently used to reflect legal pluralism in modern issues. This presentation will also introduce the limits in approach presented by these notions. This study is also interesting to reflect on transnational law and consider how it distinguishes itself from other legal theories.

The notions selected for this section reflect the effort of legal theory to capture the diversity of normative elements brought about by legal pluralism and which are not

[358] Jessup (n 177)
[359] Ibid
[360] Pieter Bekker and Innes (n 186) 386
[361] Scott (n 197)
[362] Elizabeth Fisher, 'The rise of transnational environmental law and the expertise of environmental lawyers' (2012) 1(1) *Transnational Environmental Law*, 49
[363] Dunoff (n 295) 154

generally included by the terminology of international law. The changes of approach suggested by these notions also focus on including the cross-category and transboundary nature. The following notions can participate, through a brief introduction of their key features, to understanding transnational law by comparison and place it in a broader reflective context.

First, transnational law can be associated in the literature with the term of 'non-compartmentalized legal thinking'.[364] This terminology captures a similar idea of going beyond traditional categories of law in order to not be limited by the boundaries of international legal theory. This also expresses the effort to break down what is also referred to as a 'silo' approach.[365] Non-compartmentalized thinking therefore promotes a reflection that is holistic and interconnected in the inclusion of various normative influences.[366] This type of thinking can be associated with other approaches than transnational law and it emphasizes an overall importance of departing from the strictly framed traditional legal theory and of considering the outsider and trans-category character of the new normative elements.

The other term of 'trans-jurisdictionality' can also point to transnational law in its focus on the cross-boundary nature of a legal scope.[367] This concept specifically targets the many jurisdictions affecting the governance of international issues, beyond State jurisdictions.[368] With the reference to different normative influences over the same issue, the concept of trans-jurisdictionality captures especially the transboundary and cross-category nature of the application of these jurisdictions. The use of 'jurisdiction' to discuss the legal influence (or 'jurispersuasion'), rather than the notion 'sovereignty', allows for a broader account of legal opinions.[369] However, this concept can be distinguished from transnational law in its more limited scope linked to legal jurisdictions. The notion of jurisdiction strongly relates to a legally vested authority, from institutionalised, formally recognised authorities. It can then tend to exclude informal actors, like communities without a formal or legal representation amounting to a jurisdiction. Yet, the inclusion of such actors is considered key to transnational law according to Jessup.[370]

A final example of a notion linked to transnational law and to the reflection on legal pluralism can be global law. This concept can also be used with other related notions like global constitutional law or global administrative law. Considering the context globalisation and the recognition that an isolated State's intervention can have limited efficiency for

[364] Bekker and Innes (n 186) 386
[365] See for example Stevens (n 38) 7*;* Von Braun and Mirzabaev (n 103) 62
[366] Bekker and Innes (n 186)
[367] Gray, Holley et al. (n 210)
[368] Berman 'Global Legal Pluralism' (n 180) 1175
[369] Berman 'From International Law' (n 164) 529
[370] Gray, Holley et al. (n 210)

transboundary and global issues, global law arises as an adequate scale and governance system. Transboundary and transnational issues, such as climate change, are considered to be global in terms of scale, regimes and actors. They therefore can be better viewed at the global than at the national level. Both global law and transnational law present a cross-border aspect and can include a larger range of actors and regimes. The consideration of global law, in its many definitions and nuances, can provide a crucial account of the growing global and transboundary dynamics. It also conveys integration at the global level and a holistic vision. But Bodansky points out a limit to the notion in its reflection of the diversity within the globalized world. Not all transboundary issues are global in nature, and some countries might not be impacted by a certain issue or not in the same way.[371] Therefore, the promotion of global law to regulate transboundary issues might not appropriately tackle notions of scales, and their related to actors and regimes. A certain uniformisation associated with global law is promoting a holistic and interconnected approach but it could also simplify plurality.[372] This limitation was also considered with the concept of universalist harmonization mentioned in the previous chapter.

This brief reflection on different theoretical approaches to international law as governing pluralist, holistic and interconnected issues feeds into a broader inquiry about the capacity and suitability of the system to accept legal pluralism and convey integration. These various theoretical concepts provide an idea of the key features to be focused on in modern issues, namely to represent the pluralist and dynamic nature of these issues. The concomitant development of various notions, distinct but with similar concerns, and their limits in considering legal pluralism illustrate an on-going process of theoretical reflection where a single notion has not provided a complete and unanimous theoretical approach. This section therefore contributes to setting the reflective context for the concept of transnational law and for the features it might display to capture legal pluralism. But it also leaves the door open for transnational law to distinguish itself and display unique features that most appropriately tackle legal pluralism in international law.

The next section will therefore develop the concept of transnational law and consider its suitability as a theoretical approach to legal pluralism in modern issues. The section will examine the various definitions given to the concept, based on Jessup's

[371] For instance, 'glocal' issues, with 'global causes' and 'local consequences' which can be transboundary or regional which specificities cannot appropriately be dealt with at the global level, see Harald Heinrichs and Hans Peter Peters, 'Climate Change in the Public Sphere. How to study "glocal" issues? An analysis of public communication about (global) climate change and (local) coastal protection' (2001) 6(8.10) *Internetdokumentation des internationalen Kongress "Open Meeting Dimensions on Global Environmental Change*";Bodansky (n 24)
[372] Berman 'Global Legal Pluralism' (n 180) 1190

understanding. It will consider the key features addressed in this section as guiding the description and evaluation of transnational law.

B- The various definitions of Transnational Law: a multi-faceted and debated concept

Building up on Jessup's initial definition, the literature on transnational law has elaborated on the concept. It explores diverse views on its nature, guided by a constant focus on the concept's pluralist approach and ambitions expressed through different forms.

The notion of transnational law is, as Roger Cotterrell notes, 'widely invoked but rarely defined with much precision'.[373] Indeed, the concept is neither new nor absent from the literature. However, the variety of definitions given to transnational law, as well as the widespread view that it is still a work in progress, make the literature broad and diverse. General directions taken by authors in developing the concept have been compiled by Cotterrell in his analysis of 'What is Transnational Law?', which can inform the understanding of the concept and common features among the patchwork of current definitions.[374] These general directions refer to the general substantive or procedural nature often given to the theoretical concept. The following section will introduce these two general visions of transnational law, substantive or procedural. It will also include other definitions of TNL, as a phenomenon or process and as a conceptual space. These different visions and definitions of the concept will contribute to building a broader understanding of it and determine its common characteristics. The section will therefore not present an exhaustive examination of the TNL nor set a definitive interpretation but build a comprehensive idea of it.

1/TNL as a phenomenon and process of transnationalisation

First, TNL can refer to a phenomenon and process of transnationalisation. It is also addressed as 'legal transnationalism'.[375] Similarly to the phenomenon of globalisation, this aspect of TNL interprets international law as becoming progressively transnational, which focuses on the dynamic evolution of the system.[376] Transnationalisation of international

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[373] Cotterrell 'What Is Transnational Law?' (n 230) 500

[374] Ibid

[375] Roger Cotterrell, 'Spectres of Transnationalism: Changing Terrains of Sociology of Law' (2009) 36(4) *Journal of Law and Society*; Bohdan Ferens, 'Theoretical and historical problems of law and politics' (2018) 5(6) *European Political and Law Discourse* 52, 57; Gregory Shaffer and Daniel Bodansky, 'Transnationalism, Unilateralism and International Law' (2012) 1 *Transnational Environmental Law* 31, 31; Zumbansen 'Transnational legal pluralism' (n 354) 158; Haris Psarras, 'Chapter 4: Law's authority and overlapping jurisdictions' in Roger Cotterrell and Maksymilian Del Mar (eds) *Authority in Transnational Legal Theory. Theorising Across Disciplines* (Edward Elgar 2016), 97

[376] A-M. Slaughter, A. S. Tulumello and S. Wood, 'International Law and International Relations theory: a new generation of interdisciplinary scholarship' (1998) 92(3) *American Journal of International Law*, 370

law establishes a departure from traditional conceptualisations of international law[377], beyond State-centred ideas of law. This transformation can be presented both as a progressive and practice-based transformation, as considered in the previous chapter. Scott formulates this phenomenon as a deliberate act of '*breaking faith*' with traditional legal categories.[378] In both cases, transnationalisation refers to an on-going phenomenon and evolving thought on the transformation of international law. Transnationalisation is therefore visible in relation to the initial situation set by traditional international law.[379] It highlights then the changed architecture of the legal system, with the inclusion of non-State actors or informal instruments of regulation as well as the interconnection of these various elements within legal pluralism.[380] This definition of TNL points out to the on-going progressive nature of TNL as a legal concept. But, more importantly, it brings to light the dynamic, adaptable characteristics of transnational law and its nature of socio-legal phenomenon related to a changing regulatory environment.[381]

This on-going transnationalisation of international law is also visible in the other definitions of TNL in the following sections. For instance, legal regimes have gradually developed beyond their own traditional sphere and included more actors, scales and legal instruments and regimes. It is both a substantive change to these legal regimes but also part of a progressive change and movement. This last remark highlights the connections between the various definitions of TNL presented after and illustrates that they are not exclusive of each other.

2/TNL as a 'substantive' or 'procedural' legal theoretical concept

TNL can generally be associated with having a 'substantive' or a 'procedural' nature, according to Cotterrell.[382] His inquiry into transnational law has led him to consider two different propositions from various authors: 'is transnational law primarily made up of rules applying directly across national borders [being substantive], or is it mainly coordinating regulation harmonising or linking substantive rules that may differ between states? [which might therefore be procedural]'.[383]

It is worth noting that Cotterrell does not present the two aspects as being exclusive of each other and, despite their divided presentation below, the two notions are taken here

[377] Heyvaert (n 184) 206; Slaughter 'Breaking out' (n 165) 19-20
[378] Scott (n 197) 862
[379] Peer Zumbansen, 'Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order' (2012) 1(1) *Global Constitutionalism*, 22-23
[380] Peer Zumbansen, 'Can transnational law be critical? Reflections on a contested idea, field and method' in Emilios Christodoulidis (ed.) *Research Handbook on Critical International Theory* (Elgar 2019), 8-9
[381] Zumbansen 'Transnational law, Evolving' (n 255) 898-899
[382] Cotterrell 'What Is Transnational Law?' (n 230) 501
[383] Ibid

as participating to the general understanding of transnational law and possibly as being different facets of the same multi-dimensional concept.

(a) Substantive transnational law: an emerging normative field or new legal system?

When considering transnational law as being substantive, the idea is associated with normative rules being transnational by nature, possibly constituting a distinct field or a new layer of normativity.[384] The observation of transnational legal dynamics in practice has led the literature to consider the possibility of them forming a legal field or system. Therefore, it led the way to study the possible definition and elements of a substantive transnational law.

In terms of nature and scope, substantive transnational law is sometimes viewed as combining both international and national law and what they encompass.[385] Koh expresses it as being 'neither purely domestic nor purely international, but rather, a hybrid of the two'.[386] On the other hand, for some authors, transnational law cannot be defined in reference to known notions, like international and national. For Scott:

> rather, transnational law is imagined as in some respects occupying its own normative sphere. For example, a not-uncommon way of speaking about transnational law is as a kind of (…) law that is neither national nor international nor public nor private at the same time as being both national and international, as well as public and private.[387]

In both formulations of transnational law, the literature considers TNL's scope to extend beyond the current international legal system, whether by combining with other existing legal systems or by including normative elements outside or beyond established classifications. Indeed, Psarras refers to TNL developments as 'delineat[ing] a field that includes, but also transcends, the area of international law', adding more complexity, diversity and number of actors beyond the States and the public sphere of governance.[388] In these visions, TNL is established as a field or system of rules. Despite its boundaries being still debated, TNL is for certain going beyond the international legal system.[389]

In terms of its content, TNL first includes traditional categories of international law, like hard law sources.[390] But most importantly, TNL is considered to encompass a wider content, extending beyond such categories, towards more informal normative elements.[391]

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[384] Cotterrell 'What Is Transnational Law?' (n 230)
[385] Slaughter 'Breaking out' (n 165) 17
[386] Harold H. Koh, 'Why Transnational Law Matters' (2006) 24(4) *Penn State International Law Review,* 745
[387] Scott (n 197) 873
[388] Psarras (n 375) 97
[389] Matthias Mahlmann, 'Theorizing Transnational Law–Varieties of Transnational Law and the Universalistic Stance' (2009) 10(10) *German Law Journal*, 1326
[390] United Nations, *Charter of the United Nations and Statute of the International Court of Justice*, (adopted 24 October 1945), article 38
[391] Heyvaert (n 184) 231

Cotterrell lists the consideration of 'soft law' instruments as possible content of TNL. It includes 'a mass of regulation (guidelines, standards, norms, principles and codes, together with procedures for norm-creation, adjudication and enforcement) established by associations, non-governmental organisations and administrative agencies, in addition to the "internal" collective regulation of transnational corporations and corporate groups'.[392] The author himself recognises that there is an 'impossibly huge and diverse field of transnational regulation'.[393] This would make the exhaustive enumeration of TNL's content complicated. However, this flexible description offers the crucial insight that TNL is in itself built on legal plurality. It includes various norms, sources and legal instruments, some traditionally accounted for, but especially, some beyond these categories. Indeed, attention can be drawn in this list to the inclusion of private actors, sources and norms as part of the content and scope of regulation of TNL.[394] This distinctive feature furthers TNL's dedication to legal plurality and integration, while highlighting a specific, growing type of normativity with private norms and actors, initially mentioned by Jessup.[395] The studies on the content and sources of TNL give no definitive answer or list as to what it encompasses. But they provide clear insights into the concept's characteristics of legal plurality and its focus on emerging, non-traditional sources of normative influence, such as soft law or the private sphere.

In order to illustrate the theoretical studies of substantive TNL, authors have mentioned various evidence and examples. Existing legal regimes have shown features which can be qualified here as transnational. These current regimes show for instance an inclusion of a plurality of actors, norms and scales in their approach. Some rules, which can still be affiliated to traditional international or municipal systems, are showing signs of transnationalisation in their gradually extending scopes. An example is International Human Rights Law[396] or International Economic Law.[397] Both regimes can include and rely on private actors, in addition to State actors. They influence and are influenced through instruments such as private corporate social responsibility rules, non-binding international guidelines, code of conducts or international standards, in addition to treaties and laws. Another type of transnational legal regime, extending beyond traditional international legal classifications, can be seen within the European Union legal system. For example, the EU economic integration operates at a transnational scale, beyond each European country. This economic direction also influences different regimes and various actors.[398] These specific rules form a layer of normativity and legal field specific to EU law. This legal field

[392] Cotterrell 'What Is Transnational Law?' (n 230) *501*
[393] Ibid 509
[394] Jessup (n 177); Cotterrell 'What Is Transnational Law?' (n 230) 501
[395] Jessup (n 177); Cotterrell 'What Is Transnational Law?' (n 230); Scott (n 197) 873
[396] Mahlmann (n 389) 1326

[397] Cotterrell 'What Is Transnational Law?' (n 230) 501
[398] Von Daniels (n 171) 54

or system of rules is complicated to frame by referring to traditional international legal categories.

Nevertheless, the literature is not unanimous regarding the definition of transnational law as a substantive legal concept. Cotterrell even notes that 'the many sites of global legal pluralism "do not make up a legal system"', which therefore nuances the theory of TNL as a new legal field.[399] Despite the evidence made of rules being transnational, and of regimes with transnational substantive characteristics, the author raises the question of whether transnational law can be considered a field as such, and if it can even be considered law.[400]

(b) Procedural transnational law: creating interlinkages and integration between rules across existing legal categories?

In its procedural interpretation, transnational law can be understood as 'an approach to legal studies and practice [more than as a domain]'.[401] Then, TNL would not add or create new normative rules, but it would focus on articulating existing ones. TNL can harmonise or link rules across scales, regimes and actors. It would then manage or smooth out their interactions, avoiding conflicts and contradictions. Cotterrell has formulated the reflection on procedural TNL as follows, participating to a broader and nuanced literature on the subject:

> Is transnational law (…) mainly coordinating regulation harmonising or linking substantive rules that may differ between states? The latter suggests a pluralist approach (Berman 2007) recognising and preserving legal difference but smoothing interactions between legal regimes – a kind of transnational conflict of laws system. Its main focus might be procedural.[402]

Therefore, procedural TNL can have a role of method or of bridge to the interactions between different legal regimes.[403] The traditional legal categories and binary divides, as well as the polarised difference between law and 'non-law', can create particular dynamics, and even tensions, between two rules applying and interacting. The distinction and distance between two rules can require a specific approach to consider them together. Linkages rules or a specific method on how to proceed with this consideration can help. Such rules would be designed to avoid tensions and allow for a joined and integrated application of both rules. In a similar way to Cotterrell's idea of linking

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[399] Cotterrell, 'Transnational communities' (n 167) part '1. Varieties of Transnational Regulation'
[400] Cotterrell 'What Is Transnational Law?' (n 230)

[401] Veerle Heyvaert and Thijs Etty, 'Introducing transnational environmental law' (2012) 1(1) *Transnational Environmental Law*, 2

[402] Cotterrell 'What Is Transnational Law?' (n 230) 501
[403] It is worth noting that authors express this both as a passive or active role. For example, transnational law is viewed as actively bridging regimes in a transnational setting or it can also be a lens to make visible the already existing interactions between legal regimes. The difference can have somewhat practical consequences as to what role and importance transnational law really has, which will however not be tackled here.

substantive rules, Von Daniels has introduced the notion of 'linkages rules'.[404] The author positions this third type of law as a connection between primary and secondary legal rules. It creates a type of law meant to bridge and harmonise the interactions between other rules. As mentioned above, procedural TNL as considered by both Von Daniels and Cotterrell could create a 'kind of transnational conflict of laws system'.[405] The role of TNL could be similar to the rules of interpretation in the VCLT in avoiding conflicts between several legal rules.[406] The difference would mainly consist in the broader scope, more diverse and transboundary set of rules than for traditional conflicts of law. The specificity and added value of a TNL conflict of laws would be the possible consideration of rules and dynamics having a transnational dimension. The scope of the VCLT could be extended in relation to the diversity of normative elements considered and in the reference to trans-category dynamics. Procedural transnational laws could also facilitate transnational interactions, leading to trans-regimes recognition, validation of rules and cross-fertilization. This would in turn reduce conflict, while smoothing out differences.[407]

With a similar purpose of linking and bridging different normative elements, especially across categories, Heyvaert and Thijs consider procedural transnational law as a linking lens or approach to pluralism.[408] In addition, Scott[409] and Zumbansen respectively introduce the idea of transnational law as an interpretation and a 'methodological lens'.[410] This is also the case with Berman suggesting the possibility of an 'interpretive lens'.[411] These terminologies all express the idea of transnational law as an approach linking and reflecting on pluralism between existing normative elements. While not being *per se* a procedural measure or conflict resolution rules, a transnational legal lens to promote an integrative approach to pluralism can be considered as a tool to organise and manage different existing rules.

For Zumbansen, a transnational legal lens would look at existing law, in relation to its social context and to socio-legal aspects influencing the legal field. The bridge created by this approach should reflect the influence of the 'world society'[412] or of the phenomenon of globalisation[413] on the rules interacting to focus on their dynamics. Zumbansen suggests the consideration of a pluralist, methodological approach to the various 'building blocks' of

[404] Von Daniels (n 171) 54
[405] Cotterrell 'What Is Transnational Law?' (n 230) 501
[406] International Law Commission, 'Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law' UNGAR A/CN.4/L.682 13 April 2006, 249
[407] Cotterrell 'What Is Transnational Law?' (n 230)
[408] Heyvaert and Etty (n 401) 2
[409] Scott (n 197) 871
[410] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 52
[411] Berman 'The evolution of global legal pluralism' (n 206) 178
[412] Zumbansen 'Transnational legal pluralism' (n 354) 151
[413] Peer Zumbansen and Kinnari Bhatt, 'Transnational Constitutional Law', TLI Think! Paper 6/2018 online 6th Feb 2018, 38

various actors, scales and legal regimes and to their interactions.[414] This would depart from referring to traditional international categories based strictly on laws or regimes. This methodological lens related to transnational law serves a similar primary objective of creating a tool or approach to bridge and link within legal pluralism, also with the broader, social context in which international law applies.

The perception of TNL as procedural is shown are being developed through practical coordinating rules or at a conceptual level of linking and bridging rules and their actors and scales. This perception feeds into the idea of TNL as a tool for improving the coordination and integration of existing international laws that might interact at a transnational level or have transnational implications.

3/TNL as a conceptual space: theoretically grasping the dynamics of legal pluralism?

The final understanding of TNL discussed here is the notion of transnational law as a conceptual space. Zumbansen more specifically addresses TNL as 'a newly emerging spatial category'.[415] The literature has reinforced that definition through the use of a spatial vocabulary describing *trans*-national law and its extended scope *across* and *beyond* legal categories set by traditional legal theory and tackling *transboundary* issues. [emphasis added by the author] The concept of space can be associated with notions of scale, geographical and political borders, or of legal jurisdictions. The approach of a conceptual space of transnational law can be studied first as a literal, physical transboundary and transnational legal space and secondly, more abstractly, as a space capturing dynamics and trans-category characteristics of legal pluralism.

First, Sassen notes that geography is one of the fields that has greatly helped transboundary and global issues to be tackled or analysed at a more appropriate level.[416] For example, the programs of 'Global cities' illustrate transnational law as physically anchored within a state or a city.[417] But these cities are considered global (and transnational) because of their relations with international and national law, scales and actors. These links can be about creating international trading agreements or for cities to support a programme of implementation of the SDGs. This physical perception of spatial TNL can help draw more visibly instances of TNL. Spatial connection to the definition of TNL highlights also natural connections between the development of TNL and the blurring out of political borders, the widespread globalization of issues and inherent transboundary issues, like Climate Change or transboundary river management. These physical links trigger more evidently a reflection and use of transnational law, beyond traditional political borders, legal jurisdictions and territoriality. Indeed, Fisher, Lange et al. suggest that fields

[414] Zumbansen, 'Defining the space of transnational law' (n 207) 308
[415] Ibid 334
[416] Sassen (n 168)
[417] Ibid

like international environmental law can use the development of mapping based on spatial and temporal geography to analyse more critically the field.[418] The anchoring on or representation of the undeniable physical aspects of transboundary issues can help develop an understanding and analysis of an issue on a more abstract level after.

However, Zumbansen asserts that the notion of ''space' is not meant to depict a geographical realm, but instead a *methodological* one in which the meanings –and limitations- of our distinction between the 'national' and the 'global' can be addressed'.[419] According to him:

> the term transnational does not merely signify the extension of (…) normativity across borders, say, of nation states or other jurisdictional confines. Instead, the term transnational identifies an intricate connection of spatial and conceptual dimensions: in addressing (…) the demarcation of emerging and evolving spaces (…), the term transnational is conceptual.[420]

Transnational law therefore provides or designates a space beyond the state and other conceptualisations of international law.[421] This space of governance, pluralist in nature allows various formal and informal actors, scales and regimes to be viewed together and to interact. This conceptual space does not exist in relation to a specific, existing physical space or scale. Zumbansen further explains that 'the term depicts the space in which the legal pluralist analysis of legal and non-legal regulation occurs. It makes reference to the space that is left empty between conceptualisations of a legal order from either a 'national' or 'international' perspective'.[422] TNL space is thus conceptual and is meant to point out what has not been captured or described by traditional international legal conceptualisations. The notion of TNL as a methodological lens (in the previous section) and of conceptual space of TNL can be closely related. Both are meant to provide a different way of looking at issues or to put them in a different level or scale. The result of both would be a distinct vision of interactions, isolated and highlighted on purpose. For Heyvaert, TNL as a conceptual space or as a methodological lens to transboundary issues is more than a new jurisdiction related to geographical notions of regional level or even international or national law.[423] It is neither a new field nor new redeeming narrative around a certain theme, like sustainable development. TNL is a 'new mode of understanding' issues and the tangled web of interactions within them.[424] TNL relates

[418] Fisher, Lange et al. (n 152) section 4(1)
[419] Zumbansen 'Neither 'public' nor 'private'' (n 287) 51
[420] Zumbansen 'Comparative, global and transnational constitutionalism' (n 379) 22
[421] Jolene Lin and Joanne Scott, 'Looking beyond the international: key themes and approaches of transnational environmental law' (2012) 1(1) *Transnational Environmental Law*, 23
[422] Zumbansen 'Transnational legal pluralism' (n 354) 150
[423] Heyvaert and Etty (n 401) 2
[424] Ibid

more to a process and method of thinking and analysing a certain issue, which are crucial steps before decision-making[425].

It has been commonly recognised that the concept of transnational law could be defined in different ways and could be understood both as a conceptual space, a phenomenon of transformations in international law, as well as 'a methodological approach and as a distinctly demarcated legal field'.[426] In that view, the literature often addresses the concept of TNL as a 'hybrid'[427], metamorphic notion[428] and a 'work in progress'.[429] Some authors even decide to consider the concept without entering complicated and uncertain debates over its definition. For example, Scott refers to transnational law as having 'some meaningful sense', without qualifying the term sense.[430]

The lack of a set and consensual definition of transnational law can contribute to concerns about the notion being imprecise and building 'fragile dichotomies applicable only provisionally and pragmatically'.[431] However, this section has established the common recognition of transnational law as a multi-faceted concept, where different definitions might not be exclusive of the other and feeding a broader understanding of the notion. In addition, this section has presented a dynamic and flexible pluralist approach common to the different definitions of TNL. Indeed, the concept is presented as capturing an on-going process, which is transforming procedural and substantive rules as well as of the space of international law. It is also reflecting on the changed social context and on traditional legal theory.

The concept of TNL is broad and flexible, which could work in its favour. Instead of being an empty and expendable shell, the concept can be the means to open and free the reflection and adaptation to legal pluralism. The understanding of the concept can be directed towards more essential characteristics and objectives of TNL, rather than its clear definition. Zumbansen agrees that, in relation to defining the nature of TNL, 'the jury is still out'.[432] However, he notes that a more crucial and productive approach to the concept might be to focus on its general features and objectives, often common to the different definitions of TNL in the literature. The consideration of TNL can then be freed from a restrictive definition, related to existing legal concepts and not flexible enough to adequately adapt to an evolving concept of legal pluralism, itself without set boundaries.

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[425] Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2014) 17(1) *Arbitration International* 59, section I (b)
[426] Zumbansen, 'Defining the space of transnational law' (n 207) 307; Cotterrell 'What Is Transnational Law?' (n 230)
[427] Koh (n 386) 745
[428] Scott (n 197) 874
[429] Cotterrell, 'Transnational communities' (n 167) part '4. Some Approaches to Legal Pluralism'
[430] Scott (n 197) 874
[431] Cotterrell 'What Is Transnational Law?' (n 230) 522

[432] Zumbansen 'Can transnational law be critical?' (n 380) 6-7

From the literature, informed common characteristics and an inferred rationale for TNL can be gathered. These aspects can direct the consideration of the concept towards being an unrestricted tool or method of inquiry, focused more essentially on a pluralist, holistic and interconnected vision.

C- Key characteristics of TNL and a unique pluralist approach: the focus on core features over common constitutive legal elements

In the pursuit of a new legal concept to approach pluralist legal issues, the literature on TNL has tried to define its nature and general scope, but more especially its potential characteristics and vision. While the examination of technical and rigorous definitions in a legal theory can be limited with TNL, the more direct focus on the essence of the concept contributes to conceptualising it. Therefore, this section will build on the common elements associated with TNL in the literature to express its distinctive approach to legal pluralism.

1/The lack of set constitutive legal characteristics: fragility of the theoretical concept or flexibility and innovative perspective?

Some authors have considered more in depth the possible technical characteristics and definition of TNL to establish it as a solid, fully developed theoretical concept. Contrary to the broader understandings presented above, these studies further consider several challenges faced when defining and framing precisely the concept of TNL. These challenges are generally associated with the traditional notion of ‘law’ and legal nature of TNL. Other challenges relate to the details on the sources and regimes included, as well as the actors related to TNL for instance. Two of these challenges will be mentioned in the following section to illustrate the doubts surrounding the theoretical conceptualisation of TNL, its suitability and application. The uncertainty surrounding the technical aspects of TNL, meant to define precisely the contours and functioning of the concept, can raise concern about the validity, and even existence, of TNL as a theoretical legal concept.

A core concern about transnational law, in its move away from traditional international conceptualisations, is its relation to ‘law’. The question of whether transnational laws amount to a ‘legal field’ and what transnational law could mean for ‘law’, are challenging questions for legal theory. The concept of TNL and scholars are still unclear about its relation to ‘law’ and traditionally ‘non-law’, like soft law. This consideration is traditionally important in legal theory to define the precise contour of the legal system itself. This is in turn linked with questions of legality, enforceability and other well-established, core elements of the traditional legal system such as legal predictability. For Zumbansen, the uncertainty surrounding TNL’s legality or status as law remains a weak point of its

theory.[433] In the context of substantive TNL, Cotterrell illustrates the dilemma and vague legal nature of TNL by saying that 'some of this [transnational] regulation is indisputably law. But some of it raises difficult issues about what "law" should be taken to mean in transnational contexts. How should legal theory understand the field of transnational law?'.[434] So, part of TNL is what traditionally and formally qualifies as 'law' or hard law. This content is already part of international law. In addition and most importantly, TNL includes non-law instruments, such as soft law instruments. These are not fully institutionalised[435] or may be informal.[436] A non-exhaustive list of content for TNL has been mentioned by Cotterrell in section B of this chapter. This non-exhaustive, open nature is the central point to the concept. It is also the key to approaching legal pluralism. It was widely mentioned by authors in the definition of TNL, including Jessup.

The inclusion of soft law does not create a threat to hard law and is not based on a division or opposition of both types of normative sources. Indeed, soft law can also be a step on the way to becoming hard law or completing it, and it can also be placed on a spectrum of legality rather than on a binary vision. So, Cotterrell observes that in that respect, the inclusion of soft law within TNL could be a 'prelude to the "hardening" of guidelines into state or international law'.[437] Soft law can also feed the development of hard law with a bottom-up approach to the often-private sources of soft law.[438] In addition, soft law can be developed in relation to and to complete hard laws. Finally, TNL could also be based on a system of degree of legality.[439] It would imply a spectrum of law and varying levels of authority and legitimacy attached to a given rule.[440] Both ideas provide ways in which to explore the legality of TNL, which includes soft and hard law. They establish that soft law should not be viewed within TNL as opposed to hard law. TNL can lessen the focus on this binary divide within traditional international law to include all normative sources, without hierarchy or categorisation. In turn, this idea can feed an approach which is pluralist but also holistic in considering together normative sources within transboundary issues.

Another important challenge to TNL as a theoretical approach addressed by scholars is related to the actors encompassed in TNL and the question of legal authority. Legal theory is challenged in its functioning by the inclusion of 'private and hybrid actors

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[433] Zumbansen 'Can transnational law be critical?' (n 380) 2-3
[434] Cotterrell, 'Transnational communities' (n 167) *2*
[435] Ibid 15
[436] Ibid 14
[437] Cotterrell 'What Is Transnational Law?' (n 230) 508; Karlsson-Vinkhuyzen and Vihma (n 174)
[438] Janet Koven Levit, 'Bottom-Up Lawmaking: The Private Origins of Transnational Law' (2008) 15(1) *Indiana Journal of Global Studies* 49, 56
[439] Cotterrell 'What Is Transnational Law?' (n 230) 508
[440] Cotterrell, 'Transnational communities' (n 167) part 1; Karlsson-Vinkhuyzen and Vihma (n 174)

stepping into roles that are traditionally associated with public authority' and the State.[441] Most reference points as to who has the authority and jurisdiction is blurred in TNL by the fading distinctions based on territorial location (and 'seat' of power and authority[442]) or between regulators and regulates.[443] The range of actors, and therefore of sources of authority and normativity, has no limit in transnational law. This makes it hard to make them 'genuinely knowable and attributable'.[444] Theoretical concepts, such as the State's exclusive representativeness and unity, are called into question by the development of sub- and supra- national actors.[445] Considering that the State is not disappearing with legal pluralism, the debate remains as to, whether and how much, other actors' authority and produced rules should be given attention as part of transnational law. [446] In this perspective as well, the question of enforcement is also a recurring debate practically asking how to enforce transnational law with the distancing from municipal law and the State as a key authority.[447]

The theorising of an all-inclusive system with various sources of normativity brings scholars to address the definition of TNL in more details, mindful of the great change it creates for traditional international law. Considering the lack of straightforward answers or standards set in the theories of TNL, the concept is sometimes considered to be lacking or unpractical. The theoretical base or soundness of TNL can be often considered, even by partisan of the concept, as its Achilles' heel.[448] However, it is important to note that, for some, the debates over the constitutive elements of TNL are 'irrelevant'. This is not to say they are not important but what seems to be of primary importance is the purpose and mission embodied by the concept. Zumbansen highlights that 'the real challenge of T[N]L lies in its scope and conceptual aspiration within an interdisciplinary research agenda that addresses the transformation of globalized law'.[449] This reasoning creates the opportunity to focus less on the technical components of the legal theory and more on the practical purpose and approach to address the issues arising within a traditional international legal system.[450] Several scholars have also directly focused on the purpose and effect rather than on the rigorous, detailed theorising of TNL. Von Daniels uses the notion of transnational law 'as a "title word" to group together different phenomena that cannot be adequately analysed in a state-centred view. Rather than laying out a definition, it will instead be allowed to emerge in the analysis of the examples'.[451] Similarly, Bongiovanni

[441] Heyvaert (n 184) 216
[442] Ibid 210
[443] Ibid 216
[444] Ibid
[445] Slaughter, Tulumello and Wood (n 376) 390
[446] Slaughter 'Breaking out' (n 165) 26-27 and 21
[447] Cotterrell 'What Is Transnational Law?' (n 230)
[448] Zumbansen 'Can transnational law be critical?' (n 380) 2-3
[449] Zumbansen 'Transnational law, Evolving' (n 255) 900
[450] Berman 'Global Legal Pluralism' (n 180) 1179
[451] Von Daniels (n 171) 54

addresses TNL 'in a nonspecific meaning to synthetically express' the concept and proceed to his argumentation.[452]

The apparent gaps in the definition of TNL seem to reinforce a sense of uncertainty and immaturity of the concept. However, it can also be viewed as a conscious effort to distance the concept from traditional international legal theory and conceptualisations which limit it. It can also aim to develop a practice-based and purpose-focused concept rather than a theory-based one. Finally, the apparent gaps in the theoretical features of the concept could maintain the flexibility and openness of TNL as a distinct feature. Indeed, in this perspective, the non-static definition of the concept could reflect the need for flexibility and inclusiveness.[453] For some authors, 'the language of 'transnational' is useful and appropriate, perhaps in part because its meaning is contested and its boundaries unclear'.[454] The literature might be approaching the notion with caution or with a desire to avoid limiting by defining, in order to not reproduce a conceptual confinement. The lack of precise definition of TNL is matching modern pluralist and the ever-changing issues. But it is also 'liberating [as it invites scholars] to venture beyond long-established, perhaps stifling, conventions about what constitutes law and how to study it, into a less structured environment'.[455] It is therefore most crucial to consider the essence of TNL to understand and use the concept.

2/Core characteristics of TNL: the essence of the concept guiding its conceptualisation and use

As expressed in the literature, TNL is a multi-faceted theoretical concept that particularly differentiates itself from traditional international legal theory and adopts a pluralist approach. The common characteristics of TNL inferred from the various definitions above indicate the essence of the concept. These various features of TNL point to and participate to creating a pluralist, holistic and interconnected approach.

Transnational law can be looked at in relation to two dynamics: the move away from traditional international law and State-centred conceptualisations, and the move towards 'trans-' dynamics. First, State-related characteristics (such as the binary divide between international and national scales as well as between private and public law) are departed from in order to critically engage and reassess their suitability in regulating legal pluralism. Secondly, transnational law's essence of pluralist, holistic and interconnect approach is based on its focus on dynamics, interactions and trans-categories. These two dynamics or

[452] Bongiovanni (n 243) 172
[453] Margaret A. Young (ed.), *Regime interaction in international law: Facing fragmentation* (CUP 2012); Berman 'The evolution of global legal pluralism' (n 206) 184

[454] Lin and Scott (n 421) 23
[455] Heyvaert and Etty (n 401) 7

directions taken by TNL positions it in international legal theory and advances clearly its three main characteristics: holism, pluralism and interconnections.

The first two core characteristics of TNL are its ambition towards adopting a legal pluralist and holistic approach. Whether procedural, substantive, as a process or a space, TNL aims to be all-inclusive and embracing legal pluralism. In that, TNL stands out by including together various actors, scales and legal regimes influencing the legal environment of a given issue. It especially accounts for informal and non-institutionalised actors or regimes and non-binary nor State-related categories, such as private actors. The need for a more holistic and pluralist approach to regulation has been highlighted in the previous sections by the literature and in Chapter 2 in the mismatches of traditional legal theory. The second crucial and distinctive characteristic of TNL is its emphasis on a dynamic and interconnected approach. The holistic consideration of a plurality of actors connects with the consideration of their interactions, move across set categories and their cumulative effect rather than a juxtaposed, isolated effect on the legal environment.

The following section will therefore tackle the two dynamics presented above as a move away from traditional international law towards a more transnational approach. Both of these dynamics characterise further the concept of TNL and contribute to asserting its pluralist, holistic and interconnected approach.

(a) A move away from traditional international legal conceptualisations and State-centred characteristics

Most authors have positioned TNL at a distance from traditional international law.[456] The previous chapters have addressed the gaps and mismatches in the approach of traditional international law in regulating modern, multi-dimensional issues. This has led international legal theory and practice to challenge State-centred conceptualisations. The vocabulary of binary divides within international law, related to the State, also proved to lack an adequate way to talk about legal pluralism and modern issues.[457] The reassessment and deconstruction of state-centred conceptualisations of international law is not an opposition and a rejection *per se.* But it facilitates the construction of a more complex understanding of law and of more pertinent legal categories for the regulation of modern, pluralist issues.[458] This move away from traditional legal conceptualisations and the State is also referred to as 'post-national' or 'post-modern' law.[459] These notions confirm the dynamic of law away from traditional international law or past its previously

[456] Zumbansen 'Transnational legal pluralism' (n 354), 142, 171 and 150; Cotterrell 'What Is Transnational Law?' (n 230) 515
[457] Perez (n 189) 349
[458] Zumbansen, 'Defining the space of transnational law' (n 207) 311; Zumbansen 'Can transnational law be critical?' (n 380) 5
[459] Cotterrell, 'Transnational communities' (n 167) 259; Postnational in Berman 'The evolution of global legal pluralism' (n 206) 156

relevant but now inadequate characteristics. This move away is even mentioned as a '*raison d'être'* of TNL, developed to respond to the gaps of traditional international law.[460]

Territoriality

As expressed in Chapters 2 and 3, transnational law mirrors and responds to a decrease in the importance given to territoriality and to territorial sovereignty in the modern socio-legal context. This trend can be put in perspective of several phenomena, such as globalisation or a growing emphasis of States' interdependence and cooperation in international law.[461] This fragilizes a strict and absolute vision of territoriality, especially when justifying national projects that have an external impact or for issues that involve extra-territoriality. It means that more transnational, cross-jurisdictional or extra-territorial issues or dimensions are taking place and which territoriality cannot grasp. Territoriality is not destroyed by legal pluralism and TNL but it is not the sole way to attribute authority anymore or to analyse an issue in international law.[462] Considering the possible territorial autonomy of actors, scales and regimes, the regulation of an issue can come from various physical and jurisdictional places. This is 'leading inevitably to multiple [normative] assertions over the same act, without regard to territorial location'.[463] In the regime of human rights law, the normative assertions are most often trans-boundary, both on a smaller scale than and beyond borders and jurisdictions based on territoriality.[464] The consideration of human rights claims need to be considered without a sole focus on territoriality to grasp the issues fully and accurately. The clarity and importance of 'territory' for categories of traditional international law are thus nuanced. This visible transformation of law and the traditional reliance on territorial sovereignty also affect the readings on the role of the State in a legally pluralist context.[465]

State's centrality as actor

TNL aims to include broadly the actors, scales, regimes and instruments having a normative influence on a given issue, which has been emphasized in every definition of the concept. The State, as central actor of international law, is then put in perspective with other non-State influential actors, like Multinational enterprises, NGOs and International non-governmental institutions.[466] This move away from the State mirrors a development of transnational communities or 'world society', which is not defined by or does not correspond to the State alone.[467] In Chapter 2, it has been considered that the importance and traditional authority of the State remains, and its very existence is not questioned by

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[460] Gaillard (n 425), section I(a) para 1
[461] Twining (n 166) 4-5
[462] Paul Schiff Berman, 'Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism' (2013) 20(2) *Indiana Journal of Global Legal Studies* 665, 666
[463] Berman 'Global Legal Pluralism' (n 180) 1159
[464] Zumbansen 'Transnational law, Evolving' (n 255) 913
[465] Zumbansen 'Transnational legal pluralism' (n 354) 141
[466] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 53
[467] Zumbansen 'Transnational legal pluralism' (n 354) 147

TNL nor by the acceptance of legal pluralism. But the approach and application of international law does not gravitate solely around the State anymore or even around formal, institutionalised authorities.[468] International law does experience a disaggregation of legal authority and legitimacy, which has to be redefined with other actors than the State.[469] Transnational law reflects the emergence of these new actors and other sources of decision-making. It provides the space to consider these other governing sources, including the State but also sub-states and non-state actors.[470] These softer influences on the spectrum of formalised, legitimate authority are especially focused on by TNL and balance out the State's influence.[471] The reassessment of the actors and legal authorities within modern issues beyond the State also brings changes and diversification to the sources of law themselves.[472]

Hard law and traditionally binding norms

The changed role of the State, no longer the centre of international law, implies a change in the sources of the system and the inclusion of other normative rules.[473] Treaties and international organisations rules are still a big part of international law and therefore transnational law but do not form all of it.[474] TNL aims to integrate legal instruments and regimes other than the ones focused on traditionally, like hard law. This refers to non-institutionalised, informal legal instruments, and often not recognised as law. This soft law includes recommendations, private codes of conduct, reports or international standard certifications or volunteer guidelines adoption. Transnational law therefore departs from traditional international law by not considering first their rather than authoritative and formally vested legality, referring for example to the sources of law in article 38 mentioned previously. Instead, TNL considers their normative behaviour and influence.

Private and public law divide

The spheres and fields of normativity in international law have generally been divided, more or less strictly, between private and public international law, mirroring the national law system. This divide has since been more blurred, including with the concept of TNL.[475] For Cotterrell, TNL has started mainly as a transnational private law, due to the new, often private sources of normativity it included.[476] TNL is used to designate both private regimes and actors as well as traditional ones, based on the State and its exclusive public role. Transnationalisation has led to consider together public and private sources and actors,

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[468] Berman 'The evolution of global legal pluralism' (n 206) 157-8
[469] Karlsson-Vinkhuyzen and Vihma (n 174) introduction
[470] Lin and Scott (n 421) 23
[471] Karlsson-Vinkhuyzen and Vihma (n 174) 400
[472] Roger Cotterrell, 'Transnational legal authority: a socio-legal perspective' (2016) *Authority in Transnational Legal Theory. Theorising Across Disciplines* (Edward Elgar 2016), 254
[473] Zumbansen and Bhatt (n 413) 22
[474] Lin and Scott (n 421) 23
[475] Zumbansen, 'Where the Wild Things Are' (n 20) 172 and 173-174
[476] Cotterrell 'Transnational legal authority' (n 472)

but also the cross-category influences they have on each other. Many private and hybrid actors have influenced and stepped in roles or regimes traditionally public and furthered the blur between private and public.[477] An example of such elements located in between categories can be the growing role of public-private partnerships in influencing practice and decision-making in fields like natural resources regulation.

International and national scales binary divide

TNL departs from the international-national divide by including more scales, like regional or local, and normative elements located across or beyond these traditional categories. The divide between national and international can be challenged as a legal classification due to its lack of accuracy with the evolving world.[478] On the other hand, TNL aims at reflecting the expansion of different scales of normativity and actors. TNL is understood to comprise individual actors, like indigenous populations or civil societies evolving at a local scale, as well as regional actors at the regional level, like regional trade agreements, regional NGOs or river basin organisations. The introduction of these actors involves different scales of regulation, not related to the international or national levels. Thus, TNL offers perspective on the 'allegedly separate spheres of domestic and international legal struggles'[479], blurring the idea of divide between them, which does not match the reality of modern pluralist issues.[480]

(Absolute) State sovereignty

The sovereignty of States remains a key principle of international law enshrined in the UN Charter but is not, and increasingly less so, absolute.[481] Many challenges to this claim arise first in international law itself, with for instance the interdependence between States and the duty not to cause significant harm to another country.[482] An example of the enduring importance of State sovereignty can be the sovereignty over natural resources. Natural resources governance is nonetheless experiencing a more nuanced approach with the inclusion of other actors and a broader perspective on the issue. The idea of absolute sovereignty over (water) natural resources was formulated most notably in the Harmon doctrine, which was then dismissed after its formulation.[483] Its stance on an absolute sovereignty on water was considered extreme and impracticable and was never

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[477] Heyvaert (n 184) 216
[478] Jessup (n 177), 70
[479] Zumbansen 'Transnational law, Evolving' (n 255) 910-911
[480] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 51
[481] Jessup (n 177), 53
[482] Sands and Peel (n 50) 192
[483] The Harmon doctrine can be defined as 'An anachronistic principle stating that an upstream country has the unrestricted right to use the water of an international river irrespective of downstream consequences.' See United Nations Economic and Social Commission for Western Asia, 'Harmon Doctrine' <https://www.unescwa.org/harmon-doctrine> accessed 12 March 2021; Stephen C. McCaffrey, 'The Harmon Doctrine One Hundred Years Later: Buried, Not Praised' (1996) 36 *Natural Resources Journal* 965, 967

advocated.[484] Nevertheless, the principle of sovereignty over natural resources is a central principle in the management of state natural resources. It builds on principles mentioned above, such as sovereign territoriality (where the resources are located) and the State as central actor for both the national and international levels. Sovereignty over water resources, for example, is often used to develop (almost unilaterally) projects, such as hydropower plants.[485] The project being located on a river within the national territory and often part of national agendas for energy or irrigation can be considered a national issue. Therefore, the sovereignty of States can be claimed. It cannot be absolute because of a limitation regarding rights and duties in relation to other States' shares of the water resource. The capacity and scope of State to act on its own is declining.[486] State sovereignty being limited, or at least not absolute, is also related to the nuancing of State as central actor and national territory as the framing scale for regulation.

Authors have critically positioned TNL away from traditional international law. They have highlighted its distinction from the generally State-centred core conceptualisations, considered inadequate in some instances.[487] It is worth noting that the direction taken is not an opposition or rejection of such categories, contrary to the idea of the disappearance of the State mentioned as an utmost consequence of legal pluralism and fragmentation. TNL is moving away from solely being based on these categories to, instead, strive towards a more pluralist and holistic approach.[488] It distinguishes itself, as suggested by all the versions of TNL, by moving away from the binary divides and oppositions[489] towards a more nuanced, dynamic and interconnected approach.

(b) Moving towards a 'trans'-level: a dynamic legal approach focused on interactions

As mentioned before, several legal theories have advocated for a more holistic and pluralist approach, extending the types of actors, scales and regimes examined. The adoption of a pluralist and holistic approach was expressed in TNL first by its distancing from a more selective and partial outlook created by traditionally State-centric conceptualisations. TNL has broken the frame of traditional international law and the inadequacies, inaccuracies, and limitations it displayed.[490] In addition, the concept of TNL is articulated as focusing on the dynamic interactions between the different normative elements, taking place in a transnational way. This aspect is critical in understanding

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[484] Ibid 1005-1006
[485] 'Hydropower dams' (*OpenDevelopment Mekong*, 22 December 2017) <https://opendevelopmentmekong.net/topics/hydropower/> accessed 10 March 2021, section 'Dam Diplomacy: Laos', uses the formulation of exercising 'its sovereign right to develop its natural resources within its territory'
[486] Heydebrand (n 172) 118
[487] Zumbansen, 'Where the Wild Things Are' (n 20) 177-178
[488] Slaughter 'Breaking out' (n 165) 19-20
[489] See for example Karlsson-Vinkhuyzen and Vihma (n 174); Perez (n 189) 348
[490] Fisher (n 362) 49

transnational law and its distinct way of providing an interconnected approach to legal pluralism and to modern issues.

Firstly, one of TNL's core characteristics is its focus on interactions and interconnections between the various actors, scales and regimes of a given issue. TNL has been considered above as a pluralist and holistic approach, aiming to encompass under one banner a diversity of normative elements, without restrictions of categories. The inclusion of a great variety of normative elements within one frame (TNL) creates many interactions. These interactions are multiplied and more evident in such a pluralist context. However, TNL brings even more attention to interactions between normative elements because it focuses less on traditional categories. The concept especially considers freer dynamics, occurring within, but also beyond and across, legal categories. Then, TNL aims to address the interdependent, overall cumulative impact of these elements and interactions taken together. Rigid categories of international law can limit the evolution of actors, scales and regimes to a certain sphere or isolate them. Their divides, hierarchies and likely negative interactions and conflicts are handled by the legal system. Without an emphasis on legal categories and built-in dichotomies, the interactions between actors, scales and regimes are likely to be multiplied, but also to occur in a non-linear way and not solely be negative. In addition, the study of a pluralist legal environment should take into account the combined effect of the various actors, scales and regimes. The normative influence of each element considered together is likely to have a cumulative impact on the overall legal environment of an issue.[491]

The definitions of TNL presented above suggest this interaction-focused characteristic. This is exemplified through the linking purpose of procedural TNL, through the process of transnationalisation gradually spreading across categories. Finally, substantive TNL is formed from the gathering of various rules taken together and interacting as a legal field.

Secondly, TNL is a dynamic concept. As examined before, TNL is in itself a work in progress, qualified as flexible and open-ended. This makes this concept dynamic and evolving, with the elements it approaches, with the development of its conceptualisation by the literature and with the socio-legal context.[492] This is especially visible in the definition of TNL as a process and phenomenon. The overall pluralist view of a legal environment will dynamically change to represent its specificities, with the different ensemble of actors, scales and regimes it includes. TNL's scope could possibly expand and include a more specific set of actors, scales and regimes, for each given issue.[493] Also, the interactions between all these normative elements will also be dynamic and

[491] Turner (n 201) 242
[492] Zumbansen 'Transnational law, Evolving' (n 255) 158 and 898-899
[493] Heyvaert (n 184) 231

changing.[494] The dynamic nature of TNL is hinted at in the substantive and procedural definitions of TNL, as they both expand and can consider an ensemble of normative elements, as a field or as unique, spontaneous interactions.

Finally, another distinct and essential characteristic of the direction taken by TNL, which can be inferred from the various definitions of the term, is its dimension 'trans'-categories. The understanding and representation of this 'trans'-national and 'trans'-boundary dimension participates in the pluralist, holistic and interconnected approach of TNL.

Put simply, Fisher, Lange et al. consider that transboundary environmental problems need responses to be transboundary.[495] First, in TNL's scope and the way it is conceived, the notion offers the opportunity to look at multi-national (and even transnational) issues in a macro, cross-sectoral way. Both Turner and Berman have mentioned that research, even on transnational legal fields, has generally been conducted in a compartmentalized and focused way.[496] For Turner, a 'micro' level perspective is often adopted, from the standpoint of one regime or 'sub'-regime.[497] They are not considering a 'macro' level, taking a broader holistic perspective. He illustrates a case of 'micro' level analysis in the context of global environmental governance (GEG), where the sub-regime or field of expertise still frames the pluralist and holistic approach of an issue within or from the environmental standpoint.[498] However, a 'macro' level analysis of a given issue 'is a necessary prerequisite to creating functional and transferrable multilevel, multi-scalar adaptation governance systems'.[499] Transnational Environmental Law itself seeks to consider various actors, scales and instruments influencing issues but can provide a vision framed or led by the field of environmental law, despite the use of a non-traditional 'transnational' approach. For both examples, the use of a micro or regime's point of view is counterproductive to designing a general and accurate understanding of an issue, which is connected with a broader, more complex normative architecture. This is not to say that micro or regimes' approach are not crucial and more practical to consider an issue. But in the context of this research, the more general focus on legal pluralism and integration can present the need for a macro, more generic and complex approach to plurality and interconnections. The adoption of TNL as a general legal theory, despite its more abstract nature, is aiming to consider a macro approach to transnational issues.

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[494] Dunoff (n 295) 137; B. Eberlein, K. W. Abbott, J. Black, E. Meidinger, S. Wood, 'Transnational business governance interactions: Conceptualisation and framework for analysis' (2014) 8(1) *Special Issue: Transnational Business Governance Interactions*

[495] Fisher, Lange et al. (N 152) section 3(4)

[496] Berman 'Global Legal Pluralism' (n 180)*;* Turner (n 201)

[497] Turner (n 201) 246

[498] Ibid

[499] Cinnamon Carlarne and Daniel Farber, 'Law Beyond Borders: Transnational Responses to Global Environmental Issues' (2012) 1(1) *Transnational Environmental Law*, 21

Here, it aims to avoid the restrictive or biased point of view given by the application of transnational law within one specific field. Therefore, TNL should integrate within its scope of analysis a non-compartmentalised and macro perspective, so as to convey a non-traditional, pluralist and truly holistic approach.

Most importantly, the 'trans'-categories dimension of TNL refers to the content, especially the one interconnected. Firstly, the 'trans'-dynamic content of TNL can point out to the physical and spatial aspect designated by TNL. This relates to the visible cross-border and transboundary nature of some issues dealt with by international law. The transnational focus of the concept helps consider specifically transboundary (including but not limited to global) issues and their combination of various scales (i.e. transboundary communities' level), diverse actors (i.e. basin-level civil society organisations) and regimes (i.e. rules of international environmental law on transboundary harm or Transnational companies' codes of conduct). Due to a growing blurring of political borders, through globalization especially, more issues require an approach catered to the cross-categories nature of transboundary issues. These issues can include topics such as transnational families, transnational organised crime or the internet.[500] These issues are more complex to govern than cross-border issues taking place on the same scale or when evolving within the set legal categories (such as international State-to-State interactions). In addition, TNL refers to a more conceptual consideration of transnational dynamics, yet connected to the physical aspect above. It relates to the consideration of the variety of normative sources and their critical interactions having an impact beyond their initial categories, in a constant dynamic of cross-influence.[501] The interactions and dynamic character of TNL mentioned above can include movements between legal categories. But most importantly, TNL includes interactions that are transnational, beyond and across legal categories, not only between.[502] As mentioned previously, TNL, which takes the counterpart to traditional international legal conceptualisations, is to put less emphasis on categories, while not rejecting them. Then, the concept encourages more flexibility and openness beyond and across such categories.[503] The distinctive interconnectedness of TNL builds on the specific focus on interactions, happening in a dynamic but especially transboundary and transnational way.

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[500] Transnational family law see Marylin Johnson Raisch, 'Transnational and Comparative Family Law: Harmonization and Implementation' (Hauser Global Law Program, GlobaLex, April 2007) <https://www.nyulawglobal.org/globalex/Transnational_Comparative_Family_Law1.html> accessed 12 March 2021; Transnational organised crime see Frank G. Madsen, *Transnational Organized Crime* (Routledge 2009); Internet transnational regulation, Cotterrell, 'Still Afraid of Legal Pluralism?' (n 186) II para. 3

[501] Zumbansen and Bhatt (n 413) 15 and 11

[502] Slaughter 'Breaking out' (n 165) 20

[503] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 59

In a nutshell, the concept of transnational law has been addressed in various ways. Consensus over one definition can hardly be reached because of the multi-faceted nature of the concept and the on-going development of it by the literature. The concept could be fragilized when evaluated as being a defined and matured legal theory, with criteria of having a detailed and clear scope and constitutive elements. This could impact negatively the status of solid and polished alternative to the traditional international legal system and legal categories inadequately approaching legal pluralism. However, the lack of detailed constitutive elements of TNL can direct the attention to the essence of the concept and purpose, as inferred from the literature. TNL exhibits a departure from and nuancing of traditional international law's conceptualisations. The concept heads towards being a dynamic, transnational idea focused on the interactions between actors, scales and regimes. TNL's essence is therefore conveying a pluralist, holistic and interconnected approach. It does so through its inclusive, open-ended nature considering dynamically the interactions between normative elements, especially including transnational interactions.

These core elements and the distinct approach of TNL enlighten the concept itself. Then, it can provide the basis by which to design a TNL analytical framework, which would offer a more practical way of considering a TNL approach to legal pluralism.

II- The design of a transnational legal analytical framework: creating a propitious space and language for pluralism and interactions

The following section will address how TNL can adopt a more practical design to frame and analyse the legal environment of a pluralist issue in an integrated way. Based on the distinct features determined above, the following section will consider how a TNL analytical framework can first set the background frame for plurality and interactions as a conceptual space, using legal discourses rather than references to traditional normative categories. In addition, the section will consider the extended vision of interactions created by the framing of a transnational space for legal discourses.

A-The design of a Transnational Legal Space: creating the frame for the study of a pluralist, holistic and interconnected legal environment

The above definitions of TNL as procedural, substantive, as a phenomenon or a conceptual space helped draw an overview and general understanding of what TNL is and how the concept has been developed. The following section considers the definition of TNL as a conceptual space, greatly promoted by Zumbansen, to develop an analytical framework changing the approach to legal pluralism and integration.

The following section will develop the conceptual space nature of TNL, while not invalidating or excluding the other definitions of TNL. A transnational legal space can still

include aspects of both procedural, substantive transnational rules and capture the phenomenon of transnationalisation within its space. However, contrary to the substantive and procedural aspects of TNL, the idea of conceptual space can introduce a reflection further away from commonly used legal terminologies and conceptualisations. Transnational 'procedural' or 'substantive' legal concepts might fall back on debates surrounding detailed constitutive elements of TNL, such as precise scope, content or sources and authority. Indeed, Zumbansen considers that the challenge and opportunity of using conceptual TNL also relates to the very communication method and structure of language framing the examination of pluralism and interactions in a legal environment.[504] An example can be the articulation and framing of the categories, boundaries and terminology of the legal system, like hard law. Conceptual TNL could then rely on a different qualification and communication between normative elements.

In addition, Zumbansen points out that 'the focus on space promises to capture more adequately the way in which our understanding of regulatory landscapes as well as of scopes of human interactions still reckons with concretely identifiable places of legal and political regulation while at the same time reaching beyond it'.[505] The more conceptual nature of this definition of TNL therefore opens a more detached and original way of considering TNL and its approach to legal pluralism.

Firstly, the use of TNL as a conceptual space can design a model that is more visibly connected to and evocates transboundary issues and physically transnational space. These issues, as observed in the previous chapters, are key emerging concerns in link with legal pluralism and globalisation. Their heightened and specific cross-boundary and cross-jurisdictional nature makes the insight of a transnational legal space even more valuable as it links the physical and conceptual cross-sectoral dimensions of the issue in framing it. As mentioned before, water resources have an evident transboundary physical nature. But the implications of its management also cross abstract categories of state jurisdictions or topics, in link with the connected ecosystem or the economic benefits for instance.

Secondly, the reference to transnational legal spaces (TNLS) provides insights in setting a holistic and pluralist space. As per the above-mentioned abstract characteristics of TNL, TNLS focuses less on legal categories of normative elements than on their normative influence and their interactions with each other. TNLS creates a broader, more inclusive, and flexible background and frame. It positions itself in opposition with the delimiting and spatial notions used in traditional international law to frame governance, such as legal scale or legal system.[506] The notion of legal scale is limited in framing

[504] Zumbansen 'Comparative, global and transnational constitutionalism' (n 379) 23
[505] Zumbansen 'Transnational legal pluralism' (n 354) 182
[506] Zumbansen 'Transnational law, Evolving' (n 255) 900

pluralism as it might consider a variety of actors and regimes from a specific level, such as either national, local, regional or international. This leaves out the consideration of other scales or of cross-scale dimensions of certain actors and regimes. In addition, legal systems are more limited as a framing space for legal plurality because of their specific constitutive rules as to what is in or out of the system.[507] The coding of what constitutes law and what does not is an aspect which limits the notion of legal system in including other informal influential elements. TNLS is especially hinting at more open-ended and flexible frame and boundaries.[508] It creates a single space where diverse elements influencing a legal environment can be considered on the same plane. This single plane allows different normative elements to interact more freely than when constricted by their respective legal categories or by being considered as inside and outside of the legal frame. Zumbansen describes TNLS as 'a space, a discursive realm of normative tensions and dynamics', which is not a physical space or a set scale, like the global scale. This space is abstract and conceptual, made out of discourses and various directions in which the different normative elements go. The author suggests that TNLS is a flexible frame where interactions, as current and counter-current flows, are influencing in various directions other normative elements and the overall legal environment.[509] This space therefore captures, but also creates, a propitious configuration for the development of the internal exchanges between the normative elements, considering their important effect on the overall legal environment.

Framing appropriately the normative elements of the legal environment of an issue is crucial to creating a pluralist and holistic approach. An appropriate framework can organize the enquiry on legal pluralism and integration in sustainable development.[510] It can define, form boundaries around the enquiry, show general directions and interactions. The establishment of an overall framework can help pluralism be understood and bring benefits beyond what the initial legal system could frame.[511] The frame established here is not only broader in its scope. It also allows the emphasis to be placed on the interactions and cumulative effect of elements rather than on promoting a reductive and compartmentalised thinking. The establishment of a TNLS is therefore a suitable concept to establish a TNL analytical framework. By setting a propitious frame for the diversity of normative elements and their interactions to take place, TNLS allows for a different dialogue to take place about legal pluralism and integration.

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[507] Niklas Luhmann, '4-Coding and Programming' in Niklas Luhmann, *Law as a Social System* (OUP 2004), 177; Colangelo (n 225) 29; Anthony D'Amato, 'Groundwork for international law' (2014) *American Journal of International Law*, 650

[508] Von Daniels (n 171) 68

[509] Zumbansen and Bhatt (n 413) 13

[510] Von Braun and Mirzabaev (n 103) 61

[511] Ku (n 154) 425

B- The use of 'legal discourses' terminology within TNLS: setting the background communication to facilitate interactions

TNLS creates a frame which is inclusive of various actors, scales and regimes and aims to consider within a single space and plane of legal pluralism. This then creates the need and opportunity for a change of terminology of legal theory in the conceptualisation of legal pluralism. The change in designation would allow to depart from traditional international legal categories which uses restrictive terms, such as hard law or soft law. These terms can already create and maintain a hierarchy and compartmentalisation entrenched in legal theory, as examined in Chapter 2. In addition, these legal categories can carry a negative bias towards plurality, fragmentation and expanding 'non-law' elements, which fragilize the legal system. TNLS, by changing the contours and scope of traditional international law and including these elements, offers the opportunity to consider anew an approach without perpetuating traditional international law's somewhat inadequate qualifications of legal pluralism. A TNLS is an interface for various elements to be gathered and interact. Finding an appropriate mode of communication and designation of these dynamics is therefore very important for an informed, complete and effective description and analysis of legal pluralism in a given issue.[512]

The use of the 'legal discourses' of the various actors, scales and regimes can facilitate the focus within a TNLS towards a less category-based legal environment. And instead, it would consider these normative elements on a similar conceptual level and on so called speaking terms, facilitating interactions and their impact on an overall legal environment. Firstly, this section will introduce how traditional international law's legal categories approach and formulate the interactions occurring when it addresses legal pluralism. Secondly, and by contrast, the section will examine the use of legal discourses terminology to formulate legal pluralism.

1/Traditional International Law and the conceptualisation of interactions in the context of the conflict of laws

The use of legal categories in traditional legal theory has compartmentalised the formulation, representation and analysis of the various actors, scales and regimes in a pluralist legal environment. These compartmentalisations and the entrenched negative perception of fragmentation have led legal theory to focus on and manage the conflictual and competing interactions occurring in an extended examination of legal scope.

Traditional legal theory and conflict resolution most commonly discuss and address conflictual interactions by referring to traditional legal categories and binary divides.[513] Normative conflicts can generally include a spectrum of interactions where competitions

[512] Janouskova, Hak and Moldan (n 53) 2
[513] Van Asselt (n 212) 207-8

and challenges of coordination can also be considered conflictual. Strict conflicts between norms are generally rare.[514] The possible negative consequences of conflicts for the system have been highlighted, for example with 'rule inconsistencies and strategic behaviour, such as forum shopping' and reaching up to challenges to cornerstones of law, such as predictability and fairness.[515] The VCLT most notably carries on this lingering focus on conflicts amongst legal interactions in legal pluralism and the need to solve them. This specific area is also referred to as 'conflicts of law'. It generally centralizes around a dichotomy of two norms being in conflict or not. The VCLT's suggested mechanisms have for purpose to either diffuse conflicts and incompatibilities or solve them in a specific context through hierarchy or priority rules.[516] The idea of rules on the conflicts of law is invested with the goal to manage the potential negative effects of pluralism and fragmentation. It can be assumed that this position takes into account only negative interactions within a legally pluralist environment, with varying degree of conflict. This field of legal theory aims to manage or correct these negative effects. Therefore, traditional legal theory's focus on the conflictual interactions overshadows the other interactions occurring in a legal environment. These other interactions, possibly positive or neutral, are not unknown but are not considered problematic and needing intervention by international legal theory. A complete outlook of legal pluralism and internal dynamics is not provided by the traditional international legal system.

Without rejecting the relevance and importance of the VCLT and of the rules for normative conflicts, the focus on the negative interactions creates a simplified, binary approach to legal interactions. In turn, this presents the limit of a traditional international legal theory's suitability to approach pluralist issues. It is lacking in its capacity to present the other types of interactions happening in this legal context, such as the convergences, overlaps and compatibilities.[517] These very interactions focused on in the context of integrated sustainable development policy to reinforce the interdependence and mutual realisation of the three pillars and other objectives.

2/TNLS and the use of legal discourses: facilitating a pluralist approach and the broadened consideration of normative interactions

Given the limiting approach presented by international legal theory through its categories and its conflict-biased consideration of normative interactions, the TNLS, after having laid a broader frame for plurality, needs to consider another way to communicate within its space. The modification in the terminology used can strengthen the needed and desired change of approach. The new mode of communication would allow to discuss

[514] Joost Pauwelyn, 'Bridging Fragmentation and Unity : International Law as a Universe of Inter-Connected Islands' (2004) 25(4) *Michigan Journal of International Law* 903, 907
[515] Eberlein, Abbott et al. (n 494)

[516] Vienna Convention on the Law of Treaties; Van Asselt (n 212) 62 and 67
[517] Cotterrell, 'Transnational communities' (n 167) part 1

interactions in another way than laid out by traditional international law. It would participate to creating the same background language for the various actors, scales and regimes, as a common and non-compartmentalised communication system. It would then continue to break down the legal categories and boundaries established. In turn, this will reinforce the creation of an open, pluralist, and interconnected space where interactions are focused on and diversely included.

To change the biased language compartmentalising the different normative elements in legal pluralism, the design of the TNLS model will use the terminology of 'discourses' and more specifically 'legal discourses'. 'Discourse' initially refers to a communication. It articulates and structures the thought, the rationale, the language and the communication. A discourse projects a certain internal functioning, ideas and goals onto the outside, where this discourse will interact with other discourses, creating a communication.

A legal discourse can be generally associated with the study of the language and communication system of the legal field.[518] It formulates the specificities of the discipline. It projects externally its rationale, functioning and way of communicating to other discourses and internally to the other developments of law, like specialised branches of law. A legal discourse would be considered to formulate, interpret, and apply law, based on an agreed structure, thought and communication method. Therefore, the legal discourse can refer to the legal thought being expressed. Here, instead of considering a single legal discourse to designate the normative behaviour and communication system of actors, scales and regimes, TNLS will refer to various legal discourses. A single legal discourse could still be associated with a traditional way of considering what is 'legal' and how normativity is expressed. So, using several legal discourses can express the variety, uniqueness and unconventional normative nature of each element within a TNLS. Each actor, scale and regime included within a TNLS projects a unique legal discourse, in the sense of communicating their normative behaviour and objective. This communication is independent from their category or if their legal communication is recognised as law, authoritative or legitimate by traditional legal theory. For example, the legal discourse of a private investor might communicate the objective of economic development and influence through a binding contract. This position can be associated to a legal discourse and normative behaviour because of the influence it creates on other normative elements and on the legal environment of an issue. An NGO can use reports to communicate a position towards environmental or social protection, calling governments to change their regulation of a certain issue, for instance. As such, the NGO's normative influence lies in the

[518] A legal discourse could be understood generally as a legal 'communication in speech or writing', see Cambridge dictionary. Habermas develops more on legal discourse theory, see Robert Alexy, 'Jürgen Habermas's theory of legal discourse (1995-1996) 17 *Cardozo Law Review* 1027, 1034

objective and ambition to act as a regulator or influence regulation through its communication.

Other authors have proceeded to change the terminology of law and normativity in order to distinguish themselves from traditional international law and participate to a new approach. Johns et al. have referred to the terminology of 'legal strategies' pursued by different actors, at different scales in the Mekong river hydropower legal environment.[519] The notion of legal strategies could be associated to the idea of legal discourses, as a terminology referring to the rationale and objective of normative influence uniquely presented by all actors, scales and regimes involved in an issue. Perez mentions the use of 'fuzzy rules' as 'communicative loops' or 'themes for communication' which would carry or generate some 'normative expectations'.[520] These terms also assert the specific need of new modes of communication or terminology to describe normative objectives or behaviour like legal discourses, rather than strict legality.

The use of legal discourses would change the mode of communication with a TNLS. Instead of 'legal systems', using legal discourses can identify actors, scales and regimes more broadly by their unique normative discourses, independent of their actual legality.[521] The change of designation enlarges what is qualified as having a legal impact or influence, normally reserved to traditional categories and sources of law. Therefore, using legal discourses as a way of communicating could level the playing field of TNLS. It could give a diversity of influential elements the chance to communicate and interact with other discourses, more strictly 'legal'. More legal discourses can be identified and represent a more complete and accurate account of legal pluralism, without a binary divide between law and non-law. With more legal discourses included, more interactions can occur and be facilitated on the basis of a common language. All interactions between discourses could be included and studied, whether conflictual, convergent or mismatching. The language used to represent, and then analyse, a given legal environment would not already be restricted. The restriction on what to include leads to inaccuracy of a legal analysis of a given issue, leaving aside many legal discourses and non-conflictual interactions. Thus, there is an inefficiency in promoting integration as international law governs without a holistic, pluralist and interconnected approach. A more integrated vision of the legal environment would be made possible by using a different language, which is more inclusive but reflecting diverse discourses and interactions.

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[519] F. Johns, B. Saul, P. Hirsch, T. Stephens and B. Boer, 'Law and the Mekong River Basin: a socio-legal research agenda on the role of hard and soft law in regulating transboundary water resources' (2010) 11(1) *Melbourne Journal of International Law*, 156

[520] Perez (n 189) 366

[521] Emmanuel Melissaris, 'The More the Merrier? A New Take on Legal Pluralism' (2004) 13(1) *Social & Legal Studies* 57, 58

For Cotterrell, transnational law might not operate –or not solely- 'in terms of bounded regimes', which included a certain State jurisdiction or notion of territory.[522] TNL might be more flexible, more interconnected and less distinctively delimitated in terms of spheres, jurisdiction or authority. Legal discourses can therefore picture better this idea of transnational regimes and their porous, dynamic nature.[523]

The terminology of 'legal discourses' is already used in legal theory and in transnational legal theory to refer to specific 'sub' normative communication and behaviour, within the main legal system. The 'human rights discourse' is often used to refer to the laws, rules or even non-binding instruments and principles related to human rights law.[524] This example of legal discourse refers to a broader rhetoric and dynamic than the human rights legal regime, while being more specific than the general legal discourse. It has been used as an illustration of transnational law. Indeed, the human rights discourse has characteristically spread beyond the human rights' legal regime, among other things to other legal discourses. This reinforces the perception that legal discourses are an appropriate communication method to adopt within a TNLS.

The adoption of discourses terminology to consider various actors, scales and regimes and their non-conflictual interactions can already be found in the area of sustainable development.[525] Sustainable development itself is considered a 'discursive process during which a multiplicity of actors including States, NGOs, epistemic communities and individuals interacted'.[526] The use of 'discourses' aims at creating a broader vision of each field and actor and to direct the attention towards positive and mutually beneficial interactions, like with the three pillars. Sustainable development is often based on the initial idea that the three pillars generally have competing and conflictual interactions, which is sometimes the case.[527] However, policy tried to correct or grow past this idea and to focus on convergence and interdependence between these three pillars. Some examples of these positive interactions have already been seen in sustainable development theory and in practice in Chapter 1. Both positive and negative interactions exist within sustainable development policies and between the different legal discourses promoted. The idea of either convergence or conflict between the three pillars is partial and inaccurate. The two types of interactions are not antagonistic or exclusive of

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[522] Cotterrell 'Transnational legal authority' (n 472) 260
[523] Ibid
[524] Human rights discourse can be related to a human rights communication. It has also been referred to as 'human rights talk', see Stephen P. Marks, 'Human Rights: A Brief Introduction' (*Working paper Harvard School of Public Health*, 2016) <https://dash.harvard.edu/bitstream/handle/1/27015684/Human_Rights-A_brief_intro_2016.pdf?sequence=1> accessed 21 March 2021, 2
[525] Marong (n 31) 75
[526] Ibid
[527] Landberg (n 36) 258

each other. The objective surrounding the 'three pillars' is to direct attention to other interactions than the conflictual ones between economic, environmental and social discourses. Then, sustainable development policy could enhance interactions creating more synergy and integration between these discourses. A notable example of this is the SDGs and targets agenda. This single policy document gathers various discourses and aims to highlight their convergences and interdependence. It tries to create synergy and integration, especially through their targets and built-in connections. As mentioned in Chapter 1, various studies have focused on such interlinkages and interactions, exposing their convergence and gaps to organise the implementation of integrated sustainable development.

The use of 'discourses' in different fields and disciplines like with sustainable development policy allows an interesting opening towards other fields than law. The use of a similar terminology can create a stronger link between law, the social context and other discourses, like politics.[528] This importantly opens the legal study of pluralism and interactions to a more socio-legal reflection, linking more deeply the TNLS analytical model to the social and practical context it regulates. This contributes to fill the gap between law in the books and in practice found in traditional legal theory, introduced in Chapter 2.

Finally, the choice of reference to discourses in TNLS is reinforced here considering the case study presented in the next chapter. The relation between the three pillars and the divide between their conflictual or converging relation is at the centre of hydropower projects governance. Multiple actors, scales and regimes are informal and take part in the legal environment of hydropower development. They need to be integrated to the representation and analysis of this issue, considered with formal law and the diverse interactions they can have.

In brief, the consideration of legal discourses within a TNLS helps move past the limitations set within traditional international law based on categories and the focalisation on conflictual interactions to solve. The setting of a frame of TNLS and of a system of communication based on legal discourses participates to creating a holistic, pluralist and interconnected approach. It does so by allowing for a more open and flexible representation and analysis of legal discourses' interactions of different nature, whether conflictual, convergent or mismatching.

[528] Zumbansen 'Transnational legal pluralism' (n 354) 142 and 145; Zumbansen and Bhatt (n 413) 5

C- Conflict, convergence and gap in legal discourses' interactions in a TNLS: the opportunity for analysing dynamics and their cumulative impact on the legal environment

This section will present possible interactions between legal discourses that can surface in a TNLS, beyond conflictual ones. Previous sections have highlighted the importance of interactions. Interactions are at the heart of the legal environment of a given issue and its regulation in an integrated way. Overall, the management of conflictual interactions and the enhancement of converging ones can contribute to an improved governance. The representation and focus on these diverse interactions and their following management are facilitated by the pluralist and holistic approach of TNL.[529] TNL aims to reflect the full picture of inner dynamics of a legal environment. Especially for transboundary issues, the reflection of all these interactions is important to start considering '"cross-regime sensitivities"'.[530] Interactions are cross-category and cross-boundary connections and communications between legal discourses, which can themselves operate at different scales, across actors or regimes.

The following section will present three different types of interactions between legal discourses, all represented in a TNLS. It will not however examine in depth factors such as the drivers[531], process or measured impact of such interactions. As pointed out by Eberlein et al., considering the complexity and the need for further studies, research on critical interactions occurring within pluralism, and within what is here a TNLS, can hardly predict the functioning or result of such interactions.[532] Therefore, this section aims at providing a sufficient and adequate insight into various interactions not considered before but which are critical to more realistically and broadly present the dynamics within a specific legal environment.

The three types of critical interactions presented below will focus on the conflicts, the convergences and the gaps that can potentially develop.[533] Each type of interlinkages will be defined broadly in each section. It is worth noting that the interactions considered might not fit within a clear category and that the nature of the interaction can change. More specific classifications have been developed in the study of interactions, especially in the context of sustainable development. For instance, Nilsson et al. sort the various interactions between SDGs and targets as indivisible, reinforcing, enabling, consistent,

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Zumbansen 'Transnational legal pluralism' (n 354) 148-149

[530] Pinon Carlarne (n 328) 462

[531] Oliver Hensengerth, 'Water Governance in the Mekong Basin: Scalar Tradeoffs, Transnational Norms and Chinese Hydropower Investment' in Pal Nyiri and Danielle Tan (eds.) *Chinese Encounters in Southeast Asia: How People, Money, and Ideas from China are Changing a Region* (Seattle: University of Washington Press, 2017), 5

[532] Eberlein, Abbott et al. (n 494)

[533] Van Asselt (n 212) 47

constraining, counteracting or cancelling[534]. Eberlein et al. use types of interactions based on competition, coordination, co-optation and chaos.[535] Such examples of designations, dealing with policy goals and the SDGs specifically, are more detailed in their definitions and degrees of interactions, allowing for more precise descriptions. Nevertheless, the three types of generally positive (converging, compatible), negative (conflicting, competing) or mismatching (gaps, overlaps) interactions presented here allow for a straightforward way to explore the usefulness of transnational law as contributing to promoting interactions and integration.

1/Conflictual interactions

Conflicts can be hard to define and a narrow or wide approach can be taken.[536] Some interactions can be qualified as conflictual, between norms and formal law or here as referring more broadly to possible conflicts between legal discourses. The conflict of legal discourses could encompass the opposition and competition of objectives, rhetoric and of the associated normative behaviour of discourses. Discourses' conflicts have already been mentioned in the context of sustainable development where discourses of economic development, environmental protection and human rights are often positioned as opposed or in competition. Conflict is unavoidable and its negative impacts need to be managed.[537] Conflicts and competitions between legal discourses can have an impact on the legal environment of an issue, directing it in different directions. In turn, this can create contradictions or the need to position a legal discourse over another. The trade-offs from these interactions can lead to inequalities and to a less pluralist and integrated governance. Some of these trade-offs can be reduced by the used of conflicts of law rules and the VCLT. However, more conflicts are developing outside of its frame based on traditional legal theory.

In addition, new types of conflicts need to be considered as they arise with transnational legal issues and a broad understanding of conflict. Inter-systemic conflicts can appear with a cross-category analysis of the different legal discourses.[538] These conflicts are important to highlight as they are increasing and due to their particular management. The traditional way of managing conflicts, the field of conflicts of law, is inadapted for inter-systemic conflicts. These conflicts are said to take place beyond legal rules and their specific field but to reflect collisions between different social spheres or discourses.[539] The management of such conflicts needs to go deeper than a technical solution like the VCLT but to engage with the issue as a conflict of value. Teubner has

[534] Nilsson, Griggs and Visbeck (n 71)
[535] Eberlein, Abbott et al. (n 494)
[536] Van Asselt (n 212) 52
[537] Berman 'Jurisgenerative Constitutionalism' (n 462)
[538] Fischer-Lescano and Teubner (n 176) 1000
[539] Fischer-Lescano and Teubner (n 176) 1000

tried to create a 'collision law' or 'inter-systemic conflicts of law' with the idea to tackle conflicts not strictly legal but conflicts of normative elements or discourses.[540]

The management of conflicts of legal discourses is also based on the idea that legal environment change. Legal discourses can evolve, especially at the contact of other discourses. Their interactions may be conflictual at a certain point in time but can evolve with the discourses. Van Asselt refers to interactions as 'moving targets', which can create conflicts or convergence over time.[541] A conflict of legal discourses can then be managed or naturally evolve overtime towards a more cooperative or compatible interaction. TNLS is a dynamic frame taking into account that interactions and legal discourses evolve. It can then focus on highlighting and enhancing convergent and compatible interactions in order to reduce trade-offs and contribute to integration.

2/Convergent and compatible interactions: an emerging focus in sustainable development that require more attention for an extended law of interactions

Positive interactions, like convergence or compatibility, are crucial to look at considering the lack of attention paid to it by traditional international law. The literature has increasingly focused on positive interactions and how to enhance synergies for an improved and more integrated governance. Chapter 1 of this thesis has indeed presented the importance of synergies in the 2030 Agenda and for the objective of integration. Dunoff has referred to these interactions as relational for traditional international law where, as opposed to transactional interactions, no conflict or trade-offs are managed and therefore requiring less attention.[542] The idea of relational interactions shows the common nature of these interactions, over the conflicts to manage, and allowing a smooth operation of the legal system. This justifies focusing on these important interactions, reinforcing the legal system, and to aim to understand and highlight them.

Convergent interactions between legal discourses can refer to the concurrent overall objectives and normative behaviour of two or more legal discourses considered together. This implies that a given legal discourse is to some extent cooperating or reinforcing another legal discourse's normative behaviour. This cooperation can happen when legal discourses, actors or regimes share '"the same fundamental norms and values"'.[543] In addition, their cumulative impact might be considered as a positive sum, where both objectives can be pursued simultaneously or in conjunction. The convergence

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[540] Most notably Gunther Teubner has developed the concept of 'inter-systemic conflicts law', 'collision law' or even 'discourses collision' to refer not to strict legal conflicts as expressed in the VCLT but as intersections and conflicts between broader normative elements or social discourses. See Gunther Teubner and Peter Korth, 'Two kinds of legal pluralism: Collision of laws in the double fragmentation of world society' in Margaret A. Young (ed), *Regime Interaction in International Law. Facing Fragmentation* (CUP 2012)

[541] Van Asselt (n 212) 13

[542] Dunoff (n 295) 137-8

[543] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 4

of two legal discourses can also be found in their effect, as opposed to within their overall direction, which can bring more effectiveness.[544] Effectiveness can be linked to the importance and proportion of trade-offs and to the synergies created towards realising the same goal. Contrary to the idea of forum shopping, Cotterrell shows that positive interactions within legal pluralism in courts can bring even more authority.[545] The cross-reference to other legal discourses and courts can lead to mutually reinforcing authority and solid decisions. The effect of positive interactions like convergence can bring more effectiveness and strengthen the legal system instead of fragilizing it, as expected of legal pluralism.

An example of positive interaction can be the legal discourses of environmental protection and human rights protection. Despite having distinct features, these discourses are often convergent or complementary in their objectives, values and effect. Their interactions being often positive, the implementation of both of their legal discourses most often does not require the management of conflict or important trade-offs. This convergence then makes the overall legal environment more stable, less prone to contradictory influences or to compromising and nuancing positions.

It is worth noting that convergence and compatibility, here mentioned together, can be considered different on the spectrum of interactions between legal discourses. Convergence can more clearly be looked at as bringing a positive cumulative effect. Compatibility, on the other hand, can be assessed as a non-conflictual, more neutral interaction where both instruments, actors, scales or regimes' normative behaviour are not clearly adding to nor opposing the other. Both legal discourses can evolve in parallel with each other and apply in a legal environment. In the context of investment dispute resolution, Attila Tanzi has noted that compatibility is often considered a sufficient threshold to reach in the evaluation of potentially conflictual interactions and choice of applicable law.[546] As mentioned by the author, conflicts of law and general international law commonly consider compatibility, or the absence of a conflict, to be sufficient for a functioning system. Because of their focus on managing conflicts, the establishment of compatible interactions, without going as far as considering potential convergences between two legal discourses is privileged. This can be considered a shortfall in the pursuit of integration where establishing convergences could bring more synergies and strengthen the effectiveness of implementation of different discourses.

In brief, positive interactions are central to creating synergies between the various legal discourses influencing an issue. These synergies will decrease the trade-offs

[544] Van Asselt (n 212) 55
[545] Berman 'The evolution of global legal pluralism' (n 206) 157-8
[546] Tanzi (n 324)

operated and improve the promotion of integration among a plurality of normative elements.

3/Gaps in interactions

Gaps in the interactions within a TNLS can suggest the lack of interactions between two legal discourses or the absence of regulation or normative behaviour covering a certain aspect of an issue within that space. Gaps and overlaps are common but can be left unaddressed by the literature which can create 'intellectual blind spots and a lack of co-ordinated analysis' of transboundary issues and international law.[547]

Gaps can create negative consequences as a non-regulated aspect is susceptible to being left aside and not taken into account in the legal environment. Paying attention to gaps in the interactions is crucial to indicate and analyse the disparities or the lack of links established. Gaps can both indicate the need to strengthen or establish linkages, as well the possible need to create rules. In traditional international law, gaps are often identified as the lack of 'hard law' or formal normative instruments regulating an issue. This often leads to the creation of more, formal, laws. The absence of formal laws feeds the idea that international law is absent from the regulation of certain issues, while informal, non-binding elements already create a system of influential governance. This partial account of the informal normative elements, of the actual gaps and needed improvements illustrates the need for a broader approach to legal pluralism and interactions. The use of a holistic, pluralist and interconnected approach, like within a TNLS, can then give an accurate overview of legal discourses' interactions, revealing gaps and orientating the creation of new regulation.

The consideration of legal discourses' interactions within a TNLS, including not only conflictual interactions but also convergences and gaps, participates first to understanding better what interlinkages exist in the legal environment. Some parallels, commonalities and divergences could be 'otherwise missed', if a more extensive approach to interactions was not adopted.[548] Framing more diverse interactions, to not only be visible, but also to develop freely, helps describe and analyse more accurately the legal environment which they compose and influence. This crucial step of framing and giving a new, more pluralist, holistic and interconnected approach provides the keys for an improved governance of multi-dimensional, transboundary issues. This improved governance relies on the exploitation of interactions and especially synergies within the pluralist legal environment to promote integration.

Conclusion

[547] Fisher, Lange et al. (n 152) section 3(4)
[548] Cotterrell 'What Is Transnational Law?' (n 230) 503

The first chapter has introduced the social context of the growing diversity in actors, scales and regimes leading to the goal of integration in sustainable development. This context has prompted a reflection in international law regulating these issues and the need for it to adopt an adequate integrated approach. The second chapter has evidenced the disparities in the regulation of modern issues with traditional international legal theory and its conceptualisations based on the State. This has motivated a theoretical inquiry into a more pluralist approach, which would depart from the negative connotation of fragmentation. It would also address the signs of convergences and integration visible in international legal practice. Therefore, the current chapter has introduced transnational law as a legal concept responding to the need for a more appropriate approach established in the previous chapters. Its essential characteristics, based on the nuancing of traditional international legal conceptualisations and the focus on the interlinkages within a pluralist legal environment, provide TNL with the holistic, pluralist and interconnected approach.

The design of a conceptual transnational legal space, based on TNL's characteristics, sets a frame propitious for considering a plurality of actors, scales and regimes influencing the legal environment of a given issue. In this pluralist and holistic space, the adoption of a terminology based on legal discourses, instead of strict legal categories, allows for increased and diversified interactions between the normative elements. The emphasis put on these interactions serves in turn to enlighten the dynamics occurring within and influencing a legal environment. TNLS includes the consideration of the cumulative effect of these legal discourses and interactions. The examination of a TNLS could therefore give insights into the adoption of a more integrated regulation.

In addition, an important factor highlighted by the literature to consider the adequacy of TNL as a legal theoretical concept is its development in context with a practical application. Authors have highlighted the need to use case study and contextualisation to refine the theoretical approach. It would also test TNL as an appropriate response to multi-dimensional or transboundary issues.[549] The design of TNLS needs to relate to a practical issue and to be put in the socio-legal context it regulates.[550] The mismatches between legal theory and practice, addressed in Chapter 1 and 2, are at the source of the inquiry into pluralist legal theories such as TNL. Therefore, testing TNL in context would assess the potential of the concept to bridge these gaps. Furthermore, law and TNL are anchored in a social context, relating to actors and needs, so it is crucial that TNL be related to it for an informed and appropriate regulation. In addition to its suitability, the practicality of the notion is also considered within a case

[549] Cotterrell 'What Is Transnational Law?' (n 230) 503
[550] Zumbansen 'Transnational law, Evolving' (n 255) 899; Zumbansen, 'Where the Wild Things Are' (n 20) 190

study. The design of a TNLS model will then be refined and evaluated in context, which will be focused on large hydropower projects development on transboundary rivers, in this case the Lower Mekong River Basin. The Lower Mekong River Basin is one of the epicentres of hydropower projects development which connects concerns of sustainable development, in providing renewable, cleaner energy and legal discourses on economic, environmental and social aspects. The transboundary nature of the river, and thus of the project, brings about a plurality of scales, actors and regimes. It reveals a regulation which is inappropriately tackling the plurality and interconnectivity of the issue. Consequently, the development of hydropower in the Lower Mekong River Basin is a fitting contextualisation to both look back on the concept of TNLS and to examine insights into a potentially improved integrated regulation for this issue.

Chapter 4: Hydropower development in the Lower Mekong River Basin: the contextualisation and evaluation of a Transnational Legal Space for a more integrated approach

Introduction

This chapter will study the legal environment of hydropower projects in the Lower Mekong River Basin (LMRB). The TNL set in the previous chapter will be used in this context to consider this specific legal environment in the light of transnational law. The previous chapters have mentioned the growing pluralism within transboundary sustainable development issues, like hydropower, and have highlighted the current priority given to integration within law, policy and science. But considering the inadequacy of traditional international law in dealing adequately with legal pluralism, transnational law has been presented as a suitable conceptual new approach and space within which to represent and analyse these pluralist legal environments. This assertion will be further developed in the context of the LMRB. The chapter will examine if the concept of a TNLS could participate in reflecting the normative plurality and its critical interactions in hydropower development, and in turn contribute to integration.[551]

The study will proceed by considering the existing legal environment of hydropower development in the LMRB, at different scales and mentioning a diversity of normative influences. These will compose the element influencing governance of hydropower project on this transboundary river, at the international, regional and national scales.[552] From this process, the chapter will draw an overall understanding and schema of the current plurality of normative elements and their different natures.[553] This outlook will present this legal environment in a generic and discursive way. Then, this legal landscape will be conceptualised as a transnational legal space, based on the theoretical study of transnational law. This application of the TNL analytical framework will shed a new light on the legal environment of hydropower dams in the LMRB. From that conceptualisation will emerge a more critical outlook on the dynamics of gaps, conflicts and convergence within this transnational legal space.

The Mekong River Basin (MRB) is located in Southeast Asia and shared between six riparian countries: China, Myanmar, Lao Peoples Democratic Republic (PDR)[554],

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[551] 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 Political, Socio-economic and Environmental Perspectives* (Routledge London, 2014), 87

[552] A more specific and exhaustive analysis of the various actors influencing the Lower Mekong River Basin can be found for example in Gray, Holley et al. (n 210) 49

[553] Sangkhamanee (n 551) 87

[554] Thereafter Laos

Thailand, Cambodia and Vietnam. It is said to be the 12 [h] longest river in the world with a length of 4,350km, although other sources claim it can be 4,909km or even 5,000km long[555].[556] The extent of the river goes from the Chinese Tibetan mountains to the Mekong Delta in Vietnam, and feeding one the most important freshwater lake and UNESCO biosphere reserve, the Tonle Sap in Cambodia.[557] The MRB is distributed by 25% in Laos, 23% in Thailand, 21% in China, 20% in Cambodia, 8% in Vietnam and 3% in Myanmar.[558] Most of the river's water is contributed by Laos, at 35% of the overall flow. The Mekong river basin in also traditionally divided in the Upper Mekong river basin, with China and Myanmar, and the Lower Mekong River Basin, with the four remaining riparians. Various historical, cultural and political reasons have separated the developments of the portions of the river. For instance, this separation is marked by the designation of 'Lancang river' in China instead of the name Mekong.

[555] 'Mekong Basin' (*Mekong River Basin*) <https://www.mrcmekong.org/about/mekong-basin/> accessed 8 March 2021

[556] 'The Mekong River Basin' (*Research programme on Water, Land and Ecosystems Consultative Group for International Agricultural Research*) <https://wle-mekong.cgiar.org/changes/where-we-work/mekong-river-basin/> accessed 8 March 2021

[557] 'Mekong Basin' (*Mekong River Basin*) <https://www.mrcmekong.org/about/mekong-basin/> accessed 8 March 2021; 'Tonle Sap' (*UNESCO*, last updated January 2015) <http://www.unesco.org/new/en/natural-sciences/environment/ecological-sciences/biosphere-reserves/asia-and-the-pacific/cambodia/tonle-sap/> accessed 12 March 2021

[558] 'The Mekong River Basin' (*Research programme on Water, Land and Ecosystems Consultative Group for International Agricultural Research*) <https://wle-mekong.cgiar.org/changes/where-we-work/mekong-river-basin/> accessed 8 March 2021

Figure 1: Mekong mainstream dams and state of development (location of the Xayaburi hydropower project was added)[559]

The Mekong River Basin is a transboundary basin of rich biodiversity and fisheries.[560] One example of the importance of this transboundary flora and fauna (for the basin and for the world) is the existence of endemic and protected species such as the Irrawaddy dolphins.[561] Importantly, some 80% of the population of the basin rely on the river for their

[559] Brian Eyler and Courtney Weatherby, 'Mekong Mainstream Dams' (Stimson 23 June 2020) <https://www.stimson.org/2020/mekong-mainstream-dams/> accessed 11 March 2021

[560] 'The Mekong River Basin' (*Research programme on Water, Land and Ecosystems Consultative Group for International Agricultural Research*) <https://wle-mekong.cgiar.org/changes/where-we-work/mekong-river-basin/> accessed 8 March 2021; Intralawan, Smajgl et al. (n 8)

[561] 'Ensuring a bright future for Irrawaddy dolphins in the Mekong River' (*WWF Cambodia*) <https://www.wwf.org.kh/projects_and_reports2/mekong_dolphins/> accessed 12 March 2021

livelihoods, including fisheries, tourism or as drinking water.[562] It is estimated that the LMRB is the home of 60 million people who depend on the water basin in various ways.[563]

Many activities in link with the river participate to life along the river and to the development of the economy. They can range from energy production, agriculture, fisheries, transport and trade.[564] However, these diverse interests pursued in relation to the river create pressure on the finite natural resources available and may lead to tensions in the management of the river.[565] Therefore, the development of the Mekong River Basin faces opportunities and challenges, exacerbated by its transboundary nature. More cooperation and consultation are needed for a harmonious and balanced management of the entire basin, despite the many political borders and interests. Some of these challenges touch upon sustainable development topics mentioned before in this thesis like environmental degradation and loss of biodiversity, hydropower development and climate change, the management of floods and droughts.[566]

An embodiment of these complex issues and the tensions they create in the basin is the development of large hydropower dams on the shared river. This issue, also linked to sustainable development, is an important topic for the basin, both as building dam and in being impacted by them. The Lower Mekong River Basin especially faces a dilemma between its great untapped hydropower potential and need for energy and between its need to protect its environment and its people.

The multi-dimensional and transboundary nature of the river basin implies the involvement of many different actors, scales and regimes in the regulation of hydropower projects. Hydropower dams are at the intersections of all three pillars of sustainable development and shared between various actors and at different scales of governance. (See Diagram 4 in part I).

This study will focus on the Lower Mekong River Basin. Cooperation and management of the river there has developed separately from the upper portion of the river. Development in the LMRB, including hydropower on the mainstream, has gravitated around the Mekong Agreement. This 1995 treaty between the four lower riparians is important for the management and regulation of the river at the regional and national levels. The Mekong River Commission, the regional basin organisation established from the Mekong Agreement, is central to the management of hydropower on the river. This body has

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[562] 'Mekong Basin' (*Mekong River Basin*) <https://www.mrcmekong.org/about/mekong-basin/> accessed 8 March 2021
[563] Intralawan, Smajgl et al. (n 8)
[564] 'Mekong Basin' (*Mekong River Basin*) <https://www.mrcmekong.org/about/mekong-basin/> accessed 8 March 2021
[565] Intralawan, Smajgl et al. (n 8)
[566] 'Mekong Basin' (*Mekong River Basin*) <https://www.mrcmekong.org/about/mekong-basin/> accessed 8 March 2021

suggested regional development plans of the Mekong river in the 1970s and 1980s have promoted the construction of hydropower dams and the exploitation of the river for energy production, climate change mitigation and economic growth.[567] These plans have suggested a cascade of eleven large dams on the mainstream (see Diagram 4 above). This study will focus on the development of the Xayaburi dam (indicated by a red arrow on Figure 1) to give on overlook on the typical development of hydropower on the LMRB and a reference for the other ten dams already operated or in preparations.

Case study of the Xayaburi hydropower project on the Lower Mekong River Basin

The Xayaburi Hydroelectric Power Project[568] is a large dam project (supposedly run of river[569]), with a capacity of about 1,260MW of energy production[570]. It is built in Northern Laos (close to the Thai border) on the mainstream of the Mekong River. This project is the first large dam out of the nine dams planned by Laos on the mainstream (and out of the eleven mainstream dams planned within the Lower Mekong River Basin).[571] The map of these projects can be seen in the following Figure 1 above. These projects, including the Xayaburi project, are seen by the governments of the region as offering an important contribution to the national goal of economic growth and poverty reduction.[572] The construction of the Xayaburi project started in 2010 and began

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[567] F. Molle, T. Foran and P. Floch, 'Introduction: Changing Waterscapes in the Mekong Region – Historical Background and Context' in François Molle, Tira Foran and Mira Kakonen (eds.). *Contested waterscapes in the Mekong Region: hydropower, livelihoods and governance*. (London, UK: Earthscan, 2009), 6 and 9

[568] Thereafter the Xayaburi or Xayaburi dam

[569] Thien Y (pseudonym), 'A look inside Xayaburi dam' (*Mekong Eye*, 9 March 2017) <www.mekongeye.com/2017/03/09/a-look-inside-xayaburi-dam/> accessed 29 October 2019, para 1; Sopheak Meas, 'Stakeholders visiting Xayaburi dam continue calling for the developer to share operation rules, environmental monitoring data' (Mekong River Commission, 20 February 2020) <https://www.mrcmekong.org/news-and-events/news/stakeholders-visiting-xayaburi-dam-continue-calling-for-the-developer-to-share-operation-rules-environmental-monitoring-data/> accessed 8 March 2020: The status of 'run-of-river' dam is debated, whether it stocks water or just uses it to generate energy.

[570] Sopheak Meas, 'Stakeholders visiting Xayaburi dam continue calling for the developer to share operation rules, environmental monitoring data' (Mekong River Commission, 20 February 2020) <https://www.mrcmekong.org/news-and-events/news/stakeholders-visiting-xayaburi-dam-continue-calling-for-the-developer-to-share-operation-rules-environmental-monitoring-data/> accessed 8 March 2020, she mentions a capacity of 1,260MW. Other documents mention different production capacity. Some document referenced 125MW, see 'Xayaburi dam' (*Earth Rights International*) <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/> accessed 8 March 2021

[571] Brian Eyler and Courtney Weatherby, 'Mekong Mainstream Dams' (Stimson 23 June 2020) <https://www.stimson.org/2020/mekong-mainstream-dams/> accessed 11 March 2021; 'Hydropower' (*Mekong River Commission*) <https://www.mrcmekong.org/our-work/topics/hydropower/> accessed 11 March 2021

[572] Cao Zhong and Li Hao, 'Dilemmas of hydropower development in Laos' (2017) 12(6) *Energy source, part B: Economics, planning, and policy*; 'Hydropower' (*Mekong River Commission*) <https://www.mrcmekong.org/our-work/topics/hydropower/> accessed 11 March 2021, section 'Introduction' para. 4

commercial operation in late October 2019.[573] The energy produced was set at an early stage to be sold to Thailand for 95%.[574] The main actors of the project can be considered to be the Lao government and Thai constructor Ch. Karnchang.[575]

The Xayaburi dam has attracted a lot of attention and studies for several reasons. The development of this dam is often considered as a test case or example for the dams to come on the lower mainstream of the Mekong, such as Pak Beng or Don Sahong.[576] The scale and nature of the Xayaburi project has been unique as it was the first mainstream dam in the LMRB.[577] The project has been more daring in its close transboundary position with Thailand.[578] It has also been more costly.[579] Several 'regional commercial banks and export credit agencies' financed the 3.8 billion project.[580] The investments received were from neighbouring countries, including five Thai commercial banks and one state-owned bank.[581] And while ADB did not participated in this project, the World Bank has used the project as its new type of hydropower project, asserting its reflection on socio-environmental costs.[582]

For some authors, the Xayaburi dam has not only signalled the beginning of new types of transboundary hydropower dam. It also marks the intensification of large hydropower dams development in Laos and therefore in the LMRB.[583] In terms of the status of newly reformed and improved process for the development of hydropower, the Xayaburi dam is

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[573] Sopheak Meas, 'Stakeholders visiting Xayaburi dam continue calling for the developer to share operation rules, environmental monitoring data' (Mekong River Commission, 20 February 2020) <https://www.mrcmekong.org/news-and-events/news/stakeholders-visiting-xayaburi-dam-continue-calling-for-the-developer-to-share-operation-rules-environmental-monitoring-data/> accessed 8 March 2020

[574] 'The Xayaburi Dam. A looming threat to the Mekong River' (*International Rivers*, 2011) <www.internationalrivers.org/sites/default/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 29 October 2019, 2; 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para 2: 'Thailand's electricity utility, EGAT, has agreed to purchase 95% of the dam's electricity'.

[575] 'The Xayaburi Dam. A looming threat to the Mekong River' (*International Rivers* 2011) <www.internationalrivers.org/sites/default/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 29 October 2019, 2

[576] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019

[577] Fleur Johns, 'On Failing Forward: Neoliberal Legality in the Mekong River Basin' (2015) 48(2) *Cornell International Law Journal*, 360

[578] Ibid

[579] Ibid

[580] R. Ahlers, M. Zwarteveen and K. Bakker, 'Large Dam Development: From Trojan Horse to Pandora's Box' in Bent Flyvbjerg (ed) *The Oxford Handbook of Megaproject Management* (OUP 2017), 567

[581] Johns (n 577) 360

[582] Ibid

[583] Ibid 364

also the first mainstream dam to go through the procedure of Procedures for Notification and Prior Consultation and Agreement (PNPCA) in the Mekong River Commission.[584]

The dam was widely discussed and also controversial in several aspects presented within the chapter below. The chapter will also introduce more generally characteristic issues faced by large hydropower developments on the Mekong river. This case study will be referred to throughout the chapter to illustrate and explore the legal environment of the LMRB in relation to hydropower and the critical intersections that can occur.

I- The legal environment of hydropower governance in the Lower Mekong River Basin: an introduction to the various actors, scales and legal regimes

This section presents the legal environment of hydropower projects in the Lower Mekong River Basin. An outlook on the legal environment of hydropower development on the LMRB can be a 'complex and at times confusing network of international, regional and national legal norms, practices and institutions'.[585] The thesis' take will instead introduce some of the most common legal and informal normative elements having an influence on hydropower development, at different scales and involving different actors and regimes.

This section focuses more specifically on a selection of instruments, actors or broad regimes which can help draw a snapshot of the legal context for hydropower, as opposed to offering a comprehensive description. More detailed references to literature will be included to provide for more thorough and specific study on the applicable norms for hydropower in the LMRB. The following elements were selected due to their frequent presence within the studies of the LMRB case or in official documents, such as sources from the MRC or dispute resolution reports. Therefore, this section provides a compilation of elements, introducing a diverse, informative and, to a certain extent, complete overview of possible scales, type of actors or regimes within the legal environment. It purposely mentions directly or indirectly involved actors, diverse types of actors, soft or hard law, instruments cited in judicial claims and in informal reports, to illustrate the wide array of normative influences present in the legal environment of hydropower development in the LMRB.

The various normative actors, regimes and instruments will be divided by international, regional and national scales. This compartmentalisation and order of presentation also

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[584] Johns (n 577) 362; 'The Xayaburi Dam. A looming threat to the Mekong River' (*International Rivers* 2011) <www.internationalrivers.org/sites/default/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 29 October 2019, 1 'In September 2010, it was the first mainstream dam to be submitted for approval by the region's governments through a regional decision-making process called the "Procedures for Notification, Prior Consultation and Agreement" (PNPCA), facilitated by the Mekong River Commission.'

[585] Boer, Hirsch et al. (n 343)114

mirrors the trickle-down effect of authority, or transfer to 'sub'-level legal systems, present in traditional international legal theory.[586] It will allow the analysis to first draw more attention on the international and regional scales, which are especially relevant to the study of transnational law and transboundary hydropower. A more generic insight of the national scale will then inform the outlook into the legal environment without engaging with the complexities and specificities of all four LMRB national legal systems. However, the compartmentalisation used to organise this description presents evident caveats, especially in the context of a non-compartmentalised analysis of international law. This separation is artificial and could incorrectly create the perception that every element can fit within a single category and that each scale or category is fixed and impermeable. Indeed, each regime, scale and actor can often transcend the category it is originally set into and their influence can carry beyond it. With that in mind, the following part will present an artificially organised but informative and comprehensive outlook into the existing pluralism in the hydropower legal environment in the LMRB. A broad outlook on the interactions of different actors by scales is given by Diagram 4 below. A general idea of the interactions and their different legal strength or recognition as law is also represented.

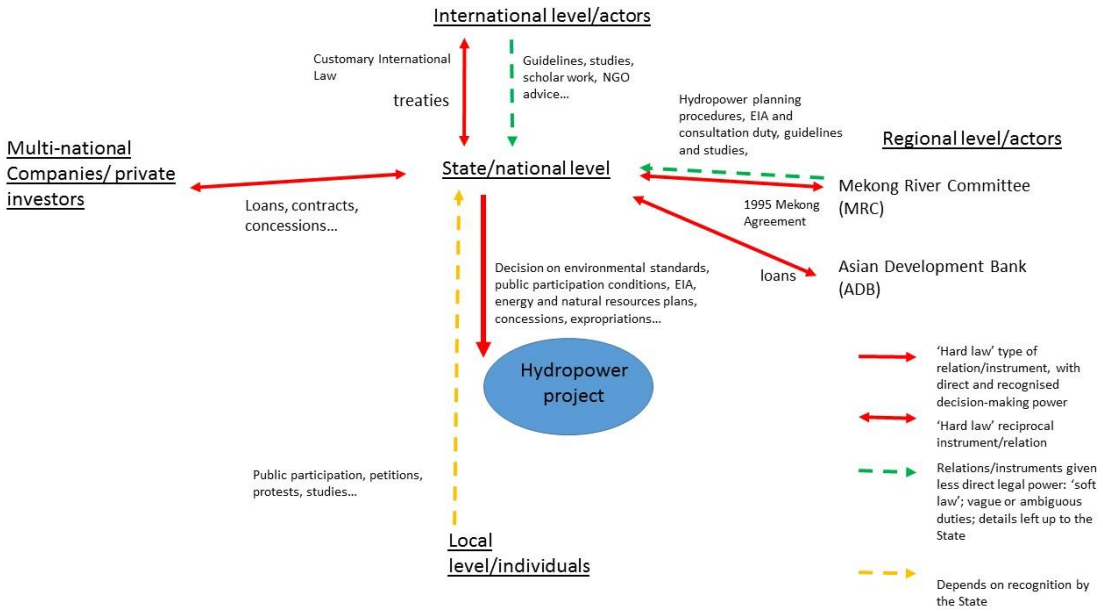

Diagram 8: Diagram 4: Example of a system of diverse actors, scales and types of legal instruments involved in a hydropower project in the LMRB.[587]

This diagram specifies, in more details and for the specific context of hydropower in the LMRB, the section of 'A multiplication and diversification of *actors *scales *regimes (and their transboundary dimensions' in the overall diagram of the thesis. This Diagram and the

[586] See the monist and dualist theories, see Viellechner (n 175)
[587] The list of actors presented is not exhaustive and the preview it gives of authority of the legal interactions between them is simplified. See Laure-Elise Mayard, 'Can A Transnational Law Approach Offer A Better Understanding of International Law's Contribution to Sustainable Hydropower Projects ? A Test Case from the Mekong River Basin' (2020) 2(1) *Brill Open Law* 40, 56

following section give an overall understanding of the players in hydropower in the LMRB, by scales, and the power struggles and prioritized interactions that arise.

A- International scale, regimes and actors influencing hydropower development in the LMRB

International norms can apply to and influence hydropower projects in different ways, whether they are legally binding or not.[588] At the international level, the laws and rules likely to be applicable in regulating hydropower are linked to investment, to human rights and the protection of individuals and groups affected by projects, and the protection of the river and shared resources.[589] In addition to the different forms or instruments they use, these rules can originate from various actors. This international legal landscape will first present some general concepts of international law relevant for hydropower regulation (established in international law or widespread). Then, it will introduce other specific instruments of international governance that are interesting for hydropower.

1/Customary and common principles of international law influencing hydropower development in the LMRB

The following section will introduce a non-exhaustive selection of customary and common principles of international law, directly or indirectly relevant to hydropower regulation.

(a)The duty to cooperate and the duty of good faith

The duty to cooperate is a cornerstone of modern international law and of the shared management of international water resources.[590] This duty creates the obligation to proceed to 'coordination to a level where [states or other actors] work together to achieve a common purpose that produces mutual benefits that would not be available to them with unilateral action alone'.[591] For example, it consists in the duty to engage with other actors, other scales of regulations and other types of principles and interests that could be related to a hydropower project.

[588] Alistair Rieu-Clarke, 'Transboundary Hydropower Projects Seen Through The Lens of Three International Legal Regimes – Foreign Investment, Environmental Protection and Human Rights', (2015) 3(1) *International Journal of Water Governance*, 6; Patricia Wouters, 'International Law – Facilitating Transboundary Water Cooperation' (2013) Global Water Partnership, TEC Background Papers 17/2013 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363809> accessed 29 October 2019, 12

[589] Rieu-Clarke (n 588) 3

[590] Sands and Peel (n 50) 200-201

[591] Christina Leb, 'One step at a time: international law and the duty to cooperate in the management of shared water resources' (2014) 40(1) *Water International*, part 'international law as an expression of cooperation between states', para. 1

This principle is articulated in the pivotal United Nations Charter and in various documents of international law.[592] For example, the UN Watercourses Convention (UNWC)[593] has crystalized the principle of cooperation after a long codification process, consolidating its customary value.[594] This instrument and principle are of major importance here because of its link with the management of transboundary water resources, like river basins. The UNWC is particularly of interest for the analysis of the LMRB legal environment for several reasons. First, the LMRB is a transboundary river basin which fits in the scope, subject-matter and expertise of the UNWC. The Convention's ambition is to be a central international reference for the management of transboundary river basins. But it also aims to be adapted to specific basin cases to be practically implemented. It could then bridge international law and other forms of basin regulations. The UNWC and the Mekong Agreement (MA) as a regional basin agreement are connected. Indeed, the MA uses international principles that are at the core of the UNWC and developed in this instrument. The UNWC itself makes specific mention of a goal to coexist and supplement existing basin rules.[595] Finally, the UNWC is relevant to consider in the legal environment of hydropower in the LMRB as Vietnam, riparian country of the LMRB, has become a State party to the UNWC and committed itself to following its principles.[596] Therefore, article 8 of the UNWC on the duty to cooperate is central to the management of transboundary river basins and for the Mekong in the present case.

Cooperation is imperative when sharing a transboundary watercourse like the Mekong River. A transboundary river is the object of different national interests and is often governed by the rule of sovereignty over natural resources. Then, the basin and the river can be the object of unilateral decisions, which create potential tensions.[597]

The LMRB has a history of cooperation over the river, especially through the agreements and institutions put in place for riparians to discuss.[598] The Mekong River Commission (MRC) itself can embody the will and capacity to cooperate over water resources management and other Mekong-related activities. But cooperation is a process

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[592] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; Wouters (n 588) 14

[593] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS Doc. A/51/869 (UNWC)

[594] UNWC, article 8; Leb (n 591)

[595] UNWC, article 3

[596] Vietnam accessed to the UNWC on 19 May 2014 see United Nations Treaties '12. Convention on the Law of the Non-Navigational Uses of International Watercourses', <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&clang=_en> accessed 11 March 2021; China's opposition vote, see in the 'South and East Asia. UNWC's Global Relevance' (*UN Watercourses Convention. Online User's Guide*) <http://www.unwatercoursesconvention.org/global-relevance/south-and-east-asia/> accessed 12 March 2021

[597] Bennett L. Bearden, *Following the Proper Channels. Tributaries in the Mekong Legal Regime* (Brill 2018), 60 and 74

[598] Bearden (n 597); Boer, Hirsch et al. (n 343)

and work in progress. It remains a key principle at the basis for hydropower development in the LMRB.

In addition, the duty to cooperate can be associated with the principle of good faith.[599] This duty to conduct cooperation and international commitments with good faith can act as a way to ensure that a certain standard and quality of cooperation is applied.[600] Cooperation can be seemingly engaged with or achieved. But without good faith, the results could be disputable. This can be illustrated with the process of Procedures for Notification and Prior Consultation and Agreement (PNPCA) conducted by Laos for the Xayaburi dam. Laos did open discussions and partially shared information[601] with the other three riparians involved. However, Laos closed the process after the open-ended 6 months period[602] set by the Mekong Agreement. More importantly, it has done despite and without addressing the oppositions from the other countries[603]. In terms of cooperation over the Xayaburi dam, Laos considered that it had fulfilled its duty. In its view, it had agreed to the PNPCA, opened discussion, received comments from its neighbouring countries and had changed to a certain extent the design of the project while investing more money to consult with additional experts.[604] However, this claim has been contested

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[599] International Court of Justice, *Gabcikovo-Nagymaros Project* (Hung. V. Slovk.) 1997 I.C.J. 3, (Order of Feb. 5 1997); International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 52 'Good faith negotiation involves (i) willingness to engage in a process; (ii) provision of information necessary for informed negotiation; (iii) exploration of key areas of importance; (iv) mutually acceptable procedures for negotiation; (v) willingness to modify position; (vi) provision of sufficient time to both parties for decision-making; (vii) agreements on proposed compensation framework, mitigation measures, and development interventions.'

[600] UNWC article 8

[601] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 2' (*East by Southeast*, April-May 2016) <https://globalwaterforum.org/2016/04/18/an-alternate-pastfuture-for-mekong-river-dams-under-the-un-watercourses-convention-part-2/> accessed 29 October 2019, part 'Obligation to cooperate in good faith and exchange information', para. 2 and para. 3

[602] The interpretation of the PNPCA process can be considered to be open-ended or up for interpretation, in addition to its unclear binding nature as being external to the Mekong Agreement, the process sets a suggested 6 month initial period for dialogue, but Laos has here interpreted it as a strict timeframe and could close the dialogue as it considered its duty fulfilled. See Bearden (n 597)

[603] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 6

[604] Susanne Schmeier and Birgit Vogel, 'Ensuring long-term cooperation over transboundary water resources through joint river basin management' in Stefan Scmutz and Jan Sendzimir (eds.) *Riverine Ecosystem Management. Science for Governing Towards a Sustainable Future* (Springer 2018), 365; Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019

by the MRC, other riparians and several NGOs that considered that real cooperation was not sought or accomplished.[605] This cooperation could be considered to have been carried out without good faith or real process to engage in communication with other actors.

Both cooperation and good faith are fundamental principles of international law that apply to the development of hydropower. The centrality of these principles in the legal environment of hydropower projects can be explained by the specific transboundary nature and impacts of the projects carried on the transboundary river. Communication, of quality, with other actors, would be the first step to avoiding trade-offs and inequalities, transboundary costs along the Mekong river and little integration of the various interests at hand.

(b)The principle of Equitable and Reasonable Utilisation (ERU)

Another customary notion of international law relevant for the LMRB is the principle of equitable and reasonable utilisation of shared water resources.[606] This principle aims to ensure the balanced use of shared resources between the different users and uses.[607] It aims to avoid overuse and other potentially damaging utilisation for the other riparian countries and for the resource itself.[608]

This principle is most notably articulated in the UNWC.[609] One aspect of ERU often highlighted is the balancing exercise operated between opposite interests, between uses of water for energy and for livelihoods purposes or between upstream and downstream countries interests for instance. In the Pulp Mills case, the ICJ notes the connection between ERU of natural resources and the balance needed between the different interests of the three pillars is at the heart of sustainable development.[610] This reasoning is applicable in the LMRB as the interests between economic development of hydropower

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[605] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 2' (*East by Southeast*, April-May 2016) <https://globalwaterforum.org/2016/04/18/an-alternate-pastfuture-for-mekong-river-dams-under-the-un-watercourses-convention-part-2/> accessed 29 October 2019, part 'Consultation & negotiation' para. 1

[606] Mekong Agreement; Wouters (n 588) 16

[607] 'UN Watercourses Convention. User's Guide Fact Sheet Series: Number 4 Equitable and Reasonable Utilisation' (*UN Watercourses Convention.org*) <https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf> accessed 11 March 2021

[608] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (International Rivers, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 8; Wouters (n 588) 24; Rieu-Clarke (n 588) 7

[609] 'UN Watercourses Convention. User's Guide Fact Sheet Series: Number 4 Equitable and Reasonable Utilisation' (*UN Watercourses Convention.org*) <https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-4-Equitable-and-Reasonable-Utilisation.pdf> accessed 11 March 2021

[610] Boyle (n 330) 4

projects and the interests of the environment and the populations are the source of conflicts and unsustainable development of the river.

For the LMRB, ERU principle is of importance for an improved and sustainable governance. However, Thailand, Cambodia and Laos not parties to the UNWC and key countries like China voting against it in the General Assembly.[611] Only Vietnam is held to the legally binding principle formulated in the UNWC. But the whole basin is supposed to follow the ERU due to its customary value. This principle should facilitate or influence riparian states to consider other uses than hydropower (like fisheries and tourism uses of the river) as well as the interests of other countries in the LMRB. For example, countries like China and Laos would have to balance their interests with external users and uses. As the main developers of hydropower and extensive users of the LMRB, they would have to consider more downstream countries' interests, like Vietnam and the need for river sediments in rice culture.

A notion associated with ERU is also the right to use resources and to develop through their exploitation.[612] This can relate to the argument presenting a right to development as a principle of international law and of sustainable development policy.[613] It is commonly used to justify the use of a river according to national agendas, often privileging energy development, economic growth and poverty reduction.[614] A document by the Lao ministry of Energy and Mines has mentioned the right to develop in relation to the Pak Beng dam construction. It mentions that other parts of the basin had already developed, in other countries especially, and that opportunities to also develop 'cannot [be] prevent[ed] or foreclose[d]' for Laos.[615] The consideration of balance and fairness promoted within ERU is a key for the hydropower legal environment in the LMRB, facing various contradictory needs and rights over the same shared resource.

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611 China's opposition vote, see 'South and East Asia. UNWC's Global Relevance' (*UN Watercourses Convention. Online User's Guide*) <http://www.unwatercoursesconvention.org/global-relevance/south-and-east-asia/> accessed 12 March 2021

612 In the context of the Lower Mekong River Basin, such claim was made by Laos, "Laos will continue to exercise its sovereign right to develop its natural resources within its territory subject to the guiding principles of reasonable, transparency and good faith." see 'Hydropower dams' (*OpenDevelopment Mekong*, 22 December 2017) <https://opendevelopmentmekong.net/topics/hydropower/> accessed 10 March 2021, section 'Dam Diplomacy:

613 Right to development articulated in the Declaration on the Right to Development, UNGA 41/128 4th December 1986 defined in Article 1.1 as 'The right to development is an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social and cultural and political development, in which all human rights and fundamental freedoms can be fully realized'; Boer, Hirsch et al. (n 343) 57

614 Boer, Hirsch et al. (n 343) 57

615 Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 4 'reasonable and equitable development'

(c)The no significant harm doctrine

The duty not to cause (significant) harm has been articulated in article 7 of the UNWC and other legal documents like article 7 of the Mekong Agreement.[616] Interestingly, it is linked with other duties, such as equitable and reasonable utilisation and cooperation. Both of these principles participate to avoiding harm and fostering a sustainable use of shared water resources. This principle is of customary importance and it is also reproduced in several influential documents, at various scales and within different fields.[617] It is a general principle of international law and environmental law, referred to as the transboundary harm principle or 'sic utere' principle.[618] It 'requires that States take all appropriate measures to prevent significant harm to other watercourses States. Such harm would include detrimental impact of some consequences upon the environment or the socio-economic interests of the harmed States'.[619]

This principle can be considered both substantive and procedural in nature, as a result or means. The duty not to cause harm can be seen more generally as a duty of due diligence.[620] The notion of due diligence and the measures to prevent harm are broad and flexible. They can refer to the control over damage done under its jurisdiction, by a State, over its territory or even by national companies.[621] The use of this notion as a due diligence focuses less on specific damages, but more on the steps and methods available and taken to fulfil this duty. Environmental Impact Assessments and other preliminary studies for hydropower impacts on the environment or people participate in fulfilling a due diligence of not causing significant harm. For instance, the International Court of Justice Pulp Mills case has asserted not only the duty to conduct an EIA but possibly the duty to conduct a transboundary EIA.[622] This influential decision shows the importance and growing awareness of transboundary impacts and duty to take preventive measures or assess these beforehand. The focus on transboundary harm is especially relevant due to the nature of the basin. The more complex and indirect nature of damages happening

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[616] UNWC article 7 and Mekong Agreement article 7

[617] Sands and Peel (n 50) 200-201

[618] Tseming Yang and Robert V. Percival, 'The Emergence of Global Environmental Law' (2009) 36 *Ecology Law Quarterly*, 646

[619] Rieu-Clarke (n 588) 8

[620] Sands and Peel (n 50) 200-201, see also the case of International Court of Justice (2010) Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay). International Court of Justice General List No. 135. Also available at http://www.icj-cij.org/docket/files/135/15877.pdf;
Rieu-Clarke (n 588) *10*

[621] Sands and Peel (n 50) 198; For the case of its formulation within the UNWC, see 'Article 7. 7.1.1 All appropriate measures' (UN Watercourses Convention Online User's guide) <https://www.unwatercoursesconvention.org/the-convention/part-ii-general-principles/article-7-obligation-not-to-cause-significant-harm/7-1-1-all-appropriate-measures/> accessed 12 March 2021

[622] International Court of Justice (2010) Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay). International Court of Justice General List No. 135. Also available at http://www.icj-cij.org/docket/files/135/15877.pdf

further downstream and out of the scope of most projects planning makes the duty to cause no significant harm central to the LMRB. Some hydropower projects on the Mekong also take place very close to borders, such as the Xayaburi dam between Laos and Thailand, which makes the transboundary impacts not only inevitable but undeniable. In this case, the due diligence for Laos and the constructor of the dam would require them to take into account, analyse and ward off such transboundary impacts.

However, this principle is complex in its implementation considering links of causality and burden of proof. With that and political dimensions, the basin generally privileges a more non-confrontational and diplomatic approach. For instance, droughts in 2016 created a lot of stress for downstream countries and are thought to be caused, influenced (or additionally aggravated) by Chinese and Lao dams.[623] Reportedly, Vietnam has diplomatically request water release from China, instead of consideration of blame or causality in these damages.[624] In July 2019, a similar significant decrease in the level of the Mekong has been described, coinciding with test runs and filling of the Xayaburi dam.[625] An example of such level differences can be seen in the picture below.

[623] Stefan Lovgren, 'Mekong River at its lowest in 100 years, threatening food supply' (*National Geographic*, 31 July 2019) <https://www.nationalgeographic.com/environment/article/mekong-river-lowest-levels-100-years-food-shortages> accessed 11 March 2021

[624] Shannon Tiezzi, 'Facing Mekong Drought, China to Release Water From Yunnan Dam' *The Diplomat* (16 March 2016) <https://thediplomat.com/2016/03/facing-mekong-drought-china-to-release-water-from-yunnan-dam/> accessed 29 October 2019; Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, Part 1 para. 3

[625] Taejun Kang, 'Xayaburi Dam Denies Responsibility for Dry Mekong River' (*Laotian Times*, 26 July 2019) <https://laotiantimes.com/2019/07/26/xayaburi-dam-denies-responsibility-for-dry-mekong-river/> accessed 11 March 2021; 'Barrage de Xayaburi au Laos: Symbole d'une nouvelle donne énergétique' (*L'EnerGeek*, 30 October 2019) <https://lenergeek.com/2019/10/30/barrage-xayaburi-hydraulique-laos-mekong/> accessed 11 March 2021

Picture 1: Level of the Mekong River between Pak Beng and Luang Prabang (see the demarcation on the rock on the right-hand of the picture, arrow added by the author). Photo taken on a tourist cruise between Houei Say and Luang Prabang (Laos) on the 2nd July 2019.[626]

(d)*Pacta sunt servanda* (for investment and other contracts)

This general principle of law is relevant to mention here as it influences the conduct of States and other actors in respecting the rights and obligations stated in any binding documents, like treaties or contracts. Here, specific attention will be given to the obligation to respect legal commitments in relation to economic and investment oriented contractual documents. Various contracts or commitments influence the regulation of hydropower (e.g. concessions, Build-Own-Operate-Transfer contracts, power purchase agreements, Bilateral Investment Treaties). The principle importantly influences the State, who remains the main actor in hydropower development and traditional international law. It is bound to respect its economic commitments, often at the expense of other considerations and interests like environmental and social concerns.

Some of the economic commitments mentioned are contracted before other commitments or processes take place. The EIAs or public participation advising against or nuancing economically favourable arguments may come after and be considered secondary. Most dams on the Mekong river already have a Memorandum of Understanding or development agreements while still being discussed in the PNPCA of the MRC.[627] Indeed, these economic contracts hold a certain precedence due to their anterior commitment. They incentivise the State to give more value to these binding

[626] This picture was taken by the author and does not constitute a proof or scientific evidence to the regular, extreme and abnormal water levels situation.
[627] Landberg (n 36) 237

instruments over later commitments or non-binding procedures and comments. An important part of this is also due to the incurred financial penalties from a breach of contract. Considering the dues and duties created by contracts towards other private actors, a gear is set in place, making the constructor in debt to fulfil its commitment to the State and the State indebted to investors of the project. Timely completion of the project will be given priority by the State and other economic actors, like constructors or lenders, over socio-environmental procedures or problems.[628] Especially, developing countries can be motivated to prioritise economic goals over social and environmental ones.[629]

Indeed, these insurances towards economic and investment legal commitments are crucial to attract investors and finance construction and exploitation of the hydropower project in the first place. The scale of the project (in the case of the Xayaburi, construction itself took nine years) and the considerable investment it represents make this mega-project a risk which should receive some safeguards and insurances. *Pacta sunt servanda* creates a legal certainty and security for investors and private actors in the face of changing regulation and the long-term nature of concessions.[630] One example of the early stages investment commitment in hydropower development is one signed between the Government of Lao PDR and EGAT, selling the prospective energy produced by the Lao dams to Thailand.[631] This secures both EGAT's investment and revenue for Laos. But it also influences hydropower decision-making where contestation of the projects, mainly due to environmental and social issues, have often been considered secondary.

The details of these contracts or agreements can vary according to the project at hand. However, recurring rules can be found in investment contracts, bilateral or regional investment treaties.[632] But it is important to consider the strong influence of the duty to fulfil one's commitment and international contract law in the legal environment of hydropower in the LMRB. Its influence is such a strong element of international law that *pacta sunt servanda* is also suggested as rule to follow in case of conflict of laws, to decide on priority to be given.[633] This increases the authority and prevalence of contracts, and especially economic and investment commitments over a hydropower project. The reliance on this principle is strong and deeply rooted in traditional international theory due

[628] Kinnari Bhatt, 'New 'Legal' Actors, Norms and Processes: Format and Informal Indigenous Land Rights Norms in the You Tolgoi Project, Mongolia' TLI Think! Paper 63/2017 (posted 25th July 2017, 10-13
[629] Gupta and Bavinck (n 211) 89
[630] Rieu-Clarke (n 588) 14
[631] 'The Xayaburi Dam. A looming threat to the Mekong River' (*International Rivers,* 2011) <www.internationalrivers.org/sites/default/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 29 October 2019, 2
[632] For investment law, most of the rules can be found in regional treaties or in BITs. See for example Rieu-Clarke (n 588) 8
[633] Van Asselt (n 212)

to its legally binding, hard law status and the centrality of State sovereignty and decision-making in a contract.

Contractual situations and monetary advantages carry a vital influence for the projects and countries, which can lead to unbalanced results in favour of economic and investment benefits. Economic benefits are also a strong point in the incentive to respect investment and economic contracts. For instance, the Finnish constructor of the Xayaburi dam, Pöyry, was hired to conduct additional studies on the viability of the EIA and of the project. These studies were highly debated as probably being 'incentivized by the promise of further work as an engineer for the project (which the company actually obtained)' with Laos.[634] Then, the evaluation of the project and its initial EIA (accounting for socio-environmental detrimental effects for instance) might have been biased due to economic interests.

(e)The duty to conduct a (transboundary) EIA:

The duty to conduct an Environmental Impact Assessment (EIA) is included in several normative instruments and used in cornerstone judicial decisions on shared water resources management, like the Pulp Mills case[635]. This duty is both a customary principle of international law and can often be found at the regional and national levels as well.[636] The content and basic requirements of an EIA vary according to different guiding documents.[637] But the general use of such tool is meant to be focused on considering objectively the various impacts of a project on its environment (including social impacts as well), establishing the benefits and costs of carrying out such project and offering insights into alternatives.[638] An EIA is originally not an instrument biased in favour of environmental concerns meant to halt or argue against hydropower projects but is an influential informative document.[639] It can often be used both to justify hydropower projects[640], for third parties to oppose such projects[641] and for lenders to make investment decisions[642]. EIAs are now a widespread practice. But the consideration of timing and scope of such documents are still debated, which in turn influences greatly a project and

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[634] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 10

[635] International Court of Justice (2010) Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay). International Court of Justice General List No. 135. Also available at: <http://www.icj-cij.org/docket/files/135/15877.pdf>

[636] J. Glasson, R. Therivel and A. Chadwick, 'Introduction to environmental impact assessment' (Fourth edition, Routledge 2012), 31 and 40

[637] Rieu-Clarke (n 588) 12 ; Campbell, Suhardiman et al. (n 342) 98

[638] Campbell, Suhardiman et al. (n 342) 97

[639] Campbell, Suhardiman et al. (n 342) 97

[640] Ibid 94

[641] Ibid 101

[642] Ibid 94

the efficiency of the procedure.[643] EIAs are preliminary documents on which the decision to carry out a hydropower project is based, so they need to be conducted before other commitments related to the dam. In addition, this preliminary analysis needs to thoroughly examine the possible benefits and costs of the project. A key factor often left out from EIAs are transboundary impacts. These are very important as highlighted in the previous section on the duty not to cause any significant transboundary harm. Its transboundary element, added notably by the ICJ's Pulp Mills case, is a growing critic of EIAs conducted on shared watercourses.[644]

Many of the general critics about EIAs have surfaced and fed opposition to the Xayaburi dam and other LMRB mainstream dams. Mainly the lack of transboundary analysis in the EIA, if any[645], and the timing of the document[646] have been pointed out for the Xayaburi dam.[647] These problems have raised concerns, opposition and requests for further studies from NGOs, the MRC and from other riparian States like Cambodia and Vietnam.[648] For instance, transboundary impacts of the Xayaburi dam, located at the border with Thailand, were mentioned in the EIA and considered minimal (even if no clear evidence was given).[649] However, these impacts were studied over 10km downstream of the projects, while a large hydropower dam is generally expected to have impacts about hundreds of

[643] Ibid 99 and 100
[644] Rieu-Clarke (n 588) 11
[645] Yumiko Yasuda, *Rules, Norms and NGO Advocacy Strategies. Hydropower development on the Mekong River* (Routledge Earthscan 2015) 64
[646] 'The Xayaburi Dam. A looming threat to the Mekong River' (*International Rivers*, 2011) <www.internationalrivers.org/sites/default/files/attached-files/the_xayaburi_dam_eng.pdf> accessed 29 October 2019, 2
[647] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 2' (*East by Southeast*, April-May 2016) <https://globalwaterforum.org/2016/04/18/an-alternate-pastfuture-for-mekong-river-dams-under-the-un-watercourses-convention-part-2/> accessed 29 October 2019, part 'Submission for prior consultation and reply'
[648] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, Part 2, part 'Submission for prior consultation and reply'

[649] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, Para 5 'The project's current environmental impact assessment only examines impacts 10 kilometers downstream from the dam site.'; Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019: Project's EIA was provided but the tb study was only 10km downstream

kilometres downstream of a project[650]. [651] Further external transboundary studies were then rejected by Laos and Thailand.[652]

(f)Stakeholder participation and related human rights principles

Principles relating to stakeholder participation and other human rights protection concepts influencing hydropower regulation can be explored in reference to the characteristic 1998 Aarhus Convention.[653] The Aarhus convention refers to principles of public participation, access to information and to justice. Despite its regional scale, these principles are recognised as important and influential, especially in relation to human rights and environmental regulation.[654] These rights tend to involve and focus on private actors, individuals, communities, human rights issues, local scales and other non-State nor institutionalised aspects within hydropower projects. These influential elements are indeed the ones forgotten or less listened to in hydropower project developments. Public participation, access to information and to justice are closely linked to the customary principles mentioned previously. Cooperation, good faith, no significant harm or ERU cannot be implemented without the inclusion of stakeholders and other actors impacted by hydropower projects. Equity and cooperation for instance also mean between and with users, like local populations and individuals, not only States. The stakeholder participation then aims to inform and integrate different point of view and interests into decision-making. Public participation is also put at the centre of sustainable development and inclusiveness of actors and beneficiaries enlarges the scope of such involvement.[655] For example, public participation within EIA documents is seen as central to have a complete and informed process and integrate other actors, scales, and regimes within decision making.[656] Despite their recognition at the international and regional levels, such rights

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[650] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 14

[651] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 5; Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019

[652] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 5

[653] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention)

[654] Benjamin W. Cramer, 'The Human Right to Information, the Environment and Information about the environment: From the Universal Declaration to the Aarhus Convention' (2009) 14(1) *Communication Law and Policy*, section 'The Aarhus Convention'

[655] Boyle (n 330) 3

[656] Rieu-Clarke (n 588) 12 ; Campbell, Suhardiman et al. (n 342) 101

and principles generally rely on State cooperation and on the national system to enable and implement public participation. The national systems of the LMRB countries influence the implementation of such rights in hydropower projects. If the national legal system does not give a appropriate channel for public participation, the interests of these people will hardly be heard or conveyed. Nonetheless, a general expectation and scrutiny is happening from other actors regarding such principles. In the context of the Xayaburi, consultations were organised in several countries, to consider their position with the project. Interestingly, consultations regarding the Xayaburi dam were conducted in Cambodia and Vietnam but none in Laos itself.[657] This could be explained by the lack of appropriate way to participate in Laos, by the willingness not to involve local populations or by an assumed consensus over national plans.

One example of participatory rights and principles from international law, which can be influential for hydropower regulation but limited to some extent at the national level, is indigenous rights. Indigenous rights, or the attention given to vulnerable or specific groups and individuals such as indigenous populations, garner growing interest from international law and community.[658] These rights generally intervene in environmental protection and in relation to human rights. They have been used in reference to the special relationship recognised between indigenous populations and nature, like rivers.[659] Often, indigenous rights' claims participate to an increased environmental and human rights protection and especially to public participation and the representation of such affected minorities. It is worth noting that the implementation of indigenous rights for the specific case of the Mekong River Basin is more complicated. The requirement for an official status or recognition as indigenous population can be problematic. For example, some ethnic minorities present in Thailand do not have the specific, national status of 'indigenous'.[660] This status recognition by the State is a condition *sine qua non* for the application of indigenous rights. The lack of status would

[657] Johns (n 577) 363

[658] An example of this specific attention to indigenous peoples at the international level can be the United Nations Declaration on the Rights of Indigenous Peoples, voted with 144 favourable votes in the UN General Assembly. See United Nations, United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGAR 61/295. <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 12 March 2021

[659] Commission on Environmental, Economic and Social Policy, 'Indigenous Peoples, Customary & Environmental Laws & Human Rights' (*IUCN*) <https://www.iucn.org/commissions/commission-environmental-economic-and-social-policy/our-work/indigenous-peoples-customary-environmental-laws-human-rights#:~:text=For%20indigenous%20peoples%2C%20their%20human,in%20all%20aspects%20of%20work.> 13 March 2021; United Nations, United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGAR 61/295. <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> accessed 12 March 2021

[660] 'Indigenous peoples in Thailand' (International Work Group for Indigenous Affairs) <https://www.iwgia.org/en/thailand.html> accessed 11 March 2021

prevent such vulnerable populations or ethnic minorities from claiming rights including land rights, use of the river or rights of consultation. In addition, Indigenous rights can influence the conduct of private actors and companies in their business with hydropower projects and affected communities. But in the LMRB, the international influence of these rights is again mitigated by the fact that the procedures specific to the indigenous status sometimes found in companies policy are opted out based off the determination of non-status by a State.[661] In addition, the indigenous status is debated and associated to terminologies like 'vulnerable' individuals or affected communities.[662] These are terms more commonly referred to in hydropower-related documents. These underrepresented actors might be a force to reckoned with in the future, through their growing empowerment and the attention paid to their rights. As public participants and actors, indigenous communities could therefore weigh in the hydropower balance for more environmental and human rights consideration. Public participation and other human rights and principles can therefore change the legal environment of hydropower regulation.

(g)Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

Several types of human rights and environmental rights can be affected by hydropower projects and reciprocally influence hydropower legal environment. These rights address a wide range of issues. They weigh on the multi-dimensional regulation of hydropower projects, with the right to a healthy environment, the right to food or the right to drinking water and sanitation. For instance, such rights can be indirectly used to argue that hydropower projects affect the right to food because of the impact they have on fisheries and on the primary protein intake for the Basin.[663] The infringement of such rights, like the communities' right to life and to its livelihood, were argued in front of the SUHAKAM (National Human Rights Commission of Malaysia) against a Malaysian company involved in the Don Sahong dam project.[664]

These rights can be found in different international instruments, such as treaties, but vary in their binding status or their overall recognition as rights. Some of these instruments are considered universal, like the Universal Declaration of Human Rights. And some still require ratification, like the two 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. For instance, the latter covenant has been used by the Community Resource Center, Thai and other civil

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[661] Bhatt (n 628)16-17; Zumbansen and Bhatt (n 413) 35
[662] Bhatt (n 628) 17
[663] Rieu-Clarke (n 588) 12
[664] About the involvement of Malaysian company (operating in Laos on the Don Sahong) in transboundary damages and infringement of national and international human rights (Thai and Cambodian communities) regarding their right to life and livelihood. See 'Human Rights Commission Report Highlights Lack of Accountability in Don Sahong Dam Project' (*Earthrights International*) <https://earthrights.org/media/human-rights-commission-report-highlights-lack-of-accountability-in-don-sahong-dam-project/> accessed 13 March 2021

society groups to write a report to share their concerns on the Xayaburi dam to the UN Committee on the ICESCR. In turn, these influential, but non legally binding decisions have advised the Thai government to consider such concerns.[665]

Other environmental rights and principles influence regulation of hydropower projects in the basin as background reference, even when the nature of the documents, sources or regimes, are not directly binding or recognised by the states.[666]

2/Specific international instruments relevant to hydropower projects and their legal environment

Some instruments within international law and governance have a great impact and influence specifically on hydropower regulation. This can be due to their authoritative sources or their expertise on hydropower, for example. This sub-section will identify the most relevant instruments mentioned in relation to hydropower's good governance or indirectly relating to investment in hydropower projects. These '[i]ndustry-specific codes of conduct are [considered] (…) increasingly prevalent' in hydropower regulation.[667]

(a)The World Commission on Dams (WCD)

One of the most relevant soft law documents at the international level is the World Commission on Dams' 2000 report 'Dams and development: a new framework for decision-making'.[668] It is a 1997 *ad hoc* multi-stakeholder body, set up by the World Bank and the World Conservation Union (IUCN). It had the goal of reviewing the growing phenomenon of large dams, to address the critics and costs of such projects, and to provide guidelines to improve them. While not rejecting dams, the recommendations notably target improvement on environmental and social issues, which are considered the biggest weaknesses of hydropower development.[669] This report's considerations of affected populations, biodiversity, river health or resettlement measures both inform an improved a model and aspire to an ideally balanced and sustainable type of hydropower project.[670] Some of the detailed recommendations are unclear to some but the core values of the report clearly point to 'equity, efficiency, participatory decision-making, sustainability, and accountability'.[671]

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[665] 'Xayaburi Dam' (*Earthrights International*) <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/> accessed 29 October 2019, para. 5 'Our solution'
[666] Johns, Saul et al. (n 519)

[667] Rieu-Clarke (n 588) 11
[668] World Commission on Dams, 'Dams and Development. A New Framework for Decision-Making report' (Earthscan, November 2000)
[669] Thayer Ted Scudder, *The Future Of Large Dams. Dealing with Social, Environmental, Institutional and Political Costs* (1st edition, Routledge 2012) 3
[670] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 8
[671] S. Jusi, 'Hydropower and sustainable development: A case study of Lao DPR' (2010) 131 *WIT Transactions on Ecology and the Environment* 199, 202

The WCD's report has been influencing 'international accords, financial safeguards, and national laws'[672] and has been cited in many documents as a reference[673]. The WCD report was also referred to by the Mekong River Commission, therefore including it as an influential international document to consider in the hydropower legal environment in the LMRB.[674] For instance, the MRC RSAT (Rapid Basin-wide Hydropower Assessment Tool) reflects the WCD principles and norms.[675]

Therefore, the WCD recommendations are setting a higher standard, with socio-environmental concerns, for hydropower projects. It has widely been spread and is even used in the LMRB through the MRC for instance. However, the standard it sets for hydropower projects, which is relied on by international lenders and other actors, is sometimes considered constraining. Laos has then mentioned that it would not be following such type of recommendations when building dams without the ADB or WB's assistance because of the burdensome and costly perception of these international good practices.[676]

(b)The International Hydropower Association (IHA)

The International Hydropower Association is a non-profit organisation, founded under the UNECSO in 1995 to advance sustainable hydropower.[677] It is a platform to share knowledge and is specialised on more economic, investment and technical aspects of hydropower development. Nonetheless, it is based on the principle of sustainability and on a holistic approach.[678] Its forum involves different actors (e.g. States and corporations, like, interestingly, the Thai public company CK Power involved as shareholder of the Xayaburi dam).[679] The IHA can be considered a 'key body' for hydropower regulation.[680] One of the IHA's most important contribution to hydropower regulation is the 2010

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[672] E. F. Moran, M. C. Lopez, N. Moore, N. Muller and D. W. Hyndman, 'Sustainable hydropower in the 21st century' (2018) 115(47) *PNAS* <www.pnas.org/content/115/47/11891?fbclid=IwAR2WhX6bUkzmuAOxdFHEPJUj6vNw_KIB23kVW10Hp3DWkXP4JY2ZfDMv7KY> accessed 29 October 2019, 6

[673] Christopher Schulz and William M. Adams, 'Debating dams: The World Commission on Dams 20 years on' (2019) 6(5) *Wiley Interdisciplinary Reviews: Water* e1396

[674] 'A Responsible Approach to Dam Building' (*Mekong River Commission*, 25 September 2008) <www.mrcmekong.org/news-and-events/news/a-responsible-approach-to-dam-building/> accessed 29 October 2019

[675] Hensengerth 'Water Governance in the Mekong Basin' (n 531)

[676] Oliver Hensengerth, 'Transboundary river cooperation and the Regional public good: the case of the Mekong River' (2009) 31(2) *Contemporary Southeast Asia* <www.jstor.org/stable/41487387?seq=1#page_scan_tab_contents> accessed 29 October 2019, 333

[677] 'Our mission' (*International Hydropower Association*) <https://www.hydropower.org/our-vision> accessed 29 October 2019

[678] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 7

[679] 'CK Power, silver corporate' (*IHA*) <https://www.hydropower.org/our-members/ck-power> accessed 12 March 2021

[680] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 8

Hydropower Sustainability Assessment Protocol.[681] This protocol sets a practical guide to assess a hydropower project and their sustainability at different stages before development.[682] The Guidelines help determine, with each stages, the 'sustainability profile' of a project.[683] Noticeably, it makes references to notions of transboundary effects, effects on stakeholders, affected communities and environmental aspects such as biodiversity and flow regulation. [684] It includes broad definitions of each term for developers to consider.[685] However, these categories remain non-consensual and limits the progress of the Guidelines promoting more socio-environmental measures. These advancements, asked by investors, are part of the updated version of the Guidelines and might take a growing, more consensual, place in them with time.[686] The protocol itself is the result of consultations with a wide range of actors, from different scales and fields.[687] However, it is worth mentioning the absence of some NGOs, like International Rivers,

[681] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019; An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[682] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019

[683] IHA Guidelines protocols and tools are split by stages of the project. There is a grading system to see if the project fits good practice. The Protocol establishes a 'sustainability profile'. An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[684] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 60-61; An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[685] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 60-61; An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[686] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 3; An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[687] 'Hydropower Sustainability Assessment Protocol' (*International Hydropower Association*) <www.hydropower.org/hydropower-sustainability-assessment-protocol> accessed 29 October 2019 'The protocol was shaped by representatives from governments, commercial and development banks, social and environmental NGOs, and the hydropower sector.', An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

considered as too 'radically opposed' to dams[688], while the position of the IHA remains to promote such projects. In addition, the areas mentioned regarding more open pluralist approaches to transboundary, communities and environmental involvements are however non-consensual.[689]

This Protocol has become very influential in the hydropower sector, supporting both the development of hydropower while making suggestions related to environmental, social and sustainable development aspects of hydropower projects. It also refers to existing (afore-mentioned) legal principles, like carrying out an EIA.[690]

(c)The World Bank's (WB) recommendations and policy directions for hydropower

The World Bank has a great influence on hydropower investment towards development. Its intervention directs regulation, through strict investment or institutional recommendations and loan conditions. More indirectly, the WB also exercises influence through its authority, expertise and importance for other investors.[691] The general policy and position of the WB regarding hydropower investment has evolved over time. It has departed from a strict, mainly economic and investment profitability position. Then, it has headed towards a more sustainable policy, as it became aware of the unsustainability of environmental and social trade-offs and costs for the overall development.[692] The WB maintains a strong belief that hydropower can provide renewable energy, poverty alleviation and development.[693] But it now takes a more nuanced and informed approach regarding environmental and social impacts. This changed position and influence on hydropower's legal environment and decision-making is visible with the WB's history and with the Mekong hydropower projects.[694] The WB has been an important partner and investor of dams in the Mekong, based on the great untapped potential of the region and the need for development.[695] However, after tremendous socio-environmental costs and controversies over the WB's involvement in these projects in the 1990s-early 2000s, the

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[688] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 5

[689] International Hydropower Association, 'Hydropower Sustainability Assessment Protocol' (1st published November 2010, *IHA* 2010) <www.hydropower.org/sites/default/files/publications-docs/Hydropower%20Sustainability%20Assessment%20Protocol.pdf> accessed 29 October 2019, 5, An updated version as of May 2020 is available <https://assets-global.website-files.com/5f749e4b9399c80b5e421384/5fa7e0f0d7fd2619e365e8e5_hydropower_sustainability_assessment_protocol_07-05-20.pdf> accessed 17 March 2021

[690] Rieu-Clarke (n 588) 11

[691] Michael A. Clemens and Michael Kremer, 'The New Role for the World Bank' (2016) 30(1) *Journal of Economic Perspectives* 53, 59

[692] James M. Cypher and James L. Dietz, *The process of economic development* (Routledge 2008)

[693] W. Rex, V. Foster, K. Lyon, J. Bucknall and R. Liden, 'Supporting Hydropower: An Overview of the World Bank Group's Engagement' (*Live Wire*, 2014/36 WBG, Washington DC.) <https://openknowledge.worldbank.org/handle/10986/20351> accessed 12 March 2021

[694] Cypher and Dietz (n 692) 515

[695] Mattijs Smits, 'Chapter (8) Hydropower and the Green Economy in Laos: Sustainable Developments?' (2012) in A. Hezri and W. Hofmeister (eds) *Towards a green economy: In search of sustainable energy policies for the future* (Konrad Adenauer Stiftung 2012) 105, 109

institution had temporarily withdrawn its participation.[696] Considerations of climate change and renewable energies have played a role in fuelling both the WB's reform of its environmental and social policies and its increased investment in sustainable hydropower projects.[697]

The WB has since resumed its involvement in the LMRB hydropower. It influences the legal environment with reformed policies weighing towards better resettlement, more public participation and consultation, and more detailed and thorough EIAs.[698] The 2005 Lao Nam Theun 2 dam was a test-case for the WB and is considered a model of sustainable hydropower project planning.[699] The WB's influence and recommendations have also led Lao to adopt laws and regulations for stable investment, environmental and social protection, and EIA domestic practice.[700] On the contrary, the WB has decided not to participate in the Xayaburi dam. Its absence and the WB sanction of a branch of Pöyry company (contractor for the Xayaburi) can both be signs of an effort of the WB for upholding a certain environmental and social protection standard in hydropower projects.[701] Considering its great influence in investment and in hydropower development, the WB should ensure socio-environmental standards are met.[702] However, in practice, the often said failure of the Nam Theun 2 as model dam tainted these new policies and recommendations.[703] In addition, the WB's influence on hydropower projects in the LMRB is nuanced by the resistance of Laos to the automatic application of such high standards for hydropower planning.[704] The presence of alternative, less strict investors also makes these international rules less central. But the WB remains a very important actor and source of rules for hydropower at the international scale, through its dual role of investor and adviser.

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[696] 'The World Bank and Dams. Part 2: Dispelling myths of Nam Theun2' **(***International Rivers*, 1 October 2015) <www.internationalrivers.org/sites/default/files/attached-files/nt2_factsheet_2015_web.pdf> accessed 30 October 2019, 1; Nathanial Matthews and Kim Geheb 'On dams, demons and development: the political intrigues of hydropower development in the Mekong' in Nathanial Matthews and Kim Geheb (eds) *Hydropower development in the Mekong region. Political, socio-economic and environmental perspectives* (Chapter 1, Routledge Earthscan 2015), 8

[697] Cypher and Dietz (n 692) 515

[698] Smits (n 695) 109

[699] Johns (n 577) 356

[700] Johns (n 577) 369

[701] 'Pöyry Finland banned from World Bank projects' (*Environment Analyst*, 12 October 2015) <https://environment-analyst.com/global/43013/poyry-finland-banned-from-world-bank-projects> accessed 11 March 2021

[702] Moran, Lopez et al. (n 672) 6

[703] Bruce Shoemaker and William Robichaud (eds) *Dead in the Water: Global Lessons from the World Bank's Model Hydropower Project in Laos* (The University of Wisconsin Press, 2018)

[704] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 13-14

(d)The Equator principles

The 2003 Equator Principles are a voluntary initiative taken by financial actors, which can apply to all industry sectors.[705] They create a framework and standards to implement due diligence during the decision-making on projects. This aims to manage and to minimize credit risks linked to the environment and social aspects of a project.[706]

In relation to the LMRB, a lot of the hydropower investment is external to the project's home country, most often being Laos.[707] However, most of hydropower investment, not related to the development or construction of the dam, are international companies located abroad.[708] Some of them follow the Equator principles and can be held to their standards. In the LMRB, some of the private investors and companies working on dam projects have signed and committed to the Equator Principles, for example, banks from China or Japan.[709] Other private banking and financial institutions, like commercial banks from Thailand who are important investors, are not volunteer institutions to the Equator principles. This does limit the information sharing and the influence of these principles in the LMRB. But these principles can be indirectly relevant for Foreign Direct Investment (FDI) and has the potential to be more relevant in the future with the development of specific voluntary investment code of conducts.[710]

(e)The UN Guiding Principles on Business and Human Rights

The United Nations Office of the High Commissioner on Human Rights has created in 2011 guiding principles for businesses regarding human rights.[711] It participates to clarifying and reinforcing the responsibility of States and businesses towards respecting human rights, avoiding infringing these rights and addressing adverse impacts on human rights these businesses might be involved with. These guiding principles also take a transboundary and transnational take on the protection of human rights. They apply

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[705] 'The Equator Principles' (*Equator Principles*) <https://equator-principles.com/about/> accessed 30 October 2019

[706] 'The Equator Principles' (*Equator Principles*) <https://equator-principles.com/about/> accessed 30 October 2019, para 1; Hensengerth 'Water Governance in the Mekong Basin' (n 531) 9

[707] Smits (n 695) 111 figure 8.5

[708] Christiane Zarfl, Alexander E. Lumsdon, Jürgen Berlekamp, Laura Tydecks and Klement Tockner, 'A global bloom in hydropower dam construction' (2015) 77(1) *Aquatic Sciences* 161, part 'Discussion' para. 5

[709] 'Nam Ngiep 1 Hydroelectric Power Project' (*Power Technology*) <www.power-technology.com/projects/nam-ngiep-1-hydroelectric-power-project/> accessed 30 October 2019: Japanese banks like Mitsubishi UFJ and Mizuho Banks have both participated in financings dams abroad, notably in Laos with the Nam Ngiep 1 hydropower plant.

[710] Louis Lebel, 'Book review: The Mekong: A socio-Legal Approach to River Basin Development, B. Boer, P. Hirsch, F. Johns, B. Saul and N. Scurrah. Earthscan-Routledge 2016, pp.xiii + 252' (2016) 37(3) *Singapore Journal of Tropical Geography,* 187

[711] United Nations, 'Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 30 October 2019

across borders and blur legal categories, like the divide between private and public or national and international law.[712]

Considering the broad scope of the text and its application to all States and businesses, the Business & Human Rights principles can be a relevant tool to consider within the Mekong legal environment. Hydropower constructors and operating companies are often criticized for not paying sufficient attention to populations and local communities while carrying out the projects and preparations.[713] The principles emphasize the responsibility of States and businesses (both public companies and private companies supported by the government, like it is the case for EGAT).[714] They highlight the need to prevent, mitigate and even remedy adverse impacts made on human rights through direct or indirect business activities.

(f)The OECD responsible business conduct guidelines

The Organisation for Economic Co-operation and Development (OECD) is an international organisation focusing on providing a platform and guidance on the economy, as well as tackling challenges having social and environmental dimensions. The OECD notably committed to Responsible Business Conduct (RBC) in 2018, where member countries are to promote a more socially responsible conduct from enterprises, respectful of human rights.[715] Part of this effort is the OECD Guidelines for Multinational Enterprises (MNEs) and its most recent update in 2011.[716] These non-binding guidelines integrate corporate social responsibility and respect for human rights as good business practice. Its overall aim is sustainable development, and it applies to MNES, operating within and outside of OECD countries' territories.[717] Importantly, the Guidelines have dedicated sections IV and VI respectively to Human Rights and Environment commitments for businesses. These provisions are linking with and referring to other international instruments, like the UN Guiding Principles on Business and Human Rights[718], the

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[712] Karin Buhmann, 'Business and human rights: Understanding the UN Guiding Principles from the perspective of transnational business governance interactions' (2015) 6(2) *Transnational Legal Theory*

[713] World Commission on Dams (n 668) xxviii

[714] United Nations, 'Guiding Principles on Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) <www.ohchr.org/documents/publications/GuidingprinciplesBusinesshr_eN.pdf> accessed 30 October 2019, 1

[715] OECD, 'Responsible Business Conduct and the corporate responsibility to respect human rights' (*OECD*) <http://mneguidelines.oecd.org/Responsible-business-conduct-and-human-rights.pdf> accessed 8 March 2021

[716] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021

[717] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021

[718] OECD, 'Responsible Business Conduct and the corporate responsibility to respect human rights' (*OECD*) <http://mneguidelines.oecd.org/Responsible-business-conduct-and-human-rights.pdf> accessed 8 March 2021, 1 para. 3

ICESCR[719], the Rio Declaration or even the Aarhus Convention. They also mention specific attention and procedures for conducting business involving indigenous people and vulnerable communities.[720] In terms of implementation, the Guidelines highlight that the duties of enterprises contained in international and national regimes are to be fulfilled as an independent commitment, regardless of the capacity and willingness of the host country to do so itself.[721] Therefore, the burden of implementation is differentiated from the traditional national anchoring. It gives more duties, influence and attention to private economic actors in a legal environment. These duties also refer to the negative impacts to be remedied by the enterprise, even if it did not actively contribute to such adverse impact.[722] The Guidelines' scope of influence is quite broad as they refer to other international and national instruments. Thus, they allow for the consideration of a wide range of adverse impacts on human rights and the environment by businesses. The Guidelines do not create new requirements or rights[723] but refer to existing ones. They recognise the internal standards and codes created by businesses as a central and growing source of good corporate practice, in terms of environment and human rights.[724]

For the case of the LMRB and hydropower development, no LMRB countries have adhered to the OECD guidelines.[725] But some OECD countries are indirectly involved. This is the case through the MNEs contracts and through the investment to dam projects, including ones from Japan and South Korea. The Guidelines' influence has already been seen in relation to the possibility to file complaints to an OECD country against companies and their action in contradiction to the Guidelines.[726] Recently, such a complaint has been filed by the Korean Transnational Corporations Watch (KTNC Watch) to the OECD Korean National Contact Point. It addresses the involvement of Korean investments and construction companies in the Xe Pian-Xe Namnoy collapsed dam in Laos, on the basis of a violation of the human rights section of the Guidelines.[727] A similar well-known complaint was lodged against the Finnish company Pöyry for its involvement in the Xayaburi dam

[719] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 32 para. 40
[720] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 32 para. 40
[721] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 32 para. 37
[722] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 33 para. 43
[723] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 25 para. 26
[724] OECD, 'OECD Guidelines for Multinational Enterprises' (2011 Edition, OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 8 March 2021, 14-15 para. 7
[725] Boer, Hirsch et al. (n 343) chapter 7
[726] OECD, 'Responsible Business Conduct and the corporate responsibility to respect human rights' (*OECD*) <http://mneguidelines.oecd.org/Responsible-business-conduct-and-human-rights.pdf> accessed 8 March 2021, 1 para. 6
[727] 'South Korean Civil Society Task Force vs. SK E&C' (*OECD Watch*) <https://complaints.oecdwatch.org/cases-fr/Case_551> accessed 11 March 2021

EIA[728] and against the Austrian turbine manufacturer[729]. This opens the way for complaints against any company registered with an OECD country doing business on hydropower in the LMRB. This mechanism demonstrates a solid influence of the OECD soft law Guidelines. Importantly, they have the potential to pressure businesses to respect human rights and environmental protection in hydropower development.

Various types of actors and instruments can, and are, influencing hydropower development in the LMRB from an international level. Each of these principles or documents make a different contribution. Their contribution can be in terms of direct impact, such as loan conditions to hydropower developers like Laos to ensure the economic but also socio-environmental viability of the projects. But their contribution can be indirect, such as the guidelines and commitments applicable to the investors or constructors of the projects requiring of them the conduct of a responsible business. In addition to this layer of international normativity influencing the legal environment of hydropower in the LMRB, the regional level gathers many key actors and documents applicable to the basin.

B- Regional scale, regimes and actors influencing hydropower development in the LMRB

The transboundary effects of hydropower projects on the whole river basin highlight the importance of the regional scale and of the widely advocated basin-level governance. The following section will present selected regional actors, each representing different regimes and perspectives, influencing the legal environment of hydropower in the LMRB.

It can be noted that the principles of the MA are largely inspired from and mention international law[730] and the UN Watercourses Convention[731] addressed in the previous section which then influence, reinforce and transfer to the regional level[732], although the level of details and content vary.[733] This is the case for several international principles, which are naturally influencing the regional level or being transposed within it.

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[728] Rieu-Clarke (n 588) 16
[729] 'Xayaburi Dam' (*Earthrights International*) <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/> accessed 29 October 2019, 'Our Solution' para. 4
[730] Mekong Agreement Preamble para. 8
[731] Wouters (n 588) 17
[732] Bearden (n 597) 71; Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, section '2.0 Does it matter if Laos violates the Mekong Agreement?' and section '2.1 The Mekong Agreement is a legally binding treaty'
[733] Bearden (n 597)

1/The Mekong River Commission (MRC)

At the regional level, the Mekong River Commission (MRC) is one of the key actors of hydropower's legal environment on the LMRB.[734] And the Mekong Agreement is a crucial source of law affecting hydropower projects. In this context, many authors have specifically studied the evolution and current configuration of the MRC.[735] Therefore this section considers more broadly the role of the MRC as a regional actor and its influence on the legal environment of hydropower projects in the LMRB.

As mentioned in the introduction, the Mekong Agreement includes the four Lower Mekong riparian countries (Thailand, Laos, Cambodia and Vietnam) as parties. The two upstream riparian countries have the status of dialogue partners (China and Myanmar).[736] This regional treaty is a binding legal instrument, framing cooperation with principles. Key chapters of the Agreement are Chapter III with the Objectives and Principles of Cooperation, Chapter IV and Institutional Framework and finally, Chapter V Addressing Differences and Disputes.[737] Article 1 sets the areas of cooperation for the riparian countries, including hydropower, irrigation and fisheries and, more broadly, fields of sustainable development. Some of the MA's key provisions are: the protection of the environment and ecological balance[738]; equitable and reasonable utilisation[739]; the duty to cause no significant harm[740]; State responsibility in case of harmful effects[741]; and dispute resolution mechanisms through diplomatic and state capacity if the MA bodies cannot successfully facilitate dialogue[742]. Consultation within projects also 'aims at arriving at an agreement', which is a form of good faith provision, ideally balancing between having a right to veto projects and the right to unilaterally develop projects.[743] In addition to the treaty provisions (often considered not clear enough or open for interpretation), more detailed procedures are provided. Five types of instruments developed by the 2000-2008

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[734] Boer, Hirsch et al. (n 343) 88

[735] Bearden (n 597); Scott C. Armstrong, 'Water is for fighting: Transnational legal disputes in the Mekong River Basin' (2015) 17 *Vermont Journal of Environmental Law* 1; Johns, Saul et al. (n 519); Gary Lee and Natalia Scurrah, 'Power and Responsibility: The Mekong River Commission and Lower Mekong mainstream dams' (*Australian Mekong Resource Centre, University of Sydney and Oxfam Australia, Sydney*, 2009)

[736] 'Dialogue Partners' (Mekong River Commission) <https://www.mrcmekong.org/about/mrc/dialogue-partners/> accessed 11 March 2021

[737] Mekong Agreement; Bearden (n 597) 54

[738] Mekong Agreement Article 3

[739] Mekong Agreement Article 5

[740] Mekong Agreement Article 7

[741] Mekong Agreement Article 8

[742] Mekong Agreement Chapter V. 'Addressing Differences and Disputes'; Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, part 1, section 'Legal gaps and limitations for governing dams' para. 2

[743] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 9

MRC Water Utilization Programme set clearer and more specific rules.[744] It is worth noting that these documents are external to the treaty and their binding character is debated.[745] One of the key procedural instruments approved by the MRC in 2003 is the Procedures for Notification, Prior Consultation and Agreement (PNPCA).[746] The PNPCA sets procedural requirements and further details about what States need to communicate and negotiate to decide on carrying out a hydropower project on the mainstream.[747] This procedure was used for the first time in the context of the Xayaburi dam project. The Mekong Agreement is binding on the LMRB riparians but not 'enforceable in the traditional sense'. [748] It has no enforcement mechanisms and the influence it has depends on the States' willingness to abide by it. The body's influence also originates from its expertise and specificity, relevancy as a regional document and incentives to comply with it.[749]

The MRC is the platform established by the MA and implementing it. This body attracts much of the attention of the regional normative scale for hydropower.

The MRC serves primarily as a platform for communication, knowledge and negotiation for the riparian countries. It is not considered to be a regulatory body[750], but rather as a facilitator.[751] Its role can be seen as a cross-over of 'procedure, science and policy', and not law.[752] The MRC can however influence regulation and the legal environment,

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[744] Bearden (n 597)107

[745] Bearden (n 597); Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, part '1995 Mekong Agreement and MRC para. 2; Alistair Rieu-Clarke, 'Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy' (2015) 5(1) *Asian Journal of International Law*, part I.C.

[746] Mekong River Commission, 'Procedures for Notification, Prior Consultation and Agreement' <https://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf> accessed 11 March 2021

[747] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, Part '1995 Mekong Agreement and MRC' para. 2

[748] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 7

[749] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 7

[750] Bearden (n 597)

[751] The role of the Mekong Agreement set in article 2 is to 'promote, support, cooperate and coordinate'

[752] Boer, Hirsch et al. (n 343) the Mekong River Commission sees its role mostly at the cross-roads between procedure, science and policy and not law.

considering its influence on various legal discourses and because of the links between science, policy and law introduced in the first chapter.

Importantly, the MRC is tasked with designing basin development plans.[753] They inform a general direction for the basin and set policy and project orientations, towards hydropower development for example. These basin plans are influencing and widely justifying national agendas regarding such projects or towards the decentralization of the MRC to NMCs[754]. The MRC participates to the knowledge and decision-making on hydropower in the LMRB. It orders, conducts studies and giving recommendations to members, at the national and basin levels, sometimes in partnership with other actors of the basin, like donors, IOs or banks.[755]

The MRC and the MA play a central role in the legal environment of hydropower on the LMRB, as regional actor and regime. They participate both to the development of hydropower and economic interests, as well as advising on environmental and social interests. Despite this ambivalent role[756], the MRC has been and is influenced by external donors and actors, often carrying principles and values of the international community and 'Northern' countries.[757] The MRC therefore promotes an IWRM approach with tools of participatory mechanisms, strategic environmental assessments and it reflects the WCD principles.[758] The MRC is a core element to promote sustainable development in the basin because it can 'liaise and coordinate between the varying interests of all the countries'.[759] This influence is carried through various instruments, ranging from legally binding treaty provisions, supplementary and equivocal procedural instruments, to soft law recommendations and expert studies regarding the Mekong. The MRC is central in the basin governance because of its inherent transboundary vision and application.[760]

In the context of the Xayaburi dam, the influence of the Mekong Agreement can first be seen in the obligation for Laos' project to go through the PNPCA. Laos did comply by sharing some information with riparian countries and receiving back their comments on

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[753] Mekong Agreement Article 2

[754] The current Basin plan and Strategic Plan for 2016-2020 mentions the development of dams in Laos and Cambodia, Mekong River Commission 'Strategic Plan 2016-2020' <https://www.mrcmekong.org/assets/Publications/strategies-workprog/MRC-Stratigic-Plan-2016-2020.pdf > accessed 9 May 2020, 7

[755] Mekong River Commission, 'Dialogue and Partnerships' (*MRC*) <https://www.mrcmekong.org/our-work/functions/dialogue-and-partnership/> accessed 12 March 2021, section 'Development Partners' and 'Collaborative Partnerships'; Mai-Lan Ha, 'The Role of Regional Institutions in Sustainable Development: A Review of the Mekong River Commission's First 15 Years' (2011) 5 *Consilience* 125, 132-133

[756] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 21

[757] Ibid; Gray, Holley et al. (n 210) 57

[758] Hensengerth 'Water Governance in the Mekong Basin' (n 531)

[759] Jusi (n 671) 207

[760] Boer, Hirsch et al. (n 343) 88

the dam plan. The Lao government has justified the project by linking it with international requirements and especially with references to the MA, the PNPCA and the basin development strategies created by the MRC.[761] This shows the importance of a justification based on the MRC, at the centre of regional regulation of hydropower. But, the influence of the MRC, and especially of the PNPCA used for the first time, encountered limits in their interpretation.[762] The enforceability of these regional rules and the authority still remain with each sovereign country and their good faith involvement in the institution. For instance, Laos has interpreted the PNPCA's timeline of six months as being strict[763] (while other interpretations can indicate an initial, 'arbitrary timeframe'[764], which could be extended should the negotiation and discussions be incomplete). The consultation process was also seen as a requirement to receive the comments of riparian countries, not a duty to answer or compromise with them.[765] In addition, its influence on hydropower's legal environment can be diffused due to the soft nature of the MRC's recommendations and suggestions. In the Xayaburi case, the Secretariat's advice and disagreement with Laos' claims remained unheard.[766]

2/The Lancang-Mekong Cooperation program (LMC)

The Lancang-Mekong Cooperation (LMC) program is another important regional organisation recently added to the actors and regimes influencing the legal environment of hydropower development in the LMRB.[767] This 2016 initiative regroups the six riparian

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[761] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019

[762] Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention' (*East by Southeast*, April-May 2016) <www.eastbysoutheast.com/author/remykinna/> accessed 29 October 2019, part 'Legal gaps and limitations for governing dams' para. 1

[763] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 16

[764] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 15

[765] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 9

[766] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, part '1.0 Introduction' para. 1

[767] The organism was launched with the Sanya Declaration, entitled 'For a Community of Shared Future of Peace and Prosperity Among Lancang-Mekong Countries' at the LMC Leaders' Meeting:

countries, including the upstream countries China and Myanmar. Its functioning is project-based, 'government-guided'[768] and involves a 'multiple participation'.[769] The LMC presents the objective of improving development, not only in economic terms but also cultural and environmental.[770] Its focus and priority areas are not solely the Mekong water resources but the whole basin.[771] However, one of the Joint Working groups is dedicated specifically to water resources cooperation.[772]

As a regional actor in hydropower development, it is for now relatively difficult to evaluate the role and decisions[773] of the LMC considering its recent establishment. But the nature of the LMC as a new regional platform brings potential for influence on hydropower development on the entire Mekong River, especially because of its complete, basin-focused membership. This element has been the source of a lot of discussions regarding the relation of the LMC and the MRC. They could enter in competition, replace, duplicate or complement each other.[774] Projects related to the Mekong and to water resources have already been financed by China through the LMC, although not yet regarding large hydropower projects.[775] China and its national interests in the LMRB for energy, trade and navigation are a well-known component of hydropower development. Many comments suggest that the LMC is also a new channel for China's influence on hydropower development in the LMRB, especially through investment and States-focused decision-making for development.[776]

'Development path' see 'A Brief Introduction of Lancang-Mekong Cooperation', (*LMC China*, 2 February 2021 <http://www.lmcchina.org/eng/2021-02/02/content_41460160.html> accessed 8 March 2021

[768] 'A Brief Introduction of Lancang-Mekong Cooperation', (*LMC China*, 2 February 2021 <http://www.lmcchina.org/eng/2021-02/02/content_41460160.html> accessed 8 March 2021, section 'Cooperation characteristics'

[769] 'A Brief Introduction of Lancang-Mekong Cooperation', (*LMC China*, 2 February 2021 <http://www.lmcchina.org/eng/2021-02/02/content_41460160.html> accessed 8 March 2021, section 'Cooperation characteristics'

[770] 'A Brief Introduction of Lancang-Mekong Cooperation', (*LMC China*, 2 February 2021) <http://www.lmcchina.org/eng/2021-02/02/content_41460160.html> accessed 8 March 2021 section 'Cooperation characteristics'

[771] '3+5 Cooperation Framework', (LMC China) <http://www.lmcchina.org/eng/node_1009667.html> accessed 8 March 2021; 'A Brief Introduction of Lancang-Mekong Cooperation', (*LMC China*, 2 February 2021 <http://www.lmcchina.org/eng/2021-02/02/content_41460160.html> accessed 8 March 2021 section 'Cooperation characteristics'

[772] 'Joint Working Groups In Priority Areas', (*LMC China*) <http://www.lmcchina.org/eng/node_1009669.html> accessed 8 March 2021,

[773] Information on the LMC from official sources are also not extensive, the only official website being linked to China and some of the sections being empty. It is worth considering that not every project would be made public, and few studies are dedicated to this organisation for now.

[774] Bearden (n 597) Chapter 5

[775] Laura Zhou, 'Five things to know about the Lancang-Mekong Cooperation Summit' *South China Morning Post* (9 January 2018) <www.scmp.com/news/china/diplomacy-defence/article/2127387/five-things-know-about-lancang-mekong-cooperation> accessed 30 October 2019, part '3. The purpose of the Lancang-Mekong Cooperation mechanism'

[776] Bearden (n 597) Chapter 5; Remy Kinna, 'An alternate past/future for Mekong River dams under the UN Watercourses Convention: Part 3' (Global Water Forum, 2nd May 2016) <https://globalwaterforum.org/2016/05/02/an-alternate-pastfuture-for-mekong-river-dams-under-

3/The Greater Mekong Subregion (GMS)

The Greater Mekong Subregion (GMS) is an economic cooperation program supporting high-priority projects for all the Mekong riparian countries. This program was created by the six riparian countries with the help of the Asian Development Bank in 1992.[777] It has funded sub-regional projects generally related to infrastructure in energy, environment, transport and trade facilitation, and tourism amongst other areas.[778] Energy is the second sector to receive investment for projects[779] (with hydropower being on the list of energies targeted[780]). But so far only one small hydropower project is listed as a funded project while transport remains the primary recipient of funding by far.[781] With the GMS Strategic Framework 2012-2022 as well, a growing focus is recently set on adequately addressing environmental concerns, especially cross-border, and on integrating such concerns within the economic development plans of the subregion.[782] The GMS has established a working group on environment and this area is the 4th sector to receive the most funds among the priority areas set within the GMS.[783] The GMS is expanding its perspectives from economic development to an informed development with

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the-un-watercourses-convention-part-3/> accessed 4 March 2021, part 'Revitalising processes for sustainable development that people can believe in: The time is now' para 2.

[777] 'The Greater Mekong Subregion at 20: Progress and Prospects' (ADB December 2012) <https://www.adb.org/publications/greater-mekong-subregion-20-progress-and-prospects> accessed 8 March 2021

[778] 'About the Greater Mekong Subregion' (*GMS*) <https://greatermekong.org/about> accessed 21 March 2021; Sebastian Biba, 'China's 'old' and 'new' Mekong River politics: the Lancang-Mekong Cooperation from a comparative benefit-sharing perspective' (2018) 43(5) *Water International* <www.tandfonline.com/doi/full/10.1080/02508060.2018.1474610> accessed 29 October 2019, part 'China's engagement in the GMS' para. 1; Greater Mekong Subregion Secretariat, 'Greater Mekong Subregion Economic Cooperation Program Regional Investment Framework 2022: First Progress Report and Update' (March 2019) <www.greatermekong.org/sites/default/files/1_RIF_2022_First_Progress_Report_and_Update_Overview_web_3Apr2019.pdf#overlay-context=gms-regional-investment-framework-2022> accessed 30 October 2019

[779] Greater Mekong Subregion Secretariat, 'Greater Mekong Subregion Economic Cooperation Program Regional Investment Framework 2022: First Progress Report and Update' (March 2019) <www.greatermekong.org/sites/default/files/1_RIF_2022_First_Progress_Report_and_Update_Overview_web_3Apr2019.pdf#overlay-context=gms-regional-investment-framework-2022> accessed 30 October 2019, 4

[780] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB,* 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 14

[781] Greater Mekong Subregion Secretariat, 'Greater Mekong Subregion Economic Cooperation Program Regional Investment Framework 2022: First Progress Report and Update' (March 2019) <www.greatermekong.org/sites/default/files/1_RIF_2022_First_Progress_Report_and_Update_Overview_web_3Apr2019.pdf#overlay-context=gms-regional-investment-framework-2022> accessed 30 October 2019, 4

[782] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB*, 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 5

[783] Greater Mekong Subregion Secretariat, 'Greater Mekong Subregion Economic Cooperation Program Regional Investment Framework 2022: First Progress Report and Update' (March 2019) <www.greatermekong.org/sites/default/files/1_RIF_2022_First_Progress_Report_and_Update_Overview_web_3Apr2019.pdf#overlay-context=gms-regional-investment-framework-2022> accessed 30 October 2019, 4

concerns about the environment for instance.[784] The program has shown interest into widening its attention given to different stakeholders of the region, beyond governments but at their discretion.[785] These efforts have been estimated to have improved the communication, cooperation, coordination interagency and the dissemination of information about the program 'within and among countries'.[786] Within the basin and at the regional level, the GMS has acknowledged and referenced the ASEAN and MRC, aiming to avoid duplication while coordinating and cooperating.[787] By this reference, the program is placing itself among the regional influential actors of the basin. The GMS also links with other actors of the basin considered essential for the development of the basin and infrastructural projects, such as the private sector[788] and external partners including financiers or technical experts[789].

In several ways, the GMS has influenced hydropower development in the LMRB or potentially could. The GMS has already associated itself with the development of the Nam Theun 2 dam in Laos.[790] First, the GMS program is another whole basin-level platform, which could create an increased legitimacy in facilitating cooperation or in deciding on projects affecting the shared river. But most importantly, the GMS influences hydropower projects to develop through the provision of funding. It especially follows its interest in developing basin-wide power grids, transmission lines, cross-border transport and trade as well as energy.[791]

4/The Asian Development Bank (ADB)

Similarly to the World Bank, the ADB has a dual role. It supports hydropower development through economic, investment and neo-liberal priorities and policies, while encouraging environmental and social protection measures.[792] These measures are for

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[784] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB,* 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 23

[785] The two provinces of the two provinces of Yunnan and Guangxi, selected NGOs like WWF and IOs like UNDP, see Hensengerth 'Transboundary river cooperation and the Regional public good' (n 676) 334

[786] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB,* 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 7

[787] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB,* 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 6

[788] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB,* 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 22

[789] ADB, 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (*ADB*, 2011) <www.greatermekong.org/sites/default/files/gms-ec-framework-2012-2022.pdf> accessed 30 October 2019, 23

[790] Matthews and Geheb 'On dams, demons and development' (n 696) 7

[791] Ibid; John Dore, Louis Lebel and Francois Molle, 'A framework for analysing transboundary water governance complexes, illustrated in the Mekong Region' (2012) 466-467 *Journal of Hydrology*

[792] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 21

example EIAs and participatory mechanisms and regulations.[793] Like the WB, the ADB has not participated in the Xayaburi dam because of the allegations of environmental and social impacts of the project.[794] But it has been involved with the Nam Theun 2 and other dams in the LMRB.[795] Still, the ADB, in a synergetic policy with the GMS, LMC and other regional investment-oriented actors, is promoting a regional power grid over the LMRB.[796] Its objective is energy production and development. This is considered by many experts and NGOs to be fuelling hydropower projects and downplaying environmental and social impacts.[797] The support of such authoritative actors influence regulation towards hydropower development. Even more so as these institutions are representing a closer level of interest and expertise than external actors to the basin.

5/The Asian Infrastructure Investment Bank (AIIB)

The Asian Infrastructure Investment Bank (AIIB) is a 2015 initiative from China, also opened to the member countries of the WB and ADB.[798] It promotes the development of infrastructures, like large hydropower projects. It finances projects and pursues goals of green energy, economic development and interconnection within Asia, including the LMRB region. Projects of energy transition are proposed in the AIIB and could include the promotion of hydropower development in the LMRB.[799] The AIIB, similarly to the ADB and the WB, has included recommendations and standards for environmental and social concerns within projects, to ensure sustainability.[800] The need to conduct an Environmental and Social Impact Assessment is present within the AIIB as well and it can influence the investment and promotion of hydropower projects. However, this obligation only affects projects declared by the client as having likely adverse environmental and

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[793] Ibid

[794] 'Xayaburi dam' (*Earth Rights International*) <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/> accessed 8 March 2021 para 1

[795] 'Lao People's Democratic Republic : GMS Nam Theun 2 Hydroelectirc Project' (ADB, 'Sovereign (public) Project 37734-013) <https://www.adb.org/projects/37734-013/main#project-overview> accessed 9 March 2021; 'Life Beyond the Dam' (ADB 17 November 2010) <https://www.adb.org/news/features/life-beyond-dam> accessed 9 March 2021

[796] Matthews and Geheb 'On dams, demons and development' (n 696) 7

[797] International Rivers Network, 'ADB Plan Supports a Dozen More Dams for the Mekong' (*International Rivers*, 5 August 2003) <www.internationalrivers.org/resources/adb-plan-supports-a-dozen-more-dams-for-the-mekong-3908> accessed 30 October 2019

[798] Martin A. Weiss, 'Asian Infrastructure Investment Bank (AIIB)' (*Congressional Research Service report*, 3 February 2017) <https://pdfs.semanticscholar.org/b40b/80039705babf07ba04286015390850ca0341.pdf> accessed 11 March 2021, Summary

[799] AIIB, 'Energy Sector Strategy: Sustainable Energy for Asia' (*AIIB*, 15 June 2017 amended 11 April 2018) <www.aiib.org/en/policies-strategies/strategies/sustainable-energy-asia/.content/index/_download/energy-sector-strategy.pdf> accessed 30 October 2019, 4 and 15-16

[800] AIIB, 'Environmental and Social Framework' (*AIIB*, February 2016 amended February 2019) <www.aiib.org/en/policies-strategies/_download/environment-framework/Final-ESF-Mar-14-2019-Final-P.pdf> accessed 30 October 2019, 27

social effects.[801] This could decrease the influence of the AIIB regarding its socio-environmental commitments and promote projects where transboundary impacts are not assessed beforehand or are not declared in good faith.

6/Chinese national interests' influence on hydropower regulation in the LMRB

The focus of this research on the Lower Mekong River Basin cannot be fully isolated from the consideration of the very influential upstream riparian that is China. Aside from a more political reflection, it is worth noting that China contributes to shaping the legal environment of hydropower on a regional level. It does so through its national interests and development but also through the cooperation and platforms it engages in with downstream riparians.[802] As an upstream country to a transboundary river, China naturally has an impact on the LMRB and has a prime access to the resource. Because of that position, China has tended to protect its sovereignty and rights over its share of the Lancang river and has limited its cooperation with basin-wide approaches.[803] This is illustrated most obviously through the unilateral development of its six large dams on the Lancang river.[804] In addition, this position has motivated China to vote against the UN Watercourses Convention at the General Assembly and to limit its participation as dialogue partner in the MRC.[805] However, separately, China has pushed for hydropower development in the LMRB through its investment[806] and involvement in the construction or consulting.[807] This can be put in the context of the country's national interests in water and energy security, as well as of the opportunities of trade and transport of energy. In the case of Laos' rapid development of hydropower, China is playing both a role of model and facilitator.[808]

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[801] AIIB, 'Environmental and Social Framework' (*AIIB*, February 2016 amended February 2019) <www.aiib.org/en/policies-strategies/_download/environment-framework/Final-ESF-Mar-14-2019-Final-P.pdf> accessed 30 October 201910, 'Category C.'

[802] Paul Wyrwoll, 'The Xayaburi dam: Challenges of transboundary water governance on the Mekong River' (*Global Water Forum*, 13 December 2011) <https://globalwaterforum.org/2011/12/13/the-xayaburi-dam-challenges-of-regional-water-governance-on-the-mekong/> accessed 10 March 2021, para. 13

[803] Biba (n 778) Introduction para. 1

[804] Ibid Part 'China's dam-building activities and their potential impacts' para. 4 and part 'China's dam-building activities and their potential impacts'

[805] China's opposition vote, see in 'South and East Asia. UNWC's Global Relevance' (*UN Watercourses Convention. Online User's Guide*) <http://www.unwatercoursesconvention.org/global-relevance/south-and-east-asia/> accessed 12 March 2021; China as a dialogue partner of the MRC, see MRC, 'Upstream Partners' (MRC) <www.mrcmekong.org/about-mrc/upstream-partners/> accessed 30 October 2019

[806] Hensengerth 'Water Governance in the Mekong Basin' (n 531)

[807] International Rivers, 'The New Great Walls. A guide to China's overseas dam industry' (*International Rivers*, July 2008) <https://www.internationalrivers.org/sites/default/files/attached-files/new_great_walls_report.pdf> accessed 30 October 2019

[808] Biba (n 778) Part 'Again: a focus on benefits other than those to the river' para. 2

Nonetheless, China has not been completely isolated and uncooperative. It had to engage in more cooperation programs to help put forth its hydropower agenda.[809] It has established bilateral treaties and agreements with other actors of the Basin, especially the other upstream riparians[810], and with the MRC in agreeing to share data on the river in Chinese territory.[811] China has also showed a more cooperative policy through different regional platforms that influence hydropower governance and decision-making. The LMC, the GMS[812], the AIIB[813] and other initiatives are both platforms and regimes influencing the legal environment of hydropower, sometimes believed to be navigated or even dominated by the Chinese interests[814] pro-development[815]. Independent of the political hegemony and the reasons behind its involvement in certain projects, China has a regional influence for the LMRB and hydropower projects, generally in favour of their development. The example it sets, its personal involvement with the host countries and with specific hydropower projects make China an important regional actor within the legal environment of hydropower in the LMRB.

C- National scale, regimes and actors influencing hydropower development in the LMRB

This section gives a general insight into the national interests generally found within the four riparian countries with regards to hydropower development on the LMRB. Hydropower regulation in each country will naturally vary and be influenced by many factors such as political priorities and interests, institutions, legal and regulatory framework or the adherence to international and regional instruments. As considered in the first chapter, the policy orientation and goals pursued do influence the legal environment. Therefore, this section briefly introduces the general interests displayed by the four riparian countries, so as to inform their role as actors, scales and regimes in the legal environment of hydropower in the LMRB. To different extents, every Lower Mekong riparian country has shown interest in hydropower development and adopted a national approach that would allow to benefit from it.[816] They all have national legal systems and

[809] Ibid Introduction para. 1

[810] Ibid Part 'China's engagement in the GMS' para. 2
[811] Ibid Part 'China's relationship with the MRC' para. 2
[812] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 12
[813] The AIIB is sometimes considered the Chinese WB, see Jane Perlez, 'China Creates a World Bank of Its Own, and the U.S. Balks' *The New York Times* (4 December 2015) <www.nytimes.com/2015/12/05/business/international/china-creates-an-asian-bank-as-the-us-stands-aloof.html> accessed 30 October 2019
[814] Biba (n 778) Part 'China's rationale for establishing the LMC'

[815] Hensengerth 'Transboundary river cooperation and the Regional public good' (n 676); Biba (n 778) Introduction para. 3
[816] Jusi (n 671) 199; The demand in energy from all four riparians is pushing the need to secure energy 'Hydropower dams' (*OpenDevelopment Mekong*, 22 December 2017)

regulations informing hydropower decision-making where the energy and finance ministries are very influential in favour of these projects.[817] At the same time, these countries have specific concerns regarding the development of hydropower projects, depending on the country's needs.[818] Considering the national level, regimes and actors, especially the State, remains an important part of the hydropower legal environment. This is part of the need for a pluralist and holistic vision. But it also relates to the fact that water issues, even transboundary, continue to be related to national vital needs and water security.[819] Finally, the section directs more attention to the hydropower legal environment in Lao PDR. This is motivated by the considerable and accelerated development of hydropower projects in Laos, currently at the heart of discussions and controversies within the basin.[820] The case study of the Xayaburi hydropower dam used in this chapter is also located in Laos.

First, Thailand has shown interest in hydropower primarily because of the energy it can bring to its increasingly developed population and urbanisation.[821] Regarding transboundary hydropower projects, Thailand generally focuses less on building dams on its own portion of the Mekong. This is due to its lesser hydropower potential and because of the possible complications and negative impacts of such project directly on its territory.[822] Nonetheless, the country often invests, constructs and is the main buyer of the energy produced by dams developed in Laos.[823] As the effects of the Chinese and Lao upstream dams are being felt, Thailand's interest towards hydropower is being questioned. It is sparkling opposition from Thai affected populations and local and international NGOs.[824] The need to protect water quality, quantity, fisheries and, therefore,

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<https://opendevelopmentmekong.net/topics/hydropower/> accessed 10 March 2021, section 'Meeting Demand'

[817] Louis Lebel (n 710) 184; For an overview of the legal measures in each of the Lower Mekong countries, see Bearden (n 597), 67-71

[818] Intralawan, Smajgl et al. (n 8) 14

[819] Biba (n 778) part 'Again: a focus on benefits other than those to the river' para. 4

[820] Nine of the eleven large dam projects on the mainstream of the Mekong are in Laos

[821] Matthews and Geheb 'On dams, demons and development' (n 696) 5; Thai Ministry of Energy, 'Thailand 20-year Energy Efficiency Development Plan (2011-2030)', <http://www.eppo.go.th/images/POLICY/ENG/EEDP_Eng.pdf> accessed 12 March 2021, section 2-1, 19

[822] WWF-Greater Mekong, 'Mekong River In the Economy' report (*WWF-Greater Mekong* November 2016) <http://d2ouvy59p0dg6k.cloudfront.net/downloads/mekong_river_in_the_economy.pdf> accessed 5 March 2021, 113

[823] Nam Theun 2 dam 95% of the energy bought by Thailand, see Ahlers, Zwarteveen and Bakker (n 580) 565; and 95% of the Xayaburi dam energy being bought by Thailand, see 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 2; Johns (n 577) 360

[824] For examples, see Steve Sandford, 'Thai Activists Protest New Xayaburi Dam on the Mekong' (VOANews, 22 March 2020) <https://www.voanews.com/east-asia-pacific/thai-activists-protest-new-xayaburi-dam-mekong> accessed 12 March 2021; Ryn Jirenuwat and Tyler Roney, 'Thailand under pressure to act against the Sanakham dam project' (*China Dialogue*, 25 September 2020) <https://chinadialogue.net/en/energy/thailand-under-pressure-over-sanakham-dam/> accessed 12 March 2021; Jitsiree Thongnoi, 'Thailand NGO seeks halt to Mekong dam project in Laos, as

the livelihoods of many individuals in Thailand have gained attention.[825] It will undoubtedly need to be made a priority concern in the future. An example of the active involvement of Thailand in hydropower in the LMRB, and especially in Laos, is the Xayaburi dam. Many of the actors linked to the conceptualisation, the construction, the investment and the energy purchase are linked to Thailand, including the Thai government participating in the project.[826]

Secondly, Vietnam has shown interest in hydropower projects with the construction of its own dams on the Sesan and Srepok rivers, tributaries to the Mekong.[827] Vietnam has developed with Laos and Cambodia the 3S dam project (on the Sesan, Srepok and Sekong tributaries).

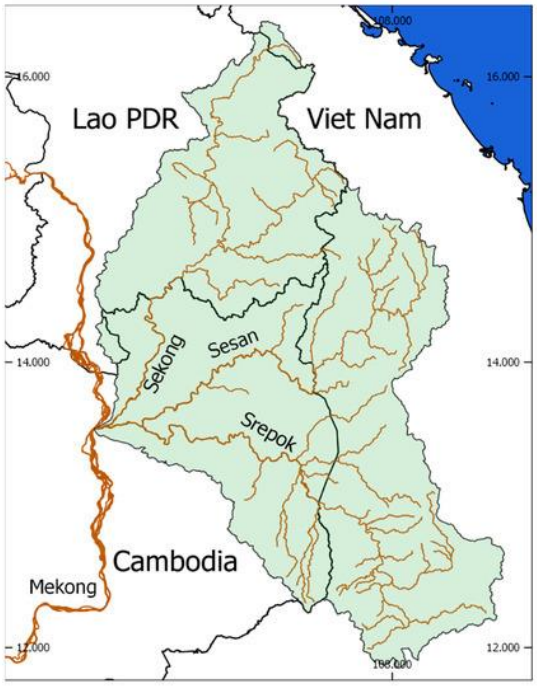

Figure 2: Map of the 3S river basin.[828]

threat to Asean's most vital waterway grows' (*This Week in Asia*, 19 February 2021) <https://www.scmp.com/week-asia/economics/article/3122326/thailand-ngo-seeks-halt-mekong-dam-project-laos-threat-aseans> accessed 12 March 2021

[825] This awareness has pushed Thailand's government to start opposing the negative impacts created by hydropower on the upstream of the Mekong river and to raise the issues at the regional level at the MRC. See Busaba Sivasomboon and Nontarat Phaicharoen, 'Thailand to Air Concerns with River Commission over Drought, Chinese Dams in Mekong' (*BenarNews*, 14 January 2020) <https://www.benarnews.org/english/news/thai/thailand-china-01142020183829.html> accessed 12 March 2021

[826] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 2; Johns (n 577) 360

[827] Paul Wyrwoll, 'The Xayaburi dam: Challenges of transboundary water governance on the Mekong River' (*Global Water Forum*, 13 December 2011) <https://globalwaterforum.org/2011/12/13/the-xayaburi-dam-challenges-of-regional-water-governance-on-the-mekong/> accessed 10 March 2021, para. 13

[828] X. Liu, N. J. Souter, R. Y. Wang and D. Vollmer, 'Aligning the Freshwater Health Index Indicator System against the Transboundary Water Governance Framework of the Southeast Asia's Sesan, Srepok and Sekong River Basin' (2019) 11(11) *Water*

Recently, the country is more critical towards hydropower projects.[829] Indeed, the country is the most downstream of the river and hydropower dams upstream pose a threat to the rice agriculture and health of the Mekong Delta.[830] The effect of upstream dams is already felt in Vietnam and raises tensions and stress over the water resource for Vietnamese. During the most important droughts striking the country in 2016, Vietnam has asked China to allow for more flow of the river downstream.[831] With this new perspective, Vietnam has also opposed the Xayaburi dam and requested several documents and changes of the plans through the PNPCA.

Thirdly, Cambodia is planning to develop on its territory two of the eleven dam projects on the mainstream Mekong (Stung Treng and Sambor dams). A third one, the Don Sahong dam, is currently being developed at the border between Laos and Cambodia. This would be a way to electrify the country or trade energy as a way to develop.[832] In its development of hydropower, the emphasis is generally put less on resources preservation and more on energy benefits.[833] Despite its interest in hydropower, the country's immediate priorities remain irrigation and fisheries. This is crucial especially for the Tonle Sap lake, considering the mainly rural and agricultural livelihoods and the still limited development of the country.[834] It is worth noting in this context of different interests for Cambodia's future that the two large dams planned as part of the eleven dams plan have been postponed in March 2020 to 2030.[835]

Regarding the Xayaburi dam, both Vietnam and Cambodia criticized the project's construction as it was presented to them during the PNPCA at the Mekong River Commission. They requested further studies to be conducted. Both countries found flaws in the EIA and a lack of evidence that transboundary impacts would be minimal or appropriately managed.[836] Despite their requests for delaying the project and for more

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[829] Paul Wyrwoll, 'The Xayaburi dam: Challenges of transboundary water governance on the Mekong River' (*Global Water Forum*, 13 December 2011) <https://globalwaterforum.org/2011/12/13/the-xayaburi-dam-challenges-of-regional-water-governance-on-the-mekong/> accessed 10 March 2021, para. 13

[830] Jake Brunner and Brian Eyler, 'Mekong transboundary cooperation: Making a problem bigger' (*IUCN,* 19 June 2019) <www.iucn.org/news/viet-nam/201906/mekong-transboundary-cooperation-making-a-problem-bigger> accessed 30 October 2019, para. 1

[831] Vuong Duc Anh, 'Vietnam asks China to open dams to relieve drought in Mekong Delta' (*VNExpress International* 18 March 2016) <https://e.vnexpress.net/news/news/vietnam-asks-china-to-open-dams-to-relieve-drought-in-mekong-delta-3370281.html> accessed 12 March 2021

[832] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 18

[833] Lebel and Lebel (n 118) 170

[834] Jake Brunner and Brian Eyler, 'Mekong transboundary cooperation: Making a problem bigger' (*IUCN,* 19 June 2019) <www.iucn.org/news/viet-nam/201906/mekong-transboundary-cooperation-making-a-problem-bigger> accessed 30 October 2019, para. 3; Bearden (n 597) 71

[835] Brian Eyler and Courtney Weatherby, 'Mekong Mainstream Dams' (Stimson 23 June 2020) <https://www.stimson.org/2020/mekong-mainstream-dams/> accessed 11 March 2021, para.1

[836] 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 6

studies, the project went ahead. This symbolizes the opposition of national interests within the development of hydropower projects (even as discussed at the regional level) and the weight of the host country's national decision.

In addition, in the context of national interests over hydropower development, it is important to mention the local scale, individual actors and national NGOs. These actors are producing influential documents and legal discourses. They are gaining recognition and importance in the integrated governance of hydropower.[837] Local actors or individuals have been mentioned indirectly in this thesis through the study of international and regional scales. Indeed, local actors and individuals are often limited to the entry given to them by more formal actors and regimes, especially through their State.[838] Each of these levels of regulation create, to some extent, space for these actors to participate, to have their rights recognised or to protect their interests through specific instruments.[839] But inversely, these actors also increasingly create their own normative space and influence every scale and regime.[840] They do so through lobbying, grouping their claims or petitioning for example.[841] At the international level, the focus on affected communities, and especially vulnerable populations, can be seen with the promotion of human rights, indigenous rights and public participation. These commitments and international legal principles can then be mirrored or accepted at the regional and national scales. In addition, the local scale has a growing traction and influence. It is at the centre of studies developed by NGOs (operating nationally or internationally), reports and through grass-root movements, including protests and claims against hydropower projects.[842] The impact of such movements is hard to determine. But they have been attracting more attention, within the media, academic studies and within other national, regional and international regimes and their respective actors.[843] Considering the complexity and difficulty to identify such actors and the normativity they create, the chapter will only focus on the local level, actors and regime through the other scales mentioned above. But the thesis

[837] Intralawan, Smajgl et al. (n 8) 14
[838] John Dore and Louis Lebel, 'Deliberation and Scale in Mekong Region Water Governance' (2010) 46(1) *Environmental Management* 60
[839] As seen in the previous sections, with international law and the access to individuals or communities in the context of international criminal law or in international human rights law or the public participation and consultation done sometimes at the regional level for regional projects. Finally, the national level allows for more direct inclusion and representation of individuals and communities.
[840] Rieu-Clarke (n 588) 2 ; Bodansky (n 24) 124
[841] Slaughter 'Breaking out' (n 165); Turner (n 201) 248

[842] Sangkhamanee (n 551) 85; Armstrong (n 735); Lebel (n 710) 187
[843] The IHA, the World Bank and the ADB have tried to increase their involvement of communities and social groups in their social and environmental guidelines. The World Commission on Dams' recommendations have focused on local needs and priorities of participation and resettlement. NGOs, IOs and academic work mentioned in this thesis have mentioned the needs, the protests and impacts of hydropower on populations. Various medias mentioned in this thesis have also referred to on-going damages and unfair situations with communities and individuals.

acknowledges the importance of such actors in influencing hydropower decision-making, which are at the centre of specific studies.[844] In the case of the Pak Mun Dam in Thailand and with the Xayaburi dam, peaceful protests were organised by local affected communities, in Thailand and along the other downstream riparian countries.[845] For the Xayaburi dam, the local movements have lobbied and protested to national governments, courts and regional actors against the project.[846] Their influence on the legal environment of hydropower in the LMRB is therefore undeniable but complex to evaluate, both from its lack of formal recognition and its fluid nature.

A specific attention to Lao PDR's hydropower development

Laos is currently showing the most involvement with hydropower development in the LMRB. It is developing seven of the eleven dams project (Pak Beng, Luang Prabang, Xayaburi, Pak Lay, Sanakham, Phu Ngoy/Lat Sua and Don Sahong dams). Two more are planned at the border between Laos and Thailand (Pak Chom and Ban Koum).[847] Lao national interests have a great influence on the overall legal environment of hydropower in the basin, through the role of its State, the national scale and the national legal system.[848]

Due to its geography and topography, Lao PDR is the Mekong river basin riparian with the most hydropower potential.[849] Importantly, this potential is still largely untapped.[850] This potential has enshrined a strong interest for hydropower in the country and oriented

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[844] Yasuda (n 645) 2

[845] Panu Wongcha-um 'Laos : Protests continue against Xayaburi Dam for the reduced river flow and risk of livelihood crisis as it begins operations' (*Business & Human Rights Resource Centre*, 10 November 2019) <https://www.business-humanrights.org/fr/latest-news/laos-protests-continue-against-xayaburi-dam-for-the-reduced-river-flow-and-risk-of-livelihood-crisis-as-it-begins-operations/> accessed 10 March 2021; K. Jenkins, L. McGauhey, W. Mills and ESCR Mobilization Project, 'Voices from the Margin : Pak Mun Dam' (*International Rivers* 8 December 2008) <https://archive.internationalrivers.org/resources/voices-from-the-margin-pak-mun-dam-2504 accessed 10 March 2021> accessed 10 March 2021, para. 3; 'Thai villagers protest Pak Mun Dam, 1991-2001' (Global Nonviolent Action Database) <https://nvdatabase.swarthmore.edu/content/thai-villagers-protest-pak-mun-dam-1991-2001> accessed 10 March 2021

[846] 'Xayaburi Dam' (*Earthrights International*) <https://earthrights.org/what-we-do/mega-projects/xayaburi-dam/> accessed 29 October 2019, part 'Our solution', para 2

[847] Brian Eyler and Courtney Weatherby, 'Mekong Mainstream Dams' (Stimson 23 June 2020) <https://www.stimson.org/2020/mekong-mainstream-dams/> accessed 11 March 2021; 'Hydropower' (*Mekong River Commission*) <https://www.mrcmekong.org/our-work/topics/hydropower/> accessed 11 March 2021

[848] The development of 9 of the 11 large dams on the mainstream is influencing the entire basin, even indirectly, through the plans of the State and its regional position in favour of the development of dams on its territory, through its national regulations and laws towards the development of dams, with more or less measures for mitigating the socio-environmental (transboundary) costs.

[849] OECD, 'Economic Outlook for Southeast Asia, China and India 2019: Towards Smart Urban Transportation' (*OECD*, 2018) <www.oecd.org/dev/asia-pacific/saeo-2019-Lao-PDR.pdf> accessed 30 October 2019, 205

[850] WWF-Greater Mekong, 'Mekong River In the Economy' report (*WWF-Greater Mekong* November 2016) <http://d2ouvy59p0dg6k.cloudfront.net/downloads/mekong_river_in_the_economy.pdf> accessed 5 March 2021, 120

national policies and laws towards that goal.[851] Considering its current status of Least Developed Country, Laos considers hydropower as its greatest asset and opportunity to graduate from its status and create economic development.[852] For Laos, hydropower development will provide economic, social advancement and environmental progress through clean, affordable and sustainable energy.[853] It will also attract external funds and revenues with the promotion of power trade and the provision of energy to its neighbours.[854] Laos' plan is allegedly to supply 9,000MW to Thailand by 2025, 5,000MW to Vietnam by 2030 and 1,500MW to Cambodia by 2025.[855] This plan of being the 'battery' of the basin is often financially supported by energy-hungry and developing countries like Thailand and China.[856] Lao national plans and developments are justified through the 1971 and 1987 MRC basin plans.[857] These basin plans were formulated after the reunion of the riparians around the MA and the MRC, after Cambodia had stopped cooperating due to regime incompatibilities.[858] This long break in the exploitation of the Mekong river has given the impression of delay in developing the river to its incredible potential. Then, the 1970-1980s basin plans reflect the interest in developing energy production in the basin.[859] It considered the great untapped hydropower potential of Laos and originally

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[851] Bearden (n 597) 70-71

[852] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 9

[853] Jusi (n 671) part 1; Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 9

[854] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 12: 'Hydropower development has two primary purposes for Lao PDR: 1) Promotes economic and social advancement by providing a reliable, clean and affordable domestic power supply 2) Attracts FDI and earns foreign exchange from exporting electricity while contributing to economic development and sub-regional energy demand Lao PDR has benefit-sharing agreement with our neighbors to supply power : • 9000 MW to Thailand by 2025 • 5000 MW to Vietnam by 2030 • 1500 MW to Cambodia by 2025'; WWF-Greater Mekong, 'Mekong River In the Economy' report (*WWF-Greater Mekong* November 2016) <http://d2ouvy59p0dg6k.cloudfront.net/downloads/mekong_river_in_the_economy.pdf> accessed 5 March 2021, 119; Jusi (n 671) part 1.

[855] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 12

[856] Jake Brunner and Brian Eyler, 'Mekong transboundary cooperation: Making a problem bigger' (*IUCN,* 19 June 2019) <www.iucn.org/news/viet-nam/201906/mekong-transboundary-cooperation-making-a-problem-bigger> accessed 30 October 2019, para. 6; WWF-Greater Mekong, 'Mekong River In the Economy' report (*WWF-Greater Mekong* November 2016) <http://d2ouvy59p0dg6k.cloudfront.net/downloads/mekong_river_in_the_economy.pdf> accessed 5 March 2021, 115

[857] Molle, Foran and Floch (n 567) 6 and 9

[858] Matthews and Geheb 'On dams, demons and development' (n 696) 4

[859] Molle, Foran and Floch (n 567) 6 and 9

suggesting the eleven dams' project. Laos is still determined and progressing towards developing these dams, despite changes in circumstances, the growing oppositions based on new data and the increased awareness of transboundary environmental and social effects. The pressing need for economic growth felt by the country, as well as contractual obligations to deliver on these power purchase agreements, reinforce the sole focus on hydropower and economic development within Laos.

To advance its overall focus on hydropower projects, Laos has developed national regulations and laws relating to hydropower economic but also environmental and social aspects.[860] Current policy documents, like the National Socio-Economic Development Strategy for 2016-2025, refer to hydropower projects as a key tool for development. The 2005 National policy on 'Environmental and Social Sustainability of the hydropower sector in Lao PDR'[861] can also be considered as an instrument participating to the goal of hydropower development and to environment and social considerations. After a degree of political stability and economic opening had occurred in Laos, external interests in the Lao hydropower potential contributed to shaping the legal environment to favour the development of dams in the country.[862] External donors and non-State actors have influenced Laos' legislation towards more environmental and social protection. Laos especially strengthened investment security in the national legal system in order to attract FDI.[863] For the construction of the Nam Theun 2 dam in 2005, Laos has developed documents clearly satisfying demands from external donors to support a more sustainable and economically secure project. Some of these documents are the 2004 National Resettlement Guidelines, 2003 the Third Party Monitoring Guidelines for the Energy and Transport Sectors, as well as the National Public Involvement Guidelines.[864] Laos has described the standards for hydropower project planning as follows:

> All large hydropower projects must produce a full Environmental Impact Assessment (EIA) and Environmental Management Plan (EMP); The right of all project-affected people will be recognized, and achieved through a Resettlement & Social Development Plan; A watershed adaptive management and participatory planning strategy will be developed to stabilize land use, and manage Protected Areas; Consultations will be conducted with all project-affected communities;

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[860] Robert A. R. Oliver, Patricia Moore and Kate Lazarus (eds.), '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 30 October 2019, 45

[861] 'National Policy. Environmental and Social Sustainability of the Hydropower Sector in Lao PDR' No.561/CPI (*International Rivers*, 7 June 2005) <www.internationalrivers.org/sites/default/files/attached-files/lao_national_policy_hydropower_0.pdf> accessed 30 October 2019

[862] Hatthachan Phimphanthavong, 'Economic Reform and Regional Development of Laos' (2012) 3(2) *Modern Economy*, section '1.Introduction' para. 2

[863] Ahlers, Zwarteveen and Bakker (n 580) 565

[864] Oliver, Moore and Lazarus (n 860) 48

Revenue sharing with the Environment Protection Fund (EPF); Ensure financial and technical sustainability of the Project.[865]

In general, the laws and regulation of Laos regarding hydropower are considered as providing the opportunity for public access to information and participation[866], and as having the most comprehensive EIA regulation out of the LMRB countries[867]. All large dam projects need a full report of their EIA and Environmental Management Plan.[868] Its EIA is considered in 2010 as 'largely compatible with international guidelines'.[869]

However, these improvements and level of 'good practice' might not be indicative of the reality on the ground.[870] Even with good governance for hydropower projects, Laos has asserted its willingness for hydropower development not to be tied or burdened by it. Laos declared that it will not use the strenuous and costly standards and procedures imposed by the World Bank and other external donors for future hydropower projects.[871] In relation to the regional legal environment for national hydropower projects, Laos argues that it is indeed cooperating by following the 2016 Basin Development Strategy and abiding by the PNPCA procedures.[872] Laos relies on Equitable and Reasonable Utilisation to justify the development of hydropower and it emphasizes the right given in the Mekong Agreement for countries to develop their plans, both on the tributaries and mainstream (while considering and addressing the risks).[873] Laos highlights on the one hand their cooperation and good faith at the basin level. On the other hand, a presentation from the ministry of energy and mines regarding the Pak Beng dam has, for example, warned its neighbouring countries that Laos could not be prevented from the opportunity to develop and that it expected only constructive criticisms from the PNPCA procedures.[874] This

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[865] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (Mekong River Commission document, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 11

[866] Oliver, Moore and Lazarus (n 860) 47

[867] Bearden (n 597)

[868] Jusi (n 671) 203

[869] Ibid

[870] Boer, Hirsch et al. (n 343) 180; This was quoted and pointed out again by Lebel (n 710)

[871] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 13-14

[872] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 7

[873] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 4 and slide 7

[874] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019, slide 16

mention clearly draws the line between the cooperation and compromise and the national interests and plans justified by State sovereignty. On an international level, Laos is bound its ratification of some agreements relating to environmental and human rights policies, such as the 1992 Convention on Biodiversity, the Ramsar Convention, the Paris Agreement and the ICESCR.[875] The country also needs to abide by customary law, like the principles of ERU, cooperation and good faith, and the duty not to cause significant harm.

So, on a general note, Lao regulations and laws regarding the development of hydropower seem to be structured. They seem to be taking into account regional and international documents or 'good practice', like EIA procedures. Some have referred to these specific laws as a model or good on paper for hydropower and for the region.[876] However, it is important to note that in reality a lack of implementation, willingness, capacity or efficiency can often make hydropower projects unbalanced and unsustainable (with economic, environmental and human rights issues).[877] This often results in contradiction or disregard for the key principles of hydropower regulation mentioned in part I (like cooperation, equitable and reasonable utilisation, attention paid to indigenous populations or responsibility of the State towards human rights).

Finally, the national presentation above can be limited, for instance because national interests and regulations will vary from country to country. Nevertheless, considering a national insight is particularly relevant because of the importance of this scale, its actors especially the States, and regimes for hydropower development.

In summary, the outlook given in part I is a partial introduction to the complex and broad legal environment of hydropower development on the LMRB. This part had the ambition to provide an overview of some of the various actors, scales and legal regimes influencing hydropower regulation in the Mekong. It also made specific references to the case of the Xayaburi dam in Laos. The section provided a certain context and practical insight into the legal plurality mentioned in abstract in the first chapters, specifically for the

[875] Laos has ratified the Convention on Biodiversity and the Convention on International Trade in Endangered Species of Fauna and Flora (CITES) in 2004 and the Ramsar Convention on Wetlands of International Importance in 2010. See 'Biodiversity and sustainable development goals in Lao PDR: Capitalising on coordinated efforts' (IUCN, 28 February 2017) <https://www.iucn.org/news/asia/201702/biodiversity-and-sustainable-development-goals-lao-pdr-capitalising-coordinated-efforts> accessed 11 March 2021; Laos has also ratified the ICESCR and ICCPR, see 'UN Treaty Body Database' (*United Nations Human Rights Treaty Bodies*) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=94&Lang=EN> accessed 11 March 2021; Laos has also ratified the Paris Agreement and the Kyoto Protocol, see 'Lao People's Democratic Republic' (UNFCCC) <https://unfccc.int/node/61096> accessed 11 March 2021

[876] Boer, Hirsch et al. (n 343) 180

[877] Jusi (n 671) 204; Johns (n 577) 363-364

LMRB. This outlook provides some useful insights, despite its non-exhaustive nature. The description made here was organised in a way to look separately at some actors, scales and regimes. But it is key to see those interlinkages and cross-sectionality can already be distinguished.

It has been mentioned in the introduction that the separation of each scale presented is artificial. Cross-scalar influence, cross-referencing and adoption of rules within another sub-legal system are common and visible despite a divided presentation. In addition, actors and instruments introduced often do not belong to a single specific category. A key example can be the MRC. Inherently, an actor like the Mekong River Commission relates to several regimes, both tackling economic, and some environmental or human rights issues. It has shown so even in its interest in hydropower development, both supporting projects but consulting populations, requesting external scientific studies on socio-environmental issues, and protecting fisheries. Also, the MRC involves various actors, like member States, their national committees, international donors, NGOs with observer status and some public participation. Finally, the MRC alone is multi-scalar, established at the regional level, with national subject matters like the discussion over the Xayaburi dam, an international scale as operating between several States, and also including local reports and participation.

In addition, in the presentation of the legal environment of hydropower in the LMRB, already existing connections between each category have naturally been hinted at in their description. Dynamics of expansion or linkages towards other regimes, actors or scales was displayed in the descriptions. Normative elements such as the various actors have influenced and expanded beyond the categories originally perceived to be theirs, from local level or from an environmental regime for instance. Such links can already be identified in this divided presentation. Indeed, the cross-referencing between different regimes, the partnerships between different actors or by the implementation or influence of a normative behaviour from an authoritative source are creating links. For instance, the Mekong Agreement makes mention of principles of international law. The OECD responsible business conduct guidelines mention of regimes on human rights and environmental protection. NGOs and individual actors and local communities often partner and work together to bring claims forward or protect their interests.

These cross-category dynamics can even promote an internal evolution of each normative element. These elements evolve towards having more open, adaptive, and multi-dimensional natures. For example, the economically focused WB has increasingly shown environmental concerns and opened its regime to the influence of environmental standards like the EIA or to practice of resettlement. The strongly State-focused MRC has increasingly opened to more individual and public participation, as well as to NGOs like

WWF. These internal changes and cross-fertilization of regimes, scales and actors are due to interlinkages which are come from the simultaneous application of diverse normative elements. Their cohabitation in the legal environment creates cross-sectional dynamics. Despite the compartmentalised and individualised presentation of the legal environment made in this section, interlinkages and cross-sectional dynamics show through. They show the need to reflect and analyse the interconnected nature of this legal environment and its legal pluralism. The initial assumption that the division and categorisation of the elements presented was artificial and incomplete is then confirmed. An accurate, informed and complete account of the legal environment of hydropower development in the LMRB would then provide a representation and analysis showing interlinkages. This reinforces the requirement for a realistic insight with a pluralist, holistic and, importantly, interconnected approach. Therefore, it is now crucial to consider this legal environment as being influenced by interactions occurring across and beyond set categories. This is characteristic of a transnational legal space as introduced in the previous chapter. The use of this analytical framework is suitable for the study of the hydropower legal environment in the LMRB and its legal pluralism.

II- The Lower Mekong River Basin as a transnational legal space: an approach reflecting the transboundary intersections and dynamics within the Basin?

The snapshot given of the legal environment represents a glimpse of the legal pluralism developing in the LMRB. However, the legal environment is not presented in a way that captures the dynamics and interlinkages occurring and affecting the overall hydropower governance. While acknowledging legal pluralism and interconnectivity as part of hydropower regulation in the LMRB (in section I) -and as part of international law (Chapter 2)- there is still a lack of an appropriate approach to reflecting these phenomena. Such a distinct approach, to bring an integrated and interconnected outlook to the legal environment, requires focus on the dynamics and critical intersections of all actors, scales and regimes presented above. As presented in Chapter 3, such an approach can be based on a transnational law approach.

The legal environment of hydropower in the LMRB has been studied in various ways, especially to consider its legal pluralism.[878] But further attention can be brought on the interconnections existing between each normative element. Several authors have pointed out the need to consider more cross-category, transnational and transboundary

[878] Some examples can be the study of NGOs in the MRB by Yasuda (n 645), or the description of the different actors in Boer, Hirsch et al. (n 343) or Bearden (n 597)

dimensions in the LMRB.[879] In line with this ambition, this section will use the concept of transnational law to consider this legal environment as a transnational legal space. It can be considered as a transnational legal space as it displays a characteristic move away from traditional conceptualisations of international law towards a dynamic, multi-dimensional and cross-sectional legal space. The examination of a transnational legal space of the LMRB would lead to a reflection on the dynamics occurring between the various legal discourses presented in the previous section. More importantly, these interactions and dynamics, of convergences, conflicts or gaps, will allow the study to acknowledge the cumulative effect of legal pluralism in the LMRB. In turn, it will contribute to reflecting on an overall integrated approach to this legal environment.

A- The evolution of the legal environment of hydropower in the LMRB away from traditional international law conceptions

A central element of modern international issues (as seen in chapters 1 and 2) and of transnational law (highlighted in chapter 3) is a move away from a traditional and compartmentalised vision. This evolution transpires progressively in hydropower governance in the LMRB. As examined in chapter 3, the dissociation from the conceptualisations of traditional international law relates especially to a move away from State-related characteristics and divides. The following sections will examine a similar structure of inquiry into this phenomenon as in chapter 3 in the practical context of the LMRB and hydropower. These sub-sections will only develop evidences of a less central influence of the State and of the national scale. It is keeping in mind the prominent role they still play in this context. It is also worth noting that the context and dynamics presented here are captured at a specific mark in time in the evolution of the legal environment in the LMRB and hydropower.

1/Territoriality and the challenge of the national scale of authority in hydropower development in the LMRB

Critics have denounced the focus on the national territory hosting the dam or on a very limited transboundary range considered in the EIAs and in public participation procedures.[880] An example of limited range is the EIA conducted for the Xayaburi. This EIA has evaluated impacts up to 10km downstream of the construction site, disregarding

[879] Johns, Saul et al. (n 519) 159-161; Hensengerth 'Water Governance in the Mekong Basin' (n 531) 2

[880] For the Xayaburi dam, see 'Xayaburi Dam' (*International Rivers*) <www.internationalrivers.org/campaigns/xayaburi-dam> accessed 29 October 2019, para. 5; Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019

the hundreds of kilometres of impact downstream of large mainstream dams.[881] Likewise, the importance of territoriality in the regime of the Mekong Agreement has been criticized. For instance, it leaves the regulation of tributaries' exploitation up to national sovereignty, instead of including it in its cooperative scope and respecting their connection with the mainstream.[882] The construction of hydropower projects on tributaries of the Mekong river depends on each country.[883] The notification of such projects is only suggested by the MA, regardless of their contribution sometimes important to the flow of the mainstream.[884] This stance is justified mostly by the often national geographical location of such streams and the greater assertion of national sovereignty over them. However, the growing awareness and critics against this position show a reassessment of a territorial vision of hydropower on the Mekong. These comments increase the attention given to a more transboundary, cross-scale approach. Legal discourses on the Mekong River also suggest a commitment to a more basin approach, like the commitment of the MRC to the IWRM in its 2011 basin plan.[885] It shows the importance for countries to consider transboundary effects in the development of their national plans. This move away from territoriality in hydropower regulation has already started more visibly with the legal claims brought to extra-territorial judicial or reporting systems and engaging the responsibility of States and businesses. Claims are mostly filed according to territoriality and jurisdiction of the national courts. But a growing number of Extra-Territorial Obligations (ETO) claims are introduced, for example to Thai courts or to the National Human Rights Commission of Thailand (NHRCT).[886] Other scenarios have showed a greater acknowledgement of the transboundary nature of impacts caused by companies, in their home country or overseas. Non-nationals have been represented or sought representation in another national court regarding complaints for actions within their home territory. An example is a complaint filed by Cambodian nationals seeking to file against Thai companies' activities in Cambodia to a Thai court.[887] These claims can be facilitated through international or

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[881] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 14

[882] Bearden (n 597)

[883] Mekong Agreement article 5

[884] Mekong Agreement article 5; Mentioned by Boer, Hirsch et al. (n 343) 96

[885] John Dore, Lebel and Molle (n 791) part 3.4 para. 2

[886] Carl Middleton, 'National human rights institutions, extraterritorial obligations, and hydropower in Southeast Asia: Implications of the region's authoritarian turn' (2018) 11(1) *Austrian Journal of South-East Asian Studies* 81, 82-83; *B&HRC* 'Xayaburi dam lawsuit' (n 18)

[887] This complaint was brought by plaintiffs from Cambodian farming families against the Thai company Mitr Phol for damages and violation of human rights in Cambodia. This case addresses sugarcane plantation and illegal land grabbing but sets a precedent or opens up possibilities for foreign plaintiffs to bring suits in a country against damages done in the host country. See 'Thai court accepts Cambodian land grabbing case, orders mediation' (*Inclusive Development International*, 5 September 2018) <https://www.inclusivedevelopment.net/cambodia/thai-court-accepts-cambodian-land-grabbing-case-orders-mediation/?__cf_chl_jschl_tk__=a0ccfc500ea89a6f4452e94cfaba1095a2b5b3b6-1615732201-0-

regional NGOs to file a complaint in the domestic legal system against a national activity happening abroad.[888] Another case recognising transboundary impacts and damages from overseas activities which are legally sanctioned is the *Niwat v Electricity Generating Authority of Thailand*. [889] Thai nationals have filed a lawsuit against the Thai government agencies and EGAT about the illegality of the Power Purchase Agreement from the Xayaburi dam in Laos, occurring before any consultation or EIA procedures. This last case has attracted a lot of attention and set a precedence to create more accountability for Thailand's investments, energy purchase and constructions in hydropower in other countries like it often the case in Laos.

2/State-centric decisions and rules

As seen with the legal environment presented in part I, many new actors and regimes have emerged in hydropower regulation in the LMRB, in addition to the State. Various actors exert influence which is external to the State, such as: international organisations like the World Bank, regional organisations like the MRC, NGOs like International Rivers or WWF, researchers and academics, private actors and companies like Pöyry and Mekong River Commission donors, or even individuals or civil society groups, like villagers or the Assembly of the Poor[890]. These non-State actors have participated in the knowledge-creation, regulation and decision-making in the LMRB hydropower development.[891] Their related influential documents have gradually gained a certain normative value and authority. Such normative role can vary in its actual influence and impacts, and it can also be overlooked by traditional State-centric actors. But it marks the inevitable departure from traditional conceptualisations of the centrality of the State as the only actor and source of normativity. For example, traditionally governmental forum like the ASEAN meeting have seen the rise of parallel meetings of civil society organisations.[892] Governmental fora have sometimes been pressed to open up, to a certain extent, the dialogue with such non-state actors and their suggestions. This can be seen occasionally with the ASEAN People's Assembly, parallelly to the ASEAN

AS9yy1R_y4exPvtkWyNbOlE0Xr18G4r8fFhJKato6dXhcTlqcN98YBhxpHVnKBlmndKjS791Yx1D70yv9e0S91lwZdYWwEc8j8eMMyJ09Zb2vQ8dyYrmce3zTFGaiZBEeCQcEIzUGKLVsf7GE13tpXRkbbPaVvLw9HGmOKb5ZyfYG1Wz2qIXpgiZSweDM7hzrJf-1Kmzp4MfaUpTMPWKzGQhEycVZMQ5E8uHaBOJcsaIfIOxF9BdWDTpNd00EjP10ApkJyXjTfn097UehlaJNIQVEuMvvk_dx74rwhWCdy3C7XMcJdiMZw-le0CK2TB3L2O-f8HQoSq_OYpiilcpfYzGG_lRPWVzDqIvTeUkMGW09Cm8yhEswVUzXKK5mbp5n9PlZ52DDnfx-7mbwIpqeAQAwkLVnGcBG5LaxR95OeIs> accessed 13 March 2021

[888] 'Human Rights Commission Report Highlights Lack of Accountability in Don Sahong Dam Project' (*Earthrights International*) <https://earthrights.org/media/human-rights-commission-report-highlights-lack-of-accountability-in-don-sahong-dam-project/> accessed 26 April 2020

[889] *B&HRC* 'Xayaburi dam lawsuit' (n 18) para. 1 and para. 3-4; Boer, Hirsch et al. (n 343) 89; Armstrong (n 735) 37

[890] Sangkhamanee (n 551) 85

[891] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 3

[892] Kelly Gerard, 'From the ASEAN People's Assembly to the ASEAN Civil Society Conference: the boundaries of civil society advocacy' (2013) 19(4) *Contemporary Politics*; 'CSO and ASEAN Forums' (*Human Rights in ASEAN*) < https://humanrightsinasean.info/cso-and-asean-forums/> accessed 12 March 2021, section 'CSO Forums'

meetings.[893] Despite a lack of institutionalised or formal influence, a big part of hydropower's influential sources in the LMRB now come from other actors than the State. The State representation and centrality is clearly not absolute anymore. For instance, some companies have even conducted consultations or public participation without the intermediary of the State.[894] NGOs train both companies on sustainable practices and communities with public participation and rights, establishing a direct, non-State connection.[895] The growing number and influence of different types of actors have built a layer of normativity. This leads States to share the scene with non-state actors as regulatory actors for hydropower development in the LMRB.[896]

3/Hard law and binding rules

In a similar way, binding, hard law coming from sources such as treaties, national legislation or other more formal instruments is not the only type of normative influence used in the legal environment of hydropower in the LMRB. Different types of norms have been previously mentioned, such the recommendations from the IHA, the guidelines and codes of conducts from the OECD or companies, the studies from bodies like the MRC or even the reports and declarations from NGOs and CSOs. The legal environment of hydropower on the LMRB has evolved away from the development and consideration of primarily hard law and more formal rules to including various soft law and informal instruments. The soft law and non-state legal discourses appearing in the legal environment of hydropower can be considered the immersed part of the normative iceberg. This part is often not as visible or accounted for, but it represents a substantial and expanding part of the legal environment of hydropower in the LMRB, under the surface of traditional international law.

4/Private and public (law) divide

The private-public divide within traditional international law is less distinct in the legal environment of hydropower in the LMRB. A considerable number of public-private partnerships is taking place in the sector of hydropower in order to make the concessions both efficient and profitable.[897] Most often, public or state-owned companies are the main concessioners of the dam or buyers of the energy produced, like EGAT. The involvement

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[893] Noel M. Morada, 'APA and Track 2$^{1/2}$ Diplomacy: The Role of the ASEAN People's Assembly in Building an ASEAN Community' (2007) People's ASEAN and Governments' ASEAN <http://library.fes.de/pdf-files/bueros/singapur/04601/2007-3/morada.pdf> accessed 31 October 2019

[894] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 11

[895] Ibid

[896] 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*

[897] Paisley, R. Denoon, T. Etmanski and P. Weiler, 'Transboundary Waters, Infrastructure Development and Public Private Partnerships: Through the Prism of the Nam Theun 2 and Xayaburi Hydropower Projects' (2017) 2(4) *Brill Research Perspectives in International Water Law* 1, 10-11; 'Hydropower dams' (*OpenDevelopment Mekong*, 22 December 2017) <https://opendevelopmentmekong.net/topics/hydropower/> accessed 10 March 2021, section 'Regional Investment' para. 2

of the State with private companies, in order to carry out hydropower projects, makes it difficult to consider if the issue is clearly dependent on private or public areas of law. Both private contract law and of public administrative law are used. The different types of actors involved, such as private companies and investors as well as States and ministries, also participate to blurring the nature of hydropower legal environment.

5/The international and national scalar divide

The divide between national and international scales is also blurred within the legal environment of hydropower. The LMRB presents a well-established and developed governance at the regional level, through the MRC and the ADB for example. For the Mekong water resources, regional actors and regimes are central to the legal environment. They are emphasized as the adequate, basin-level at which to manage the resources, with the centrality of IWRM for example. In this perspective, the regional level should be the main scale of governance so as to respect the integrity of the river basin. A lot of emphasis is also gradually brought on the local scale. The local scale of normative influence is becoming increasingly visible and important. The local scale often refers to both lower degrees of governmental regulation (depending how decentralised and delegated authority is in a country) and to the local populations affected and participating on a more targeted, smaller scale. The international community itself often pushes forward the local scale, important to consider the closest scale to the project level. It promotes the involvement of the communities, more directly and strongly affected by these projects as opposed to more general, national policies. Parts of the national populations are often unequally bearing the consequences of transboundary dam projects (e.g. through loss of livelihoods, resettlements or displacement from the dam site).[898] It is often justified for the advancement and benefits of the overall national population (e.g. overall economic development and energy provision to cities). In the MRB, these factors have led to a growing attention given to these populations, through the promotion of indigenous rights, the capacity-building of these groups (through NGOs), grouping into civil society groups for protests or civil suits against the states and companies. EIAs and public participation processes have promoted a greater attention to the local level (also in a transboundary way). In addition, various tools are being developed, like individuals' right to access information and the recognition of groups' or individuals' participation at the international and regional levels (through the MRC opening up to the public and public comments for example).

In summary, the legal environment of hydropower in the Lower Mekong River Basin displays the characteristics of a transition away from traditional international law conceptualisations based on the State. This phenomenon is an on-going process. This

[898] Intralawan, Smajgl et al. (n 8) 14

does not imply the disappearance of the State or the rejection of all categories traditionally used but moves past it, nuances and opens categories and divides.[899] This dynamic has been considered as a central characteristic of transnational law and of transboundary issues. Therefore, the Lower Mekong River Basin is not being adequately framed and understood through solely traditional international law concepts. It calls for a representation of the plurality of actors, scales and regimes beyond the State and legal categories, as well as reflecting the interactions between these legal discourses. This description and objective fit the characteristics of a transnational legal space. Studies into the socio-legal environment of hydropower in the LMRB have also concluded that more reflection needs to be done on the aspects presented above, going beyond traditional international law's classifications, like the dichotomy between soft and hard law.[900] An introspection focused on the non-binary or opposite relationship between traditional legal categories, or law and 'non'-law, could provide a different approach to normativity in modern issues like hydropower in the LMRB. In general and in hydropower, sustainable development is based on the integration of the three pillars, their often-competing interests and the interrelationship between the different normative elements.[901] A transnational law approach could contribute to exploring the present trans-category dynamics in a holistic and interconnected way. This would attempt to distance itself from common compartmentalised inquiries into the study of legal pluralism present in the LMRB and their content.

B- The Lower Mekong River Basin as a transnational legal space: addressing the legal environment beyond traditional legal categories for an integrated approach?

Another characteristic of transnational law displayed in the legal environment of hydropower in the LMRB is a move towards a dynamic, multi-categories and cross-categories legal environment.

Both the evolution of international legal theory (in chapter 3) and the practical overview of the LMRB case have shown that legal plurality is generally present and acknowledged as a phenomenon of modern legal environments. This is especially visible in transboundary issues, like with hydropower projects on shared rivers. In both cases, the legal diversity is generally dealt with through the traditional legal categories, used to represent and analyse a legal environment. However, a more complex and intricate factor for international law to capture is the dynamics and interactions present between the different legal discourses. They are also often occurring across categories. As considered both in theory and with the hint of an interconnected legal environment of hydropower in the LMRB, each

[899] Suhardiman and Giordano (n 264) 975
[900] Johns, Saul et al. (n 519)161 and 163;

[901] Jusi (n 671) 202

normative legal discourse presented interacts with other and has a combined impact constituting the legal environment. These dynamics are important to focus on. It would provide a more accurate and holistic representation and analysis of the cumulative effect and the interactions participating or not to a more integrated approach. As examined in chapter 3, the dynamics and interactions within a legal environment are a central element to a transnational law approach. It especially emphasizes interactions in a trans-category way. The influence of transnational dynamics, and therefore of intersections between the dynamic legal discourses, on the legal environment in the LMRB is highlighted as a crucial aspect to study by Johns et al..[902] The transnational legal space created with this basin would help internalise externalities and govern elements that are naturally connected with a pluralist and holistic view.[903] For instance, the transboundary nature of the river would not be considered as possibly being governed within a national sovereign space and perspective only. Transboundary impacts would be integrant part of the evaluation of a national project. More than geographically, legal systems could not be separately looked at. For instance, from the perspective of national level with external influences like the international level which requires an additional effort and willingness to integrate. The interconnections highlighted by TNLS would link all factors on an equal footing and allow for an overall view and not a governance selective of the normative elements to consider.

It is worth noting that the dynamics of actors, scales and legal regimes examined in the following sections are constantly changing, as well as the nature of their intersections. Therefore, considering the LMRB as a transnational legal space in this research imposes a vision at specific moment in time and it cannot accurately represent or predict the dynamics to come.

1/The legal environment of hydropower in the LMRB and the case of transboundary rivers

The transnational legal character of hydropower development in the LMRB is closely linked to the transboundary nature of the river. When considering the concept of transnational law in chapter 3, the literature review has considered its spatial dimension. TNL, despite being related to a more conceptual, reflective legal space, can be associated on a primary level to a physical space. This physical and geographical anchoring in the LMRB is important to the consideration of legal pluralism and of the transboundary dynamics.[904]

The physical transboundary nature is already present in the LMRB as a sharing a watercourse crossing six countries. Linkages between different categories of actors, scales and regimes, can be seen, starting from a physical link across borders. Being transboundary, the frame of the LMRB creates natural bridges and interactions between

[902] Johns, Saul et al. (n 519) 164 and 173
[903] Moran, Lopez et al. (n 672) 4
[904] Melissaris (n 521) 64

the States for example their economies and other spheres of regulation and interests. Trade is often done within the basin, like energy trade between China, Laos and Thailand or tourism alongside the Mekong river. Transboundary characteristics are traditionally framed in law and in politics according to borders and jurisdictions. But these transboundary interlinkages cannot be accurately and holistically captured according to these physical and political boundaries. They can be better represented and enhanced by transboundary classifications, like transnational law. This aspect of the hydropower development in the LMRB influences the nature of the issue and its legal environment with transboundary actors, scales and regimes developing. The more accurate approach to the transboundary nature of the river given by transnational law and the use of a spatial representation connecting the transboundary physical aspect to the normative regime for the LMRB shows the suitability and opportunity given by the concept of TNL.

2/A multi-level and especially trans-categories concept

Legal plurality brings about several levels or layers of rules applicable to a single issue. For hydropower, broadly two or three legal systems are generally considered for as part of the legal environment –such as the host country's national law, international law and maybe the companies' home country's national law.[905] However, this pluralist approach does not represent these normative layers as interconnected, as well as cumulatively building the legal environment of the issue. The presence of interconnections between regimes, scales and actors in a legal environment requires not only a perspective that lists and considers holistically the various normative elements. This multi-level approach would not reflect their general connections, synergies, compatibilities or conflict. The legal environment of hydropower in the LMRB is indeed multi-level but also interconnected and trans-category.

An example of the trans-category rules applying to hydropower can be the duty to conduct an EIA. This duty, as mentioned before, can be considered to cross different fields and is not only cloistered to environmental considerations nor social ones. It includes also economic aspects, without initially representing an anti-hydropower discourse. In terms of actors, EIAs are also trans-category and are not reserved to private consulting actors or States but can be conducted by and include several actors. In relation to scales, EIAs are not only geographically transboundary but also abstractly belong to several scales. EIAs can be found at national, regional and international levels. Then, EIAs could be considered as being duplicated, overlapping or slightly varying between scales. This is due to the vision of divide between the legal scales and because of the differences in their formulations and contents for each scale. A multi-level approach to EIAs in the LMRB legal environment could enumerate this duty within each scale and consider the

[905] Moran, Lopez et al. (n 672) 4

application of one of these versions to a project, generally at the national and smallest scale. However, these different EIA regulations could also be considered as heterogenous versions of one EIA duty. They would have mutually reinforcing, informative or mirroring natures. In this case, the duty to conduct an EIA within the hydropower legal environment could be approached as a unique, trans-category principle and not only as multi-level, juxtaposed rules. In turn, this would allow the consideration of the different EIA rules as interconnected and cumulative in their effect on the legal environment of a hydropower project in the LMRB.

The consideration of the transnational aspects of legal discourses or rules could present the advantage of joining several approaches to a certain normative expectation. It would lead to examine the principle of the rule, its intent despite varying provisions and other versions would help fill the gaps and counter-balance different approaches of the rule.[906] In the case of companies or actors having to consider their existence in relation to different scales, actors and regimes for a sole project, a transnational approach to the hydropower legal environment might make easier the burdensome consideration of existing on different planes and having to adapt to various standards.[907] A single approach would be taken which would link all scales or regimes together if they regulate the same topic.

The interconnected and holistic approach to the many transnational dynamics existing in a legal environment like hydropower in the LMRB would frame a conceptual space. But the creation of such a conceptual space, gathering these normative elements and accounting for their interactions, differs from an idea of uniformization. The vision of the Lower Mekong River Basin as a transnational legal space does not create integration nor a comprehensive, uniform regime through an all-encompassing vision. However, what it does is to establish a space (with an opened scope but physically anchored on the sub-basin) highlighting the dynamics and interactions between various elements (actors, scales and regimes), taking place across and beyond borders and set legal categories. This space differs from an idea of conceptual uniformization as the plurality of legal discourses remains but informs the analysis of compatibilities between the different rules or their conflicts. It helps analyse and map the directions given to the legal environment.

The pluralist, holistic and interconnected approach of a TNLS aiming to represent and analyse various actors, scales and regimes addresses a key factor of both the objective of integration and of Jessup's vision for TNL: view together all elements that would influence a certain issue (including the three pillars of economic, environmental and social aspects). The transnational legal space considered here gathers together on the

[906] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 22
[907] Ibid 2

same normative plane the plurality of legal discourses identified in the first part. Integration also calls for a deeper representation and analysis of the dynamics and interactions occurring and influencing the overall situation. This transnational legal space could represent and guide the consideration the legal discourses presented. These legal discourses can evolve in isolation of each other but more importantly have a cumulative effect on hydropower legal environment. Therefore, the TNLS framed here will allow for more focus on a dynamic and interconnected approach of legal pluralism in hydropower regulation in the LMRB, to analyse in a more cumulative and integrated way the overall legal environment.[908]

C- The critical dynamics and interactions between legal discourses: conflicts, convergence and gaps as the key factors in reflecting on LMRB hydropower legal environment in an integrated way?

The conceptualisation of the legal environment of hydropower in the LMRB as a TNLS facilitates the attention towards the interactions between a variety of actors, regimes and scales. As considered above and in chapter 3, the dynamics and interactions between legal discourses have a cumulative effect. They can influence the overall legal environment through conflicts of rules or convergences for instance. Therefore, such interactions are key to represent accurately and analyse the legal environment of the LMRB for hydropower projects. Traditional international legal theory has mostly focused on a specific and restricted aspect of interactions which are negative, conflictual interactions. The other interactions influencing the legal environment, such as convergences, compatibilities or mismatches between legal discourses, need to be taken into account and studied to get a fuller picture.

The following section will introduce examples of the three types of dynamics and legal discourses' interactions, in the context of hydropower development in the LMRB. These examples will provide an insight into the interconnections already present between the legal discourses describes separately in part I. The section will also show the influence each of these types of interactions can have on the overall legal environment. This in turn will advance the need to consider interactions in the legal environment of hydropower in the LMRB to accurately represent and analyse it so as to contribute to a more integrated approach of it.

The work here will only introduce the description of the dynamics and some intersections observed and likely to occur within the LMRB hydropower legal environment.

[908] Johns, Saul et al. (n 519) 159

1/Conflictual interactions in the legal environment of hydropower in the LMRB

Conflictual interactions have been widely studied in the context of hydropower development in the LMRB.[909] These conflicts emerge from the tensions between the various legal categories[910] as well as between legal discourses from the three pillars, as mentioned in the context of sustainable development policy in chapter 1. Indeed, these conflicts are visible in hydropower development in the LMRB because of the strong position of state and national normative elements and economic factors. These elements, in addition to being favoured, are often in competition with environmental and human rights legal discourses. These tensions and competitive interactions are often pointed at by studies and can be visible in the legal claims or conciliation requiring the use of conflict of laws' approach. More perspective and reflectiveness can be introduced in the study of these interactions.

For example, generally economically oriented actors, like international banks or national ministries of energy, are often met with contestations and opposition from more environment and human rights-focused actors, such as NGOs or committees for international human rights instruments. The conflict between these three discourses could possibly lead to the disregard of one or the other discourse, to excessive trade-offs and then, to the unsustainability of the hydropower project at hand.

These interactions are not immutable and strict. They are part of a dynamic system. This requires the consideration of the position of conflictual interactions in the bigger picture of interactions occurring and informing on the overall legal environment. The type of interactions occurring between two legal discourses at a certain time does not decide definitively of a negative outcome between two legal discourses. It is very rare that a conflict of law or of legal discourses is based on a strict incompatibility. Interpretation is most often the way these conflicts are managed and articulated so that their meaning and implementation are compatible or so that the conflict is diffused.[911] Therefore, conflicts can depend on the flexibility and evolution of the two initial legal discourses. The TNLS set here allows for this evolutive perspective and consider the negative outcome of a conflictual interaction as a potentially spontaneous incompatibility. Because of a less binary approach of the TNLS, the vision of conflicts is part of a more dynamic and asymmetric legal environment. Then, the distinction conflict and non-conflict, or a

[909] See for example Ian White, *Water Management in the Mekong Delta: Changes, Conflicts and Opportunities* (UNESCO Paris 2002); Scott W.D. Pearse-Smith, ''Water war' in the Mekong Basin?' (2012) 53(2) *Asia Pacific viewpoint* 147;Thomas B. Wild and Daniel P. Loucks, 'Mitigating Dam Conflicts in the Mekong River Basin' (2015) *Conflict Resolution in Water Resources and Environmental Management* 25

[910] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 2

[911] This is advocated especially by the VCLT and the notion of systemic interpretation, Panos Merkouris, 'The Elements of Article 31(3)(c) of the VCLT and the Principle of Systemic Integration' in Panos Merkouris *Article 31(3)(c) VCLT and the Principle of Systemic Integration. Normative Shadows in Plato's Cave* (Brill, 2015)

spectrum in between, is extended to the possibility of conflict evolving in convergences and compatibilities as well.

2/Convergent and compatible interactions in the legal environment of hydropower in the LMRB

Convergence and compatible interactions have been defined previously as positive interactions where two or more legal discourses can be applied or promoted simultaneously without conflicts or with mutually beneficial effects. An example of convergent intersection between two legal discourses can relate to the human rights and environmental aspects in hydropower. Despite being distinct and pursuing different objectives at times, a convergence between environment and human rights is often noticed. Both of these legal discourses often bring concerns over the overly economic hydropower governance and its impacts especially touching socio-environmental aspects. Their claims and their objectives to balance hydropower projects for a more sustainable approach often intersect and converge. For example, damages to the Mekong river and to its ecosystem affect both the fisheries and the livelihoods of populations in the basin. Environmental and human rights discourses are advocating for a limitation or for a careful planning of hydropower projects. Indeed, the human rights and environmental losses are under-appreciated during these projects while economic benefits are disproportionately exaggerated.[912]

Another example of convergent interaction within the LMRB hydropower governance can be the compliance or adherence of some private economic actors to standards (regional or international) that can promote either similar discourses or promote objectives bringing compatibilities or mutual benefits. These convergences can be planned, strategic or naturally occurring.[913] But they are important because of the connections, synergies, and reinforcement they can create in the legal environment of hydropower between different actors, regimes or scales.[914] Private investors like banks from China adhering to the Equator Principles is a sign of strategic synergy and convergence with a different discourse from an international soft law document, which is mindful of environmental and social issues in the conduct of business. The discourse of environmental and social corporate responsibility is both creating and feeding compatible intersections between economic, human rights and environmental aspects of hydropower regulation.

Several actors, legal discourses and different scales share a commitment to sustainable development within the Basin. This creates a converging aspect and synergies for these discourses, regardless of legal categories. For instance, this goal is common to the World

[912] Lyu (n 13) 67; Ahlers, Zwarteveen and Bakker (n 580) 556
[913] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 22
[914] Ibid 4

Bank[915] (as an international economic governmental actor), to the Mekong Agreement (as a regional treaty), to States or even NGOs (international, regional or national non-State actors, often promoting soft law documents on environmental and human rights' protection). This then allows for a convergence between different scales, actors and regimes, despite the variations present in the details of this goal and the method to pursue it. In addition, the synergies promoted between the SDGs can create interlinkages between legal discourses despite their different commitments to one or another goal. The SDG 7 on the promotion of clean energy can be pushed forward by economic and investment actors in the LMRB as their contribution to a sustainable development. Other actors, defending socio-environmental interests, can be advocating on the other hand for the SDG 6 for drinking water and SDG 14 and 15, respectively for life below water and life on land. These different objectives, separately pursued are still connected by the general Agenda and the promotion of integration, seen in chapter 1.

In terms of converging discourses between different actors within the LMRB hydropower regulation, an example can be the possible compatibility and mutual reinforcement of the discourse of affected populations and NGOs with the discourse of the Chinese State. The Chinese government has displayed concern for its image and interest for green policy and green investment. Therefore, it controls more tightly the bad press and environmental controversies involving its national companies.[916] China has emphasized to its companies the respect of host countries' laws and it has adopted a strict position to prevent environmental issues from its companies working abroad.[917] This has led local populations in the LMRB to report or put forward claims to the China against Chinese companies or against projects in which they are involved that are causing environmental damages.[918] This illustrates the presence of trans-national and trans-category interactions between different actors, when their legal discourses create a certain compatibility or convergence.

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[915] The World Bank, 'Sustainable Development Goals (SDGs) and the 2030 Agenda' (*The World Bank*) <www.worldbank.org/en/programs/sdgs-2030-agenda> accessed 31 October 2019

[916] 'Safeguarding People and the Environment in Chinese Investments' (*Follow the Money to justice*) <https://www.followingthemoney.org/chapters/chinesestandards/?__cf_chl_jschl_tk__=2606f6bf4258ac774f12f606a2f5c8377673c821-1615668954-0-ATp8zudSGa9YifmvPFxzca-rinY_MGMqtYQqWqhIhTbtrtqrctGkTnlfpsvSMzq38qjWtaaPQSthwQuXT_6bMnqKMu04L6nnDEF_h89pEOowFSgDWi9asyTrE_6lZkm6XIfChD-9vfn0zXZfiaS7Q2OczOFNmjotb5884A8AMFjKBInuTumkWEL8ZJ3rbOqQEBUpHdJ7BXO0EFWumtzYeP3t06PaKrEEDEYZZqty4cA1A-f0b_t0JHJQH94t_cD76m3kgnfwA2ZnTY9igG3wjK1cF1NuauHxBhqrTpgsvpfv_42LiIzYvjMWo3TU7rpCb55VkJyC25HFVHqfr9Vk5do0MB7-q5-KyEg8gMH_UUa7> accessed 12 March 2021

[917] Inclusive Development International, 'Safeguarding People and the Environment in Chinese Investments. A guide for community advocates' (*IDI*, 2017) <https://chinaenamericalatina.info/wp-content/uploads/2017/04/Safeguarding-People-and-the-Environment-in-Chinese-Investments.pdf> accessed 12 March 2021;

[918] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 6-7

This perception of convergences and synergies, especially in a transnational way as illustrated above, has been discusses as a possible way to reflect on the way legal discourses are separately positioned in a legal environment so far. The impact, cross-influence and even translation (in the sense of 'moving' to another legal discourse) need to be addressed.[919] The TNLS approach set here could participate to viewing, representing, understanding and analysing these legal discourses and their interactions. It gives a less compartmentalised approach to the legal environment. These points of convergences or compatibility can also participate to drawing the legal environment as a holistic interconnected system with potential critical intersections of cooperation and integration.

3/Interactions indicating gaps between legal discourses in the legal environment of hydropower in the LMRB

Gaps between legal discourses interacting can be due to gaps in regulation where a specific issue has not been addressed in law or in other normative documents. Gaps or mismatches between two different legal instruments, scales or actors can also result from a lack of consideration of the interlinkages and connections between them or not positioning them on the same plane of influence. For example, Bearden mentions that big discrepancies and differences between national water laws and policies and the regional Mekong Agreement regime can be found.[920] These gaps in the overall legal environment of hydropower projects are for example linked to a lack of translation between these two scales.[921] An interconnected approach between the different regimes is weak or absent. and of an interconnected approach to link different regime.

A more intersectional and transnational vision of the legal environment could potentially inform the gaps in interactions seen in the governance of hydropower projects. For instance, there was a gap of interpretation between the Mekong Agreement and Lao government regarding the start of the works conducted on the Xayaburi dam before the end of the PNPCA consultation period.[922] These works are considered either allowed 'preparatory works' or forbidden 'beginning of construction' of the dam project.[923] This gap

[919] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 22
[920] Bearden (n 597) 218
[921] Hensengerth 'Water Governance in the Mekong Basin' (n 531) 13
[922] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 13-14
[923] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 13-14

in interpretation could have been avoided and informed by the consideration of international standards (and the intention of the parties) and what measure would consist in good faith practice.[924] This gap in interpretation can strongly be linked to the political dimension of hydropower development and national agendas. It is worth noting that this mismatch can be linked back to the lack of a holistic view in governance (including other legal discourses from other scales) and the lack of attention to interconnections and transnational links (between rules on similar topics at the international and regional levels). The need to consider a broader normative context and other informative rules is examined in the VCLT with the systemic interpretation in article 31 (3)(c).[925] But this invitation to consider broadly the connections with other legal discourses and with the more general legal environment of a given issue to connect rules mainly refers to hard law and formal legal elements.

In summary, the approach of hydropower development in the LMRB as a transnational legal space allows to focus on the interactions in this multi-dimensional issue. The TNLS sets up a frame and background language that contributes to considering, in a pluralist, holistic and interconnected way, the different normative elements and especially the way they relate to each other. In addition, the creation of a TNLS helps examine more broadly the LMRB hydropower legal environment by including the transboundary and transnational nature of its normative elements, especially because of the shared water resource. The three types of interactions presented give an insight into a full and diverse picture of the legal environment, as opposed to more selective and manageable analysis referring to traditional international law.

The use of a TNLS analytical framework is suited to approach more accurately the legal environment of hydropower in the LMRB than the traditional legal approaches taken. The TNLS designed in the previous chapter has allowed to consider the case study of hydropower development in the LMRB in a more pluralist and integrated way. It both reflects and highlights its specific transnational and interconnected nature, beyond conflictual relations and strict categories.

[924] Kirk Herbertson, 'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement' (*International Rivers*, 13 January 2013) <https://data.opendevelopmentmekong.net/lo/dataset/bd77be0d-5d8c-477b-a595-08226f37b857/resource/0051356f-9ac7-49ec-b084-990ccbaa025b/download/intlriversanalysisofmekongagreementjanuary20130.pdf> accessed 29 October 2019, 13-14

[925] Merkouris (n 911)

III- The effectiveness of transnational law within the Mekong River Basin : reflections on the ideal use and application of TNL and its more realistic consideration within the basin

Part I of this Chapter has introduced the pluralist legal environment of hydropower development in the Lower Mekong River Basin. This introduction to a wide diversity of normative influences within the Lower Mekong River Basin, and for projects like the Xayaburi dam, has demonstrated the highly pluralist legal environment at hand. The section presented this pluralism in a list, introducing each element separately and disconnecting them. This division by actors, scales or by regimes can show a great fragmentation of jurisdiction and authority between the different normative influences in the LMRB. The fragmentation created here can open the gates for misreading and misunderstanding the pluralist legal environment within the LMRB. These issues echo the concerns about this growing phenomenon mentioned in Chapter 2. Two opposite problems and challenges can arise when faced with legal pluralism. A pluralist legal environment can either bring too many normative sources to follow, and confuse the application of law, or plurality can bring a selective and dominant view of a certain source over others to manage fragmentation. Indeed, a hydropower project on the Mekong can have too many normative assertions over the issue and rules to follow. All the rules applied will often conflict with each other to a certain degree. The second scenario of negative fragmentation is the issue of a selective take on a pluralist legal environment, discussed in Chapter 2. A hydropower project will selectively follow one scale, regime, or actor, thus uniformising pluralism and bringing a narrow and false representation of the issue. These projects, especially in transboundary basins like the LMRB, focus most often on the national level around the State. This is the case for most of the hydropower projects on the mainstream Mekong. Due to the nature of water and of the Basin, hydropower projects are transboundary and also fall under regional and international legal jurisdictions. However, hydropower projects are considered national projects, depending on sovereign territories and are often pushed forward by States, like China or Laos have done on the Mekong River Basin. The selective perspective of pluralism and ineffective regulation of the Basin come from a fragmented, disconnected vision of the legal environment.

The presentation in part I of the legal environment for hydropower development in the LMRB shows the need for a more pluralist, holistic and interconnected approach. As mentioned at the end of part I, the presentation of the pluralist legal environment of the LMRB without accounting for the links and interactions between each normative element is artificial. Therefore, the LMRB's hydropower legal environment needs an interconnected and transboundary approach to pluralism, in order to present a more effective, accurate

and informative representation of dam planning. Some of these interlinkages are already naturally built or existent. Some instruments mentioned in the legal environment of hydropower in the LMRB have featured other sources, from different actors or scales. The OECD MNE Guidelines for instance refer to international legal agreements like UN Guiding Principles on Business and Human Rights and the Aarhus Convention.[926]

Then, part II of this Chapter has aimed to look at the LMRB's legal environment as a TNLS to 'apply' TNL to create a new vision and analysis of the situation. Indeed, to best consider the legal pluralist environment of the LMRB, without falling into the traps of fragmentation, it would be appropriate and useful to consider the lens of a transnational legal space, established in Chapter 3. This lens has been fitted to pluralist and transboundary settings, with actors, scales and regimes evolving beyond and across traditional legal categories, like the ones in the LMRB. The design of an analytical framework, the Transnational Legal Space (TNLS), helps when elaborating a way to more practically frame the use of transnational law with a specific issue and convey its main characteristics. Establishing a TNLS within the LMRB is a way to frame the issue within the basin and to consider it with a transnational law lens. The section promotes a vision of the LMRB legal environment as a transnational legal space. It brings to light the existing characteristics of transnational law in the LMRB: a move away from traditional international law conceptualisations, the fundamental transboundary and transborder nature of the issue and the diversity of interactions already present in the legal environment of the LMRB. This TNLS approach connects together many normative discourses and presents a more appropriate representation, understanding and analysis of pluralism.

Finally, the current section will consider in more details the potential application and use of transnational law to the legal environment of hydropower projects within the LMRB. The opportunity and accessibility to use TNL are initial criteria to an effective TNL. For the application of transnational law, this section will consider the 'entry points' or 'access channels' within the legal environment of hydropower development in the LMRB. These channels will indicate where a transnational law approach could be referred to or used. It can include and range from formal and legal access within courts to more informal access through diplomatic, planning or NGO action channels. These various access points are often the cross-points of many normative discourses over hydropower projects. For instance, the space and time when discourses for and against hydropower projects or when State and non-State actors discussion can be an adequate introduction of a more transnational approach. Court decisions are a promising example of a key forum for hydropower regulation when and where to apply TNL. These access points can influence

[926] See Chapter 4 -I – A/ 2- (f)

the course of a hydropower development and the rules guiding it. The consideration and application of transnational law could and should occur throughout a project's decision-making phases, from planning, discussion to judicial cases for instance. Throughout the development of a hydropower project in the LMRB, several instances of 'entry points' can be observed, where an opportunity to apply transnational law is available. This section will consider certain moments and places where transnational law could be applied to a hydropower project on the LMRB.

First, the section will address the ideal context of application of transnational law within the hydropower legal environment within the LMRB and key points of application through formal and less formal channels. The second part will consider a more nuanced and realistic take on the use of transnational law within the basin, considering some limits of capacity and willingness that may make TNL less likely to be effective.

A-The ideal use of transnational law for hydropower projects in the LMRB: a pluralist and transboundary mindset throughout the development of hydropower plans

The following section will consider ideal circumstances in which transnational law could be used and show its application in the most propitious conditions.

1-Judicial 'entry point': Making TNL applicable within national court decisions and remedies

The judicial level, especially at the national scale, is a key entry point where international and transnational law can be applied. During a national court case, the judging authority can use international law, in addition to national law. International law can be considered more or less directly (as seen with the monist and dualist legal systems mentioned in Chapter 3) or could be mentioned as an informative or influential source of law. Then, a national case could be an entry point to introduce or refer to a more transnational legal approach. For instance, a national obligation can be read and applied in light of an international principle or when a national decision affects different actors at different scales (from local to global) in an indivisible way.

The *Niwat v. EGAT* case, mentioned in page 189, provides a good example of an entry point for transnational law at the national judicial level. This case opposes the Thai governmental agency of EGAT, and five other governmental bodies, to the group Rak Chiang Khong Group, gathering communities from Northern Thailand (lead by Niwat Roykaew) at proximity of the Lao-Thai border and of the Xayaburi dam. It has been filed under the claim that while signing the Power Purchase Agreement with the Lao Xayaburi Power Company Limited, the project lacked an assessment of transboundary health and environmental impacts as well as the lack of consultation under Thai Constitution. The

case is being argued in a national Thai court with claims based mainly on Thai national law. In addition, within the PPA, the governing law was set to be Thai Law, with dispute resolution in Thailand, in Thai and according to Thai arbitration rules.[927] The transboundary dimension of the case (being the external Xayaburi dam project built in Laos and having an impact on the shared river and ecosystems of the LMRB) is not the focus of the argument in this claim. The claim focuses more on the national part of the decision to support and invest in such a transboundary project.

Despite this exclusively national judicial context, a transnational approach can still be promoted. The contested document is the PPA made between parties from two countries. These parties have the right to enter into an international contract and through it, to fulfil their own interests, such as buying electricity from Laos for the energy-hungry Thailand. However, the document referred to is also an international agreement. It opens the possibility to consider international law and more specifically international contract law and international investment law. The domestic legal level is then connected to the framework of international law and to the transboundary level (by connecting the two scales and considering the impact of an international project at the national level). Transnational law approach could lie on the Power Purchase Agreement being more anchored in the basin, taking into account the effects of such hydropower projects at different scales and on different actors, including local populations.

Another instance of national judicial entry points for applying transnational law can be the consideration of Extra-Territorial Obligations (ETO). These cases refer to acts and decisions made by companies outside of their country. They can be dealt with by national courts and laws and enforce obligations and duties according to home law. This entry point is an interesting and promising way to include transnational law in hydropower projects regulation. The process to consider the respect of national rules abroad establishes a direct connection between extra-territorial activities and responsibilities according to national law. This connection requires a transnational and indivisible vision of the activities concerned. Indeed, this idea goes even beyond the respect of international law by companies conducting projects abroad. These extra-territorial activities are considered to be connected to home activities, beyond the borders and boundaries established in the basin. The use of ETO cases to provide a more transboundary and connected approach to hydropower regulation in the LMRB can palliate the effects of the legal fragmentation of scales, where the basin can be the sum of all the scales involved instead of a single transboundary basin where all activities are interconnected. For

[927] Ashwini Chitnis, 'The Xayaburi Power Purchase Agreement. An independent review' (*International Rivers*, August 2013) Executive summary, fourth paragraph, <https://archive.internationalrivers.org/sites/default/files/attached-files/xayaburi_dam_ppa_analysis_final_report_2013.pdf> accessed 1st October 2021

instance, in Thailand, an entry point for the examination of such ETO cases can be the Human Rights Commission for Thailand (HRCT). Cambodian farmers have indeed filed in Thailand a complaint against sugar producing Thai companies regarding land grabbing accusations.[928] The commission has considered the case out of its mandate but the examination of the claims in the first place has raised hopes for future cases to be heard. The LMRB is there considered connected and activities within the basin are transnational by nature.

The national judicial level is one of the most direct ways to influence hydropower projects, often considered national projects. Certain aspects of cases at the national level can provide an entry point for the application of transnational law and of a more transboundary approach to hydropower projects.

2-Adjudicatory 'entry point': other fora for the application of TNL

Aside from national judicial systems, other fora of adjudication are available to bring claims or concerns regarding a hydropower project on the LMRB. Their decisions, often not-legally binding or without an enforcement mechanism, still carry an influence on hydropower projects and their actors. These adjudicatory fora often include the participation of a broader range of actors, scales and regimes influencing issues, as promoted in transnational law. Some of these fora refer to soft law rules, like with the OECD's MNE Guidelines, and include other actors than States and international organisations. Such is the case of international arbitration institutions, like the International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce (ICC), the Permanent Court of Arbitration (PCA). The influence of these fora can vary but some, like the ICSID, the WTO dispute settlement mechanisms, the OECD investigations or the International Court of Justice, can influence investments, loans or even contracts.

For instance, the OECD has established a possible recourse for the breach of the MNE Guidelines by its member countries. Such a claim can be brought by any interested party to the relevant OECD National Contact Point (NCP) for investigation. This type of claim made to the OECD can still be influential in the course of a hydropower project. For instance, an investigation on or a decision against a certain project, company or country can influence the flow of foreign investment or the offer for partnerships from OECD countries especially. As mentioned in page 165, the Korean Transnational Corporations

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[928] 'Cambodian farmers file lawsuit in Thailand against sugar producer Mitr Phol over alleged land grabbing' (*Business & Human Rights Resources Centre*, 2 April 2018) https://www.business-humanrights.org/en/latest-news/cambodian-farmers-file-lawsuit-in-thailand-against-sugar-producer-mitr-phol-over-alleged-land-grabbing/ accessed 1st October 2021

Watch (KTNC) and other Korean civil societies have brought such a claim against SK E&C Co. Ltd and other companies to the OECD's South Korean NCP.[929] The claim was based on the company's involvement with the Xie Pian- Xie Namnoy dam in Laos that collapsed and killed several people. The NGO is trying to hold the company responsible for its involvement with the dam using soft law, considering the company's home laws and even host laws are not sufficient or not applicable. Such entry point can allow the involvement of transnational law by expanding the types of actors involved in the hydropower project process. Indeed, third parties such as NGO (like KTNC) or governmental organisations (here the OECD) can therefore show an interest and get involved in the development or life of a hydropower dam. In addition, this type of adjudicatory decisions adopts a transnational law approach to the regimes involved. Despite the main focus of the OECD being economic, other regimes are connected to it within the MNE Guidelines. The breach of human rights related rules, like with the KTNC case, are also investigated and are an integral part of the economic and investment projects pursued by OECD countries. A similar case and claim were brought to the OECD and to the Finnish NCP regarding the expertise and reports provided by the company Pöyry for the Xayaburi dam.[930]

This entry point introduces a promising way to get involved and influence hydropower projects, beyond the traditional actors, scales and regimes associated with them.

3-Legislative 'entry point': the inclusion of TNL elements within national legal systems

The legislative level, at the national scale, can promote a transnational law perspective, applicable throughout the development of the hydropower project. Countries can adopt measures and rules which can promote a more transboundary perspective, including the bigger picture of more regimes, actors and scales for hydropower project regulation.

An example of legislation which can be an entry point for the inclusion of a more transnational law approach is the duty to conduct a transboundary EIA. The duty to conduct an EIA is a requirement which is present in all four riparian countries. The content and standard of this duty varies depending on the laws, as mentioned in Part I. The duty to conduct an EIA also has its international and regional equivalent, in customary international law and in the Mekong Agreement. The duty is not transboundary by nature and is only required to be transboundary in the ICJ's Pulp Mills case most notably.

[929] 'South Korean Civil Society Task Force vs. SK E&C. Dam collapse in Laos involving Kexim' (*OECD Watch*) <https://www.oecdwatch.org/complaint/south-korean-civil-society-task-force-vs-sk-ec/> accessed 1st October 2021

[930] 'Siemenpuu et al vs Pöyry Group. Pöyry Group's controversial advice on Xayaburi Dam in Laos' (*OECD Watch*) <https://www.oecdwatch.org/complaint/siemenpuu-et-al-vs-poyry-group/> accessed 1st October 2021

However, without being mandatory, a transboundary study and vision of the environmental impact of hydropower dams is often necessary and encouraged. Indeed, the EIA provided by Laos for the Xayaburi dam, mentioned on page 188, is considered to provide close to no transboundary evaluation or has studied the impacts of the dam on such a small portion that actual transboundary impact remains unclear. The Xayaburi EIA has been criticized by many actors in the Basin, including NGOs and academics. Both the Mekong River Commission and the riparian countries of Vietnam and Cambodia have requested a new assessment of the transboundary impact of the Xayaburi dam project at the end of the PNPCA.

Companies conducting the EIA do so following the country's legislation. Therefore, a national legislation on the content of an EIA needs to specify or adopt new rules to include a transboundary assessment for the development of dam projects. For instance, the national laws on EIAs could specify an approximate measure or idea of what 'transboundary' should mean. In the case of the Xayaburi EIA, the transboundary study evaluated the impacts over 10km range. The actual transboundary effects of such a project are considered to spread over hundreds kilometers.[931] National laws could otherwise or in addition make an explicit reference and link to the international duty to conduct an EIA, as formulated in the Pulp Mills case.

The legislative entry point is the most direct way to influence the development of a hydropower project ahead of the project itself. Contrary to the judicial level, it sets a transboundary standard before the project has been developed, studied or signed upon. Then, the hydropower dam could be inherently transnational in its approach accounting for the transboundary nature of the project and for a more accurate and informed impact on different actors, scales and regimes, further away from the dam development, geographically and in abstract.

4-Diplomacy 'entry point': the application of TNL within the relationships between the riparian States and the willingness to consider a bigger picture

Transnational law can be introduced at the entry point of diplomacy within the regulation of hydropower projects in the LMRC. This entry point relates to the willingness, good faith and capacity of the riparian countries to collaborate and communicate about the hydropower project. Diplomacy and good neighbourliness are a great part of hydropower development in the Mekong River Basin, as mentioned in the previous parts of this chapter. Indeed, hydropower projects on shared rivers, especially of large capacity, are by their nature transboundary and involve all the riparian states, even upstream. However, hydropower projects are generally dealt with at the national level. The cooperation

[931] Page 188, Chapter 4 – part II – A – 1 : 'Territoriality and the challenge of the national scale of authority in hydropower development in the LMRB'

between the riparian countries depends on their good will and good faith. They engage in collective discussions about a natural resource on which they have a sovereign right to a certain degree.

First, bilateral diplomatic relationships between countries can be subjected to a more transboundary and transnational approach. Each country can develop and manage its relationship to another country of the basin with a transboundary approach in mind. They can conduct their relationship with in mind the potential effects on other countries and on the Mekong River Basin. For instance, the relationships between Laos and Thailand or Laos and China are at the centre of hydropower development, investment and regulation. These bilateral relationships are both the supply and demand for hydropower projects. Thailand and China are in high demand for energy and Laos has clearly expressed its agenda to be the 'battery of Asia'.[932] The State-to-State political and diplomatic nature of these relationships can be influenced by a transnational and transboundary approach if the States decides to do so. Thailand can consider subject its demand and purchase of energy from Laos to the conduct of a transboundary EIA or to a public consultation. For instance, in its bilateral relationships with the LMRB riparians, China can encourage or request the respect for its Green Energy policy and the respect of environmental measures it has developed nationally.[933] Chinese investments in Lao dams could follow stricter environmental standards, similar to the World Bank or Asian Development Bank requirements. In addition, each State subjects their diplomatic relationships to their own international commitments binding them. For example, the environmental or economic commitments made by each country should not be infringed by the State. These international relationships, from country to country, are generally placed under the influence of international law and of customary international law. Through all these arguments, the idea of a transboundary approach and of transnational rules can be promoted by each State. The bilateral nature of these relationships does not preclude the introduction and application of TNL as contained in national law or as resulting from an international relationship.

Apart from States' bilateral diplomatic relationships, another diplomatic channel and crucial entry point to the LMRB is the regional level. The MRC is a key diplomatic entry point for transnational law as the regional, but also the transnational, centre for the common regulation of hydropower projects. It is more evidently transboundary and a more propitious entry point to develop basin diplomatic cooperation. Regional cooperation agreements and institutions, like the MRC, are subjected to the signature of these riparians and on their willingness to submit themselves to these rules. Indeed, the MRC

[932] Chapter 4 part I - C: 'A specific attention to Lao PDR's hydropower development'
[933] Chapter 4 part I - B - 6: 'Chinese national interests' influence on hydropower regulation in the LMRB'

does not have an enforcement mechanism and the overall functioning of the institution depends on the member States. However, the MRC presents different entry points in its functioning and relationship with riparian countries that can provide a more transboundary and transnational approach to hydropower in the basin.

First, the use of National Mekong Committees (NMC) is an example of transnational cooperation and transboundary approach that can be improved. The NMCs, as established by the Mekong Agreement[934], are meant to be the gate and exchange point between the national level and the MRC. For instance, the communication of documents or the feedback on the projects proposed by countries at the council level go through the NMCs. They are involved for instance in the PNPCA for hydropower projects and play a pivotal role in informing and consulting each riparian country. The lack of engagement or responsiveness of these NMCs can hinder the connection between the two scales and reinforce fragmentation. Then, it can decrease the likelihood of providing a transboundary and transnational approach and cooperation between the riparian countries. The application of a transboundary approach and of transnational law could promote more publicly shared information and systematisation of transboundary communication to the MRC and from the MRC into each country. For instance, as inspired by the Aarhus Convention, communication and procedural rules could increase the focus on a smooth flow of communication and the duty to share information.

Secondly, the MRC can impose the fulfilment of procedures and engagement with cooperation at the regional level to the country developing a dam. The PNPCA are the embodiment and a promising way of requiring cooperation in good faith between the riparian countries and the engagement with a minimum transboundary vision. As seen with the PNPCA rules used for the first time for the Xayaburi dam, Laos has engaged with the other riparians through the MRC. It has provided them with certain documents related to the project for discussion. At the end of the PNPCA's arbitrary period of 6 months, the lack of consensus or of a more transboundary approach were criticised by other countries such as Vietnam and Cambodia and by the MRC. But these oppositions and request for a more thorough basin approach did not prevent Laos from considering its good faith obligation and duty to cooperate fulfilled and thus proceeding with the project. A possibility to promote a transnational law approach would be to strengthen the PNPCA and emphasize the transboundary nature of this process. This idea is often advocated and the recent application of the PNPCA are enlightening its shortcomings and possibilities for improvements.

Thirdly, the MRC can be an entry point for the application of transnational law through its pivotal, regional and informative role in the LMRB. The use of the MRC is often limited to

[934] 1995 Mekong Agreement, Chapter IV. Part C. 'Joint Committee'

the extent to which the countries are willing to use it. The basin plans established by the MRC give a general direction for the basin's use of the Mekong, including recommendations on hydropower development. As mentioned in part I, these basin plans are often used by countries to justify the development of their projects, especially Laos. As considered in part I of this chapter, the MRC is not a regulatory body but a knowledge and communication platform. If the LMRB countries were willing to consult the expertise of the MRC in good faith instead of selectively instrumentalising it, a more transnational basin approach could be conveyed.

The MRC's main role and expertise lies with the amount of data and research it does on the basin and on every possible use of its resources. The MRC's studies are most often taking a transboundary approach, including the entire LMRB and each of the riparian countries' specific circumstances. The scientific studies conducted provide a more complete and accurate vision of the LMRC. This vision based on the transboundary nature of the river and of every resource related to it coincide with the essence of transnational law. In addition, the MRC involves different actors participating in the functioning of the institution and in its studies, apart from State actors. Besides the four riparian countries, their populations can sometimes participate (for instance through surveys).[935] NGOs, intergovernmental organisations or academic actors can also be consulted or given a say as experts or as donors of the MRC. These different actors involved to a certain extent in the MRC are a representation of a transboundary and transnational law approach, aimed at gathering every stakeholder at the decision table. In addition, these actors represent in their legal discourses different scales and regimes. Despite being less predominant than the member States, these various actors, scales and regimes complexify but broaden the information at the root of recommendations from the MRC.

The diplomatic level of the regulation of hydropower development in the LMRB can provide several entry points for the application of TNL. Considering the important place of informal diplomacy, this entry point is of great potential for the application of TNL. Bilateral diplomatic relationships between the riparian states can be a good channel to impose a more multilateral and transboundary perspective within an agreement limited in its actors and scales. More importantly, the regional organisation of the MRC can be a promising and important entry point for the development of a transnational law approach. The MRC presents a transboundary focus, both in as a LMRB riparians forum and for other actors and scales. The studies conducted by the MRC focus on the entire LMRB and include various fields, among which hydropower development and its effects on the basin. Its

[935] Mekong River Commission, 'Public Participation in the context of the MRC' (February 2006) <https://www.mrcmekong.org/assets/Publications/policies/Public-Participation-in-MRC-context.pdf> accessed 1st October 2021

scientific expertise can be an important entry point to provide a complete and accurate vision of the basin highlighting the transboundary nature of the issues tackled.

5-Capacity building 'entry point': Strengthening non-traditional actors, scales and legal discourses to open hydropower decision-making

The use of TNL and of a more transboundary approach can be introduced in the capacity-building campaigns in the LMRB. These policies and campaigns are often conducted by NGOs for local populations of the basin and for affected communities. This capacity-building information includes knowledge on rights and possible legal recourses for them to promote and protect their interests.

First, this entry point is interesting as the education it provides helps developing the participation and the legal discourse of a non-State actor, local communities. Capacity-building empowers an actor and a scale that have had an interest but not much visibility in the past regarding hydropower development in the LMRB. The purpose and effect of capacity-building itself for communities reflect the essence of transnational law in giving a full and accurate account of the elements at hand in a hydropower project in the LMRB. Secondly, capacity-building often develops normative discourses where local communities are being informed of the rights and duties involved in hydropower development. The awareness of law and of legal rights to defend themselves not only positions the local communities in the national legal context but also links them to a transboundary situation where infringements of rights and different duties are connected to external projects.

Finally, the content of this participation and of the legal discourses developed amongst local communities can be a good entry point to promote a transnational law approach. Indeed, capacity-building can inform local communities not solely on the national legal system. It can emphasize on the broad and interconnected effects of a transboundary context like the LMRB. The local and affected communities are intrinsically aware of such effects as they are the ones bearing the impacts of hydropower development policies often conducted abroad. The defence of the rights of local communities often have to do with an international or transboundary effect and need to be able to raise legal arguments about a project that can be developed abroad. A TNL approach within the legal discourses of communities can help them raise points that would otherwise be deemed beyond the national jurisdiction. The promotion of the legal rights of local communities are often linked to transboundary effects produced by a foreign project to be defended at the national level. These different levels can disperse the responsibility and the link of causation. Local communities need to be informed of and trained to use the legal system of over different layers of jurisdiction and of regulation with a transboundary and interconnected mindset.

For instance, the Niwat case has proved the possibility to promote a transnational law approach through the legal discourse of local communities, against a project abroad, to national legal courts. Indeed, the complaint at the centre of this case was lodged by a group of communities from Northern Thailand, at the Lao-Thai border. This case clearly points out to the awareness and use of the transboundary and transnational law aspects of hydropower projects like the Xayaburi dam. The Thai communities have indeed placed a complaint to the Thai court, about an international contract for a project in Laos. Capacity-building projects can also take place at a transboundary level by helping the different countries, and their populations, build a cooperative and informed strategy for their shared water resources. This is the case for the IUCN's BRIDGE (Building River Dialogue and Governance) project with the 3S (Sesan, Sekong and Sre Pok) rivers, transboundary tributaries of the Mekong shared between Laos, Cambodia and Vietnam (see page 179, Figure 2).[936] This project includes building a knowledge resource hub for stakeholders, training programmes for local leadership and building institutional for a for cooperation.

In summary, the ideal setting and application of transnational law has been presented throughout different 'entry points', at which and during which a transnational law approach could be introduced or improved. These entry points can take place at different levels (local, national or regional) and be pushed by various actors (the States, the MRC, the local populations or NGOs). In all these entry points, an ideal application of TNL relies greatly on the anchoring of hydropower projects in the bigger picture and in the transboundary and interconnected nature of the LMRB. This ideal application presupposes the capacity and the willingness from each entry point, and more generally the different actors, scales and regimes involved in the projects, to consider a transnational law approach.

B-The realistic use of transnational law for hydropower projects in the LMRB: the challenges of capacity and willingness in the application of TNL

The ideal use of TNL presented in the previous section is to be nuanced. The reality of using transnational law for hydropower projects on the LMRB faces questions of capacity and willingness in its implementation. The following section will introduce these limits by further developing the examples referenced previously. As opposed to the previous section that conveyed a more theoretical and idealistic take on the situation, this section will help consider a more realistic approach and hint at the complexities

[936] 'BRIDGE in the Sesan, Sekong and Sre Pok river basins (BRIDGE 3S)' (*IUCN*) <https://www.iucn.org/regions/asia/our-work/programme-areas/water-and-wetlands/bridge-sekong-sesan-and-sre-pok-river-basins-bridge-3s accessed> 11th October 2021

transnational law has to face. The insights provided here have been based on the information and ideas I have gathered during my studentship in the Law department of Chiang Mai University, in Thailand. These ideas and impressions, left from the different actors I have met, will be used as examples and guidance for the description of a more realistic take on hydropower regulation in the LMRB and the place of TNL there. The insights mentioned here are mainly focused on the experience of the system in Thailand.

The use of national judicial cases can help promote a transnational law approach, especially by including various actors (like local communities) and different scales (for instance local, national and international levels). However, this entry point is limited in its international and transnational dimension and presents a less certain and open window of action than imagined in the previous section. In such scenarios, it has been suggested to me that actors would tend first to use non-legal mechanisms. But when judicial cases are still pursued, like with the Niwat case, the main (and generally only) focus is to bring claims under national law. There is a great feeling of sovereignty and reliance on the national legal system rather than on external ones. It leads to a reluctance and avoidance to use international law at the national judicial level. A claim brought under a violation of national law would be the most effective and reliable way to protest against a dam project in which the government is involved. For instance, the Niwat case was filed for a breach of the national duty to consult the population before entering into a Power Purchase Agreement (PPA) with Laos regarding the Xayaburi dam. The transboundary nature of the impacts of a dam based in Laos and the international nature of the PPA could have been the basis for a claim referring to international and transnational law. However, to optimise their chances to be heard, and of even winning the case, the group of Northern Thai communities have chosen to focus solely on national law. However, a lawyer working on the Pak Beng dam case[937] has mentioned that the most promising way to introduce the use of international law in a national court case might be to refer to economic and investment related documents and rules. Indeed, discussing loan conditions or PPA (like with the Xayaburi dam) would allow the local communities to use international law and the transboundary nature of the project to defend their rights. But this possible strategy to use international law would only grant them an indirect access to justice. Indeed, international economic and investment related agreements and rules are generally discussed by and through States. Examples given of international economic ways to influence a dam project can be the projects' Memorandums of Understanding (MoU) and the use of the World Trade Organisation (WTO), the latter being used in relation to the impact on fisheries for instance. However, both of these elements rely on State participation and decision and

[937] Pianporn Deetes 'Briefing on Pak Beng Dam Lawsuit' (*International Rivers*) <https://archive.internationalrivers.org/resources/briefing-on-pak-beng-dam-lawsuit-16498> accessed 1st October 2021, similarly to the Xayaburi, opposed by a group of communities from Northern Thailand, the Rak Chiang Khong Group, led by Niwat Roykaew)

can provide local communities with an indirect representation and an interest focused on economic aspects of the dams, rather than the environmental and social impacts it has.

For ETO cases, an important issue is the capacity and the willingness to bring, hear and decide on such cases. The process within the Human Rights Commission of Thailand (HRCT) requires the willingness of the commissioner to hear the case and consider that it has the mandate to decide on such case. In addition, if the case is accepted, the commissioner has to go through different levels of consultation of the parties, non-binding and non-enforceable reports and suggestions sent to the companies, which can then respond, if this procedure is deemed unsuccessful, the report can go up to the Prime Minister and, potentially and ultimately, to the Parliament. The mandate and the process remain weak in capacity and entirely dependent on the commissioner first and on other actors.

Both the ETO and other national judicial cases are very rare and cannot represent an effective nor reliable entry point for the application of TNL through the local actors' claim for transboundary impacts of a dam project. Furthermore, the landmark case of Niwat vs EGAT, which has opened the way for such cases when it was heard by Thailand's administrative Supreme Court, has not yet been successful.

For adjudicatory cases like the KTNC report to an OECD contact point, the main issue is related to involvement and accountability. First, the OECD and the National Contact Point need to be able to hold accountable the companies or countries concerned. Indeed, for instance, the NCP needs to be reliable[938], the OECD needs to decide whether to investigate or not and grievance mechanisms need to be available. Beyond these processes, the use of a transnational law approach relies on a cross-border, cross-category and traceable accountability and involvement in a dam project on the LMRB. Most often, projects like the Xayaburi or the Xie Pian-Xie Namnoy dams have multiple actors and investors, often fractioning the involvement and the responsibility of each actor. This situation makes it difficult to trace and link responsibility and find a main culprit. For instance, with public-private partnerships[939] or with investments divided in equal percentages, there is no lead responsibility and the joint responsibility is hard to trace and pin down on a specific actor to hold it accountable. This is even truer with transboundary cases. The transboundary character of an issue, which would be an ideal context for the application of a transnational law approach, is more complex in establishing a clear

[938] The OECD Japan NCP was considered ineffective by the KTNC when the organisation tried to hold accountable third parties investing in the Xie Pian - Xie Namnoy dam, including South Korea but also Japanese banks.

[939] In this case the State party to the partnership can be assumed to be the one insuring the respect of national interests and the ones of its population

responsibility and thus to hold someone accountable for the violation of the rights of local populations, for instance.

The legislative level is also a difficult entry point for transnational law in reality because of its relationship with the State, internal politics and external politics, both in terms of willingness and capacity. Indeed, an open, transnational and transboundary approach is hard to promote at the national level that is inherently focused on the national scale, regime and the State. Besides the limit of willingness related mainly related to sovereignty, it is worth noting that some limits can be linked to a lack of capacity. For instance, in Laos and in other LMRB riparian countries, the institutions and processes meant to promote a transboundary approach, or even monitor and enforce social and environmental aspects of a hydropower project, can be weak. For instance, the Lao EIA law was mentioned to be good and well advanced compared to others, opening an opportunity for a promotion of a transboundary approach. But in fact, the lack of expertise, finances and of enforcement often plagues the assessment and the promotion of a transboundary approach.[940]

Similarly, diplomacy mainly relies on State sovereignty and interests and it can easily be limited in adopting an approach more pluralist, decentralised and leaving way for common interests. Many of the limits of diplomacy based on bilateral agreements and State to State basis are various and rely heavily on the notion of sovereignty, non-interference in State's business and interests, including the sovereign use of its natural resources. In addition, the MRC also presents limits in its potential to promote a transnational law approach. These limits (related to willingness and capacity) have been the subject of more in-depth studies. Some of these challenges are the fragmentation between the regional and national scales, the intervention of external donors reducing ownership and raising defiance for a western-influenced body, or even the language barrier (both also limiting capacity-building).

The capacity-building entry point of transnational law application is also to be nuanced by limits of willingness and capacity. This entry point focuses on empowering local populations of the LMRB to defend their rights, promoting a transboundary approach to the impacts of dam projects all over the basin and the consideration of non-traditional yet important actors, scales and regimes.

First, in its transboundary communication, capacity-building is harder to carry out in more than one country (or at least one county at a time). For instance, Laos is a difficult country to create capacity-building campaigns and the access to the country, by NGOs and

[940] Lauren Campbell, Diana Suhardiman, Mark Giordano, Peter McCornick, 'Environmental impact assessment: Theory, practice and its implications for the Mekong hydropower debate', International Journal of Water Governance 4 (2015) 93–116

others, is very limited.[941] Capacity-building can focus on transboundary awareness separately within each country, although this raises problems of consistency, efficiency and true transboundary approach as well as informing populations completely and uniformly. Secondly, the content of capacity-building is limited in its transnational law approach because the information of rights, processes and legal recourses to promote their normative discourses and rights are generally specific to a country. As mentioned before, non-legal processes are put first and then national law and rights will be the most reliable and certain way to push claims. In addition, the awareness of and use of regional, international and transnational laws would link to the perception of interventionism from western actors like academics or NGOs. Capacity-building for affected populations is a good way to spread and reinforce a transboundary approach but the step towards transnational law is difficult. For example, the perception of law is overall negative, with populations thinking they are either protected by the State or powerless in front of the State).

The examples mentioned above embody the challenges faced in the application of a transnational law approach in general and in the LMRB most specifically. Questions of the willingness and capacity to extend and include more regimes, scales and actors are raised (e.g. to include international law, international acts abroad, non-legal actors partially and indirectly linked to the project, non-State actors whose responsibility is not clearly established or primary, reaching out to populations in a transboundary way and everywhere in the basin). The limits mentioned here in a non-exhaustive list are illustrating that, even with possible channels of application, a transboundary and TNL approach is not straightforward.

Finally, an important limit to the application of transnational law lies in the perception and use of law. Law has been mentioned in Chapter 1 as one of the fields and tools used to translate an objective of integrated sustainable development into desired impacts on the ground. The perception and relation to law influence its application and effectiveness. In turn, it affects the application of transnational law. In the LMRB, law is often not considered an openly accessible and reliable tool to promote rights and enforce duties. Law is considered the prerogative of the State. Rights and duties are believed to be enforced by the State and populations often distrust NGOs and non-state actors (even local ones) as been agitators or contesting activists. Even when individuals and communities do not fully rely on the State and try to enforce their own rights, they consider law to serve only powerful actors. To them, law is ineffective and not accessible for small and weak actors. Then, law is associated with the protection of the interest of dominant actors, like the State or investors, and often coincide with economic and investment law.

[941] Earthrights' access to Lao data and interaction with its populations is either not taken into account yet or could be done through Lao NGOs or other actors there.

Certain NGOs have also noted that the laws supposed to regulate business conduct and to safeguard non-economic interests for instance are sometimes inexistent. Most importantly, if such legal rules exist, they are often not fast enough to keep up with business evolutions and to ensure an effective and reassuring protection. The distrust and perceived ineffective role of law are also present at the regional and international levels. International or regional laws are not viewed as a potential option to enforce rights or as a possible guidance for national policies. Law beyond the national level, and objectives of sustainable development for instance, are often perceived as embodying western values and interventionism. For instance, the policies and rules from western donors in the MRC or from international NGOs in capacity-building are distrusted and create less ownership of the policies by the riparian States. In general, the perception and use of Law, and thus of international and transnational law, are negative in the LMRB.

Despite a more limited application of transnational law in reality, the challenges of capacity, willingness and vision of law cannot hide a changing environment. Great possibilities are opening and bridging the realistic take and the ideal one regarding the application of transnational law in hydropower in the LMRB. First, the communication about law, dam projects, State's duties and people's rights are changing. The legal capacity-building in the LMRB is now often paired with an active work on communication, awareness campaigns and on reliable, comprehensive, and engaging information. For example, the legal affairs and media departments are working jointly in Thailand's Earthrights. Reports on dam projects and their costs are cautiously drafted, including the work of documentaries by local artists.[942] In addition, communication about dam issues are improving with populations developing their own capacity and normative discourses to take matters into their own hands. Despite first being influenced and lead by external and western actors, capacity-building is a key element in subsequently empowering and giving ownership to local populations. New generations of leaders from the basin are educated to take care of hydropower and of the resources of the Mekong River Basin themselves. An example of such training and capacity-building for future generations is the Mekong Legal Advocacy Institute, created by Earthrights and based in Chiang Mai.[943]

[942] The report made by several non-State actors under the Mekong Butterfly, 'The Hidden costs of hydropower dams in the Mekong River Basin: 9 years of repeated history of the lack of government and accountability', was subjected to several meetings including one I have attended at Chiang Mai University where the method and message to communicate the information to the public effectively was of great importance. See the final published report: Mekong Butterfly, 'The Hidden costs of hydropower dams in the Mekong River Basin: 9 years of repeated history of the lack of government and accountability' <https://themekongbutterfly.wordpress.com/2019/11/24/hidden-cost-the-damages-inflicted-by-the-xayaburi-hydropower-dam-on-local-community-the-environment-and-the-mekong-river-ecosystems/> accessed 1st October 2021

[943] 'Mekong Legal Advocacy Institute' (*Earthrights International*) <https://earthrights.org/how-we-work/training/legal-training/mekong-legal-advocacy-institute/> accessed 1st October 2021

Another opportunity of expanding the limited reality of transboundary and transnational approach lies with the legal recourses and other channels available to the population. The national legal case about the Xayaburi dam has opened the way for subsequent cases about the Pak Beng and the Luang Prabang dams, which are being brought to Thailand's attention. While the number of cases is still very limited and their outcome are yet to be known (for the Niwat vs EGAT case for instance), these cases are the beginning of an empowerment to use legal recourses for local communities. Indeed, the rare, recent and still uncertain use of the Thai judicial system for claims against hydropower dams presents the evolution of law in the LMRB, especially for the consideration for transboundary projects.[944] These cases can be very interesting to begin the analysis of a pattern in judicial cases against hydropower dams on the LMRB and to compare the development of the cascade of dams, with the first dam being the Xayaburi project opening the way for the following and similar dams, the Pak Beng and Luang Prabang dams. Other fora for adjudication and investigation of hydropower projects on the LMRB are developing. The Xayaburi dam has led to an OECD investigation of the Poÿry company from the Finnish NCP and the KTNC has brought up another claim for the Xie Pian-Xie Namnoy dam, on a tributary of the Mekong River. The national legislative and diplomatic channels are also changing, engaging with more consideration, communication and cooperation with the basin more generally. More international commitments and interconnected national priorities have brought a bigger picture and a need for a transboundary vision of the LMRB. Capacity-building has also developed the possible reliance and access to affected populations. These populations, by becoming more informed and vocal about their rights and a dam'' transboundary impacts, can be more easily and actively included in transboundary EIA and public consultation for instance.[945]

Finally, an interesting entry point and opportunity is that the generally negative perception of international law in the LMRB could be differentiated from the concept of TNL. Indeed, because of its essence and the distance it creates with traditional law and international law, transnational law could be a useful tool to palliate the lack of trust and effectiveness of law in the LMRB. Transnational law can be considered less as law *stricto sensu* and more as a roundtable and meeting point of different normative discourses and needs. The less formally legal, more vague but inclusive transnational law can be a strong point. Transnational law creates a communication and way of reformulating hydropower

[944] Three cases so far have led the way towards the strengthening of the use of adjudication as a means to empower local populations and require a more transboundary, basin approach to hydropower development. Adjudication is said by some of my contacts to have been used for around five to six years only.

[945] Problems with EIAs and transboundary studies of EIAs can be linked to most local populations affected being in the villages and the consultation being in cities and not with the local dialect or language spoken by the companies directing the EIA. Having populations able and equipped to defend their rights might make them reach out more to participate and be consulted.

development in the LMRB as a pluralist, holistic and interconnected issue which can diffuse the perception of inaccessible and ineffective role of law.

In summary, the application of TNL faces challenges and opportunities which can be exploited at different moments during a hydropower project's life span and through different actors and scales. Therefore, applying transnational law and adopting a more transboundary and interconnected approach to hydropower in the LMRB cannot realistically and effectively happen through one entry point. Despite some entry points being more promising for the application of transnational law, a diversity of actors, scales and regimes needs to be engaged with the use of TNL, at the same time throughout the project's process, in a connected way, even across fields such as politics or communication.

To conclude, the use of TNL on hydropower project regulation in the LMRB faces several challenges. Its ideal application within the basin relies on the broadening of the types of actors, scales and regimes considered at each step of hydropower projects' lives and on transboundary interconnection. Indeed, a transnational law would encourage the consideration of a holistic view of the basin, the consultation of populations and diverse actors or even the transboundary and cumulative EIA of the dam projects. However, issues of both capacity and willingness at each of these 'entry points' of application make the use of TNL less than certain. In spite of these difficulties and not favourable conditions for the development of a transnational law approach, the sole opportunities, gradual improvements and presence of normative discourses demanding a more transboundary approach are a reason to consider TNL as a fitted concept, both in theory and in practice.

Chapter 5: Insights and lessons learnt from a transnational legal approach to legal pluralism in international law within hydropower development on the Lower Mekong River Basin

The following chapter will discuss the main insights and lessons learnt from the overall inquiry into transnational law and its approach to legal pluralism. These insights will be illustrated and built on examples from the Lower Mekong River Basin.

The thesis has been put in perspective of the policy goal of integration in sustainable development. It has then reflected on its operationalisation in international law. With this goal in mind, a key challenge was the consideration of the multiplied and diversified actors, scales and regimes to integrate. A fitted approach was needed to include the parameter of legal pluralism in the representation and analysis of the legal environment of an issue. Integration of the plurality of legal sources within a legal environment requires a holistic, pluralist and interconnected approach. To answer this research's inquiry, the concept of transnational law was examined and evaluated as a suitable approach to legal pluralism.

The following research question has guided the thesis and inquiry into legal pluralism in international law:

'How can transnational law present a more suitable approach to the plurality of actors, scales and regimes in multi-dimensional issues, like hydropower development on the Mekong River, and contribute to a reflection on legal pluralism and integration in law?'

In the introduction, the research has set the aim to study transnational law and to conduct a preliminary evaluation of the concept as a suitable approach to represent and analyse legal pluralism. The suitability of the concept has been posed as the main hypothesis of the inquiry. Then, the research aims not only to prove or dismiss this claim but also to consider how this concept could fulfil its given mission of approaching legal pluralism in a more accurate and fitted way. The thesis has responded to this inquiry in a positive way, considering transnational law capable and suitable to bring an accurate representation and analysis of legal pluralism in the legal environment of an issue.

To examine how the concept could be fitted for its given purpose, the research has both focused on the concept itself and on a contextualisation in a case study. First, the thesis has examined transnational law in its more theoretical definition. Then, it has studied it through the design of an elementary analytical framework. These theoretical reflections were applied in a more practical setting, going beyond but building on a theoretical understanding. Both these theoretical and case study analyses have contributed to shaping a broad definition and the essence of transnational law. This

definition has in itself supported the hypothesis that the concept is a fitted approach to legal pluralism, likely to contribute to integrated sustainable development. The distinct pluralist, holistic and interconnected approach of transnational law developed in the thesis has positioned the concept as a suitable concept to answer the inquiry. Secondly, the research has developed the context in which the concept would be applied. The research has presented the socio-legal context for transnational law, establishing the need for a more pluralist legal approach. Then, the study has elaborated on the opportunity presented by transnational law and its characteristics to convey pluralism. These arguments have laid out the simultaneous need for a change of approach and the solution presented by the concept of transnational law to answer this very question.

Each chapter has participated to answering this inquiry and to unfolding step by step the overall research arguments. The first chapter has introduced the context of sustainable development and its objective of integration. This development was put in perspective of a previously imbalanced and unsustainable development leaving out many actors and concerns. The operationalisation of integrated sustainable development was connected to international law and the need for it to also promote an integrative legal approach. This integrative approach is important because of the need to reflect and analyse accurately modern issues. It needs to include the growing plurality of actors, scales and regimes at the risk of leaving out interests or voices, thus people. The second chapter has therefore addressed the place given to legal pluralism in international law. It tackled the limitations of the system's traditional conceptualisations and categories. These limitations failed in capturing broadly the elements having a normative influence on an issue but not being considered 'law'. The inadequacy of traditional international legal theory to appropriately reflect and analyse legal pluralism has led to a (damaging) mismatch between law in the books and law in action or what it should be. The third chapter then explored the central concept of transnational law. This chapter has elaborated on the different definitions and theoretical positions on TNL and determined its key characteristics and approach. Then, the chapter proceeded to design an initial analytical framework based on a transnational legal space approach. Finally, the fourth chapter has contextualised and evaluated the analytical framework in the practical setting of hydropower development on the Lower Mekong River Basin case study. It has envisaged the perception of the LMRB as a transnational legal space for the purposes of organising and switching perspectives on the legal environment of hydropower there.

The answer to the inquiry into transnational law and legal pluralism will be considered in this chapter, while addressing the two main themes established in the research: a more practical context of hydropower development in the LMRB and a more

theoretical context and insights of transnational law. First, a general assessment of the research question and initial hypothesis will be conducted in part I. It will also consider other insights brought by the use of TNL, like a contribution to the theory of TNL and the additional reflective dimension carried out by TNL. In the second part, observations will be made in relation to the challenges and the lessons that can be learnt from TNL. Thirdly, the chapter will look at the transferability of TNLS to other fields, to other case studies and generalised to international law. Then, recommendations will be made to reflect on the next steps to take and the potential development of the TNLS analytical framework.

These insights and conclusions on the research question and on the concept of Transnational Law will be put back and fed by the experience and case study of hydropower development in the LMRB. Examples and references to chapter 4 will be illustrating the conclusions made on the research. The study of hydropower governance in the LMRB with a TNL approach has brought insights into the theoretical concept used in this research and on the application of it in the case study. Furthermore, it also participated to broader discussions on international law and sustainable development. Hydropower development in the LMRB has been positioned in this research as a useful contextualisation and practical insight into the research question. It has a clear link with sustainable development and its displays an increasingly pluralist legal environment. In addition, it is currently showing signs of imbalanced development as well as of important and irreparable damages to the basin. This case study also touches upon a very relevant issue for many countries, greener energy security and hydropower development. For this, a re-actualised approach to the pluralist legal environment is necessary to improve governance and the overall costs-benefits trade-off operated in hydropower. The presentation of this specific context had for objective to explore the distinct features of hydropower development in the LMRB, in relation to its growing legal pluralism. Therefore, the following section will consider if transnational law has and can bring about a more pluralist representation and analysis of the legal environment.

I-Insights from the use of a Transnational Law approach: the contribution of International Law to the objective of Integrated Sustainable Development

The hypothesis posed at the beginning of this thesis to answer the research question has been considered positive. International law can contribute to integrated sustainable development through an improved, more appropriate approach to legal pluralism. This approach, pluralist, holistic and interconnected in nature, is facilitated by the adoption of a transnational law approach.

First, TNL will be examined in relation to its purpose, laid out in the two first chapters and in the research question. This purpose relates to integrated sustainable development and the need for a pluralist legal approach.

Secondly, this section will address the reflection on the concept of TNL itself, its definition and its usefulness as a legal pluralist theoretical concept.

Thirdly, this section will examine the other expectations formulated for TNL in the literature, regarding its reflective nature for legal fields and law in general. These ambitions surrounding the impact of the concept will be addressed as aspirational views, additionally to the initial mission it was given and with the idea to consider a broader effect for TNL in international law.

A-The confirmation of the hypothesis of Transnational Law as a more appropriate approach to legal pluralism and integration

The following section examines the positive contribution observed from using a TNL approach and applying a TNLS analytical framework in the case study of hydropower development in the LMRB. It adequately followed the aim of better capturing and analysing legal pluralism. This is both done in theory and practice through the pluralist, holistic and interconnected approach of TNL. This is useful to offer a more accurate and informed way to govern transboundary issues for decision makers, like hydropower in the LMRB. But most importantly it is useful and essential for the people impacted and involved in these issues.

1/ The confirmation of the hypothesis

Based on the first two chapters, the *raison d'être* for the current theoretical inquiry into TNL is the goal of integration promoted in sustainable development. This goal responds to a multiplication and diversification of the actors, scales and regimes to take into account in governance. Then, integrated sustainable development requires a more pluralist legal approach to this complex socio-legal context. International law's traditional categories and characteristics have proven somewhat inadequate and have been feeding a gap between law in the books and law in action. The key challenge posed to the contribution of international law to integrated sustainable development is the inadequate approach to legal pluralism. The immediate purpose of the research is to evaluate the suitability and the potential of TNL to approach legal pluralism and fulfil the broad objectives mentioned.

Indeed, TNL fulfils the objective of studying and suggesting a better way for international law to contribute to international goal of integration within sustainable development. In chapter 1, issues linked to sustainable development have displayed the characteristics of involving a plurality of actors, scales and regimes. This has prompted in

policy and science the adoption of an integrated vision, gathering the variety of regulatory elements within one perspective. The holistic and pluralist approach of TNL reflects this goal of integration, mirroring the inclusion of the three pillars of economic, social and environmental aspects. TNL can be associated with the idea conveyed with policy instruments of IWRM or nexus. In addition, the idea of interconnection and interdependence in policy, such as the SDGs and the three pillars, are reflected in the concept of TNL. A more adequate and effective approach to legal pluralism allows for a better contribution to the overall goal of integration and realising integrated sustainable development.

Transnational law presents a 'better', more appropriate way to consider legal pluralism, as compared to traditional international law. An improved would match the policy objective of integration which IL is supposed to implement and a more accurate representation of the actors, scales and regimes in an issue.

2/Before and after: the positive changes brought about by TNL

As opposed to traditional international law, TNL has provided an approach generally more adapted to represent and analyse legal pluralism in a given legal environment.

Based on chapter 2, traditional international law was presented as limited in several ways in its vision of pluralism. This is related to its restrictive legal categories and its focus on conflictual interactions. Traditional international law has, and still does, relied on categories related to the State and national legal systems, such as a public - private divide, a primacy of the State as an actor, a law - non-law distinction or to a legal jurisdiction linked to State territoriality. These categories created a strict frame for what is to be considered in governing a specific issue. In addition, traditional international law appears more developed in its interest in and management of conflictual dynamics in law. This approach is notably centred around the emblematic VCLT. Indeed, these conflictual interactions between legal sources can create conflicts and disrupt the smooth functioning and application of international law. However, these dynamics do not constitute the only interactions available and promote a partial and negative idea of pluralism and its multiplied interactions. So, this international law theoretical straitjacket has created a degree of mismatch with the legal practice, with the multi-dimensional nature of issues and with the goal of integration. International law is currently very selective in the actors that can be heard, while local actors and NGOs are increasingly vocal and demanding more consideration and inclusion. In addition, the most important scales to be represented and take part in the governance of an issue would be the international and national scales, with less representation of the regional and local scales for example. Finally, regimes linked to the privileged actors' interests and to the regimes with a better

anchoring in hard law and legally binding channels, such as contract law and investment law, will be given more space in a traditional international law system.

Indeed, the consideration of legal pluralism within international law gives a partial, inaccurate and inefficient representation of the situation on the ground and of the gradual developments of modern law itself. In turn, the legal analysis of a specific issue and its legal environment will be based on a wrong representation and would be the base for inaccurate, misinformed, biased governance.

In chapter 3, TNL has positioned itself at a distance from traditional international legal theory and provides a pluralist, holistic and interconnected approach. TNL has embraced legal pluralism as an inherent characteristic of modern issues. It has then dissociated and distanced itself from the overall negative and cautious theoretical position of traditional international law on legal pluralism. The concept of TNL explored in this research is informed by the various legal categories of traditional international law but not constrained by them. It also goes past the common focus on these categories and on conflictual interactions to suppress. TNL has switched the focus to an open and broad consideration of all legal influences as legal discourses. TNL also directs the attention towards the different interactions and dynamics between a variety of legal discourses that can happen in spite of legal categories.

In brief, transnational law has changed the approach used in international law to consider complex issues like sustainable development issues. The concept has positioned itself to correct or tackle differently the unsustainable situation arising from a partial, inaccurate approach that increases trade-offs and imbalances. This change has been brought by a more pluralist, holistic and interconnected approach and the development of an analytical framework based on the definition of transnational legal space (TNLS).

3/How did transnational law convey a more pluralist approach to legal pluralism?

The third chapter has introduced the literature addressing the concept of transnational law and the expected use of the concept as an integrative approach or alternative to the traditional international legal approach. Various definitions of transnational law have fed a general understanding of the concept and presented its multi-faceted nature. The essence and core characteristics of transnational law were inferred from these different visions. The thesis has developed its inquiry into the relation of international law to legal pluralism based on one of these definitions, the transnational legal space. Transnational law and transnational legal space have been characterised by a pluralist, holistic and interconnected approach. This unique approach has distinguished itself from traditional international law and provided an answer to the research question. The transnational law approach has then been developed in this thesis through the use of

an analytical framework based on transnational legal space. Both the theoretical approach and the analytical framework have participated to exploring transnational law as an appropriate approach to promote integration.

(a)The transnational law approach: a pluralist, holistic and interconnected take on legal environments

The principal input of transnational law and its conceptual space design in the overall thesis inquiry is its pluralist, holistic and interconnected approach.

TNL provides a pluralist approach to a legal environment by being open-ended and inclusive of the diverse actors, scales and regimes involved in a given issue. The extent of its scope is wider than what is meant to be comprised as traditional legal sources (such as hard law and State actors). The other, informal, normative elements considered within the pluralist approach of transnational law are all the more important. They are usually forgotten or left outside of the system by traditional international law and governance. Soft law instruments, environment-related interests and regimes, local scale and communities are examples of normative elements normally left aside or secondary in governance. These informal elements are however very important in a fitted understanding, analysis and governance of an issue. First, they are parts related to an issue, whether they are impacted by it or playing a role in its development. For instance, local communities are impacted by dam projects and their voices need to be taken into account to govern an issue while getting the full picture, avoid irreparable costs and trade-offs at their expense, and avoid unsustainable projects. Most often these actors defend a socio-environmental stance at the project/local level which generally go unnoticed or unheard. Economic overall benefits for the national level and sealed by hard law like concession contracts take priority. Therefore, these informal actors need to be heard because they are part of the matter and because they defend minority but essential interests. In addition, despite their lack of formal recognition and involvement, they can be influential on the legal environment of an issue. Protests, capacity-building, regrouping as part of civil society organisations are proofs that an individual, soft interests can grow into a visible and influential force to be reckoned with. These elements are key to a more pluralist and integrated governance. Transnational law's pluralist approach, and its special attention to informal elements, are at the centre of an informed, accurate, balanced and integrated governance.

This pluralist approach is useful in order to represent more accurately and completely the legal environment of complex issues. Then, a transnational law approach can bring a more informed governance, where all interests that have an influence on an issue can be represented. A more pluralist approach is important to avoid unsustainability and extreme imbalances and trade-offs. The under-representation of some actors, scales and regimes means less opportunity or influence to defend certain interests against other ones.

Governance would only be built on a partial analysis of the legal environment and would reflect only the interests of the authoritative, traditional sources of normativity, like national laws for instance. A more sustainable project is based on the consideration of different interests and the conciliation of them, avoiding imbalances. For instance, unsustainable projects biased towards economic interests, like some hydropower projects, lead to irreparable costs to the environment and to the people but also, in turn, to economic costs. More pluralism in decision-making is important because it leads to better governance, with for instance, ownership of the policies and projects by many actors including the local ones closer to the project.

In addition to a pluralist dimension, transnational law also characteristically conveys a holistic approach. A holistic approach to a legal environment implies for the different normative elements to be considered as parts of a whole. An accurate and efficient governance is based on a complete representation and analysis of the legal environment. The holistic dimension of the transnational law approach is linked with and as important as its pluralist dimension. There is a need to connect the heterogeneous and separated diversity of actors, scales and regimes considered. The different elements playing a role are part of the same issue and, thus, governance. This dimension of transnational law is useful in order to avoid disparate governance. No integration can be promoted if the seemingly disconnected and independent legal discourses are not related to each other by conceptualising that they all apply and influence the same legal environment. This idea has been most notably conveyed in the 2030 Agenda with the idea that all 17 priorities and goals were connected under a single document and the idea that they all, and together, participate to sustainable development.

The lack of pluralist and holistic approach to a legal environment can create partial, inaccurate and misinforming account of a specific issue, then influencing its governance. These representations often adopt a selective and manageable or argumentative and positioned approach to the legal environment. On the one hand, selective and manageable approaches can be taken to analyse the legal environment of hydropower in the LMRB. These approaches have the practical idea that diversity can lead to complexity, slower and more nuanced decision-making. Thus, a more manageable legal approach can select a certain focus on the normative elements represented and analysed. This simplifies decision-making and allows for a somewhat simpler and smoother governance. An example is to take a hard law approach to highlight only the formal and enforceable rules that hydropower projects have to abide by. This approach facilitates the understanding of what regimes are legal binding and applicable while carrying out the hydropower project. A hard law approach to hydropower would highlight the role of the state as the final decision-maker while calling it to respect its regional and international commitments and more general principles. This is generally the approach adopted in

Laos. While engaging their nationally planned dams without a fail, they are ticking the boxes of regional and international cooperation and regulation. While these approaches are not wrong or mistaken, they create a certain selected and inaccurate representation of the overall legal environment. In a hard law approach, the many soft law regulations and participations, characteristic in the LMRB, would be at best considered as informing practice or expertise. On the other hand, an example of a partial and biased governance can be seen in the argumentative and positioned approaches often taken to hydropower development in the LMRB. Each existing legal discourse and its normative objectives can feed a certain perspective on the overall legal landscape. Many studies consciously adopt the perspective of certain actors, legal regimes or scales of the LMRB. It directs the attention to certain normative elements or to advocacy of certain changes or positions on hydropower. Studies can choose to focus on instruments like soft law or on informal actors like local communities. This would bring forward their role and objectives, but often taken out of a broader perspective of the overall legal environment. Studies on the Mekong River Commission also direct the narrative around this important regional actor of the basin and argue for a greater role and assertion of it. These argumentative or positioned approaches do make a selective decision to focus on a specific aspect of hydropower in the LMRB. They can present a partial and inaccurate representation of the legal environment. So, in summary both the pluralist and holistic dimensions of the transnational law approach are necessary and inseparable to have a fitted and integrated representation, analysis and governance of an issue.

Thirdly, the transnational law approach conveys an interconnected dimension that is key to providing an appropriate way to address legal pluralism. The pluralist and holistic approach to an issue can only be fully effective in informing governance if the diverse normative elements gathered around the same table can interact and take all their importance by being related. The interconnected approach focuses on, observes and can enhance the natural dynamics and interactions between the different actors, scales and regime of a same issue. These dynamics, including convergences, conflicts and gaps, are a result of legal pluralism and the interconnected, transboundary nature of the legal environment. They indicate the relations between the different legal discourses, allow decision-makers to examine their positions in comparison of each other and to look at their evolution. They are key indications to consider so as to accurately and fully representing and analysing a legal environment. They also indicate the way forward to creating or supporting integration by managing conflictual dynamics, enhancing synergies and filling gaps.

The goal of integration in sustainable development highlights the key role of interconnections and interdependence between its various aspects and objectives. Sustainable development policy recognises the connections existing within a pluralist

environment and that elements and topics are not isolated or fully independent from each other. This is the case with the promotion of the three pillars of sustainable development. The interconnections emphasized are prompting dynamics of different nature, which can be conflictual, convergent or mismatching. In these interactions, trade-offs are operated between two normative elements, where concessions and compromises are weighed between the two positions promoted. This can result in imbalances between the interests considered. Sustainable development policy, by focusing on connections, aims to guide the operation of trade-offs by emphasizing converging dynamics and managing conflicts. It could bring more balance and equity in the notion of integration. The particular attention given to gaps and convergences aims to create synergies and balanced trade-offs from the ensemble of interactions occurring. This would participate to a smooth integration within the existing regulatory patchwork. Then, TNL participates to integrated sustainable development with its transnational and interconnected approach. It emphasizes interactions and presents a panel of potential conflictual, converging and mismatching aspects of these interactions within a legal pluralist environment. It contributes to representing the bigger picture of the dynamics influencing the overall legal environment, and not solely positive or negative interactions. These interactions can be examined as influencing trade-offs within governance, and as having the potential to be directed towards convergence.

Most often, analyses can be directed, sometimes on purpose, towards a specific type of interaction. For example, some studies have been directed towards pointing out the tensions between the economic development and profitability of hydropower with the environmental and human rights protection. The focus on these conflicting interactions feeds a certain idea of irreconcilable legal discourses. Then, balancing trade-offs and avoiding irreparable costs would be difficult and integration would be nearly impossible. The perception that hydropower projects can only create environmental damages would push some actors to oppose completely these projects, setting aside economic and social benefits. Extreme trade-offs will be expected, without considering the environmental benefits that can come from a project that traditionally pursues economic benefits. In reaction to these irreconcilable perspectives, the analysis of the legal environment of the hydropower could be influenced. A more manageable and selective approach to pluralism would be applied as it implies fewer potential conflicts and detrimental trade-offs. For instance, a mainly economic approach could be pursued, which would lead to fewer trade-offs and concessions within the limits of what would converge with economic interests, to then avoid conflicts. Conversely, the specific focus on converging interactions within the legal environment would feed a partial and positive representation and analysis of hydropower development. Some of these converging legal discourses fit and reinforce the idea that hydropower, as a renewable energy, is satisfying and integrating interests of

greener energy and economic development for improved living conditions. This argumentation based on a focused and partial representation of the dynamics in hydropower lead to an overly optimistic position on hydropower. More projects could be justified based on this partial representation and analysis of the legal environment of hydropower in the LMRB, focusing only on the dynamics that do converge. Advocates pro or against hydropower projects in the LMRB can, and do, use a selective presentation on either converging or conflicting interactions to argue their positions. While each of these interactions is indeed occurring in the LMRB, a complete and accurate representation of the overall legal environment requires the consideration of all dynamics. The cumulative effect and dynamic nature of these interactions greatly influence, nuance and inform the legal environment. Important trade-offs due to a selective perspective and inefficient governance of hydropower due to uncalculated normative factors can be some of the negative consequences.

Finally, the TNL approach also participates to integration within sustainable development issues through its focus on transnational and transboundary aspects. As presented in hydropower and in general terms, sustainable development issues are often also cross-categories and physically cross-borders, beyond national boundaries, and touch upon a lot of topics and stakeholders. Hydropower development most often occurs on a shared river, which gives a transboundary dimension to the actors, scales and regimes involved, to the effects and the governance of such projects. For instance, the impact of the Xayaburi dam does not only impact the Lao portion of the river or of its nationals but the environment and communities of its neighbours. These elements might not be represented from a national perspective or even through an international or MRC perspective. All three scales and their actors assume that these actors are traditionally represented and heard through their State and national scale. A separate and transboundary idea of these actors can let their voices be heard and consider them part of the project, when for instance they are not actively involved in the project or when they are located too far away from the project to be considered (such as the Vietnamese populations at the end of the river). TNL presents a unique cross-dimensional perspective on the legal actors, scales and legal regimes involved in an issue. It considers plurality but has the potential to not be limited in its scope and categories.

Transnational law has helped study the contribution of international law to integrated sustainable development through its unique and more appropriate approach to legal pluralism. This approach is both pluralist, holistic and interconnected. Each of these elements allow for a more accurate, complete and efficient representation, analysis and governance of complex, and often transboundary, issues. This new approach is useful for both decision-makers, in charge of adopting the best governance to promote sustainable development. It is also useful and especially important for people, both involved and

impacted by these projects. The importance of the TNL pluralist, holistic and interconnected approach is ultimately linked to these latter actors (and their related scales and legal discourses). Unsustainable projects and extreme trade-offs and imbalances affect the people closer to the project (at the local scale for instance) and people with the least influence to advance and protect their interests. In hydropower projects, these actors, scales and regimes sacrificed in unsustainable imbalanced projects are local scales, close to the dam or completely relying on the river along the river, communities and individuals like fishermen, and socio-environmental interests regarding the protection of the river or of livelihoods. TNL is therefore a key factor in improving the representation and integration of all voices, especially the informal ones, in governance of issues by international law.

This approach was translated in the transnational legal space as framing an open-ended space, physically anchored in the Lower Mekong River Basin.

(b) Transnational Legal Space (TNLS) analytical framework

The thesis has framed the issue as a transnational legal space to concretely convey a transnational law approach and it has designed an analytical framework based on this concept to give it a practical insight. The TNLS and its analytical framework have provided an open-ended frame, a common background language of 'legal discourses' and attention to diverse types of interactions. The use of a TNLS setting has offered a more pluralist, holistic and interconnected outlook of the legal environment of hydropower development on the LMRB. Through this, TNLS has engaged with legal pluralism in a less restricted, more accurate and dynamic way.

The TNLS promotes a distinctive approach to the consideration of pluralism as giving a more general, objective and representative outlook. In the context of TNLS, it means an extended inclusion of formal and informal normative elements in the LMRB. In the concrete context of hydropower in the LMRB, the pluralist approach of a TNLS suggests a change of setting and frame for the legal environment.

Firstly, the frame of TNLS is not limited. It aims to include a variety of actors, scales and regimes, as suggested by its pluralist approach. The frame of governance of a transnational legal space is both conceptual and geographically linked to the basin (or sub-basin of the LMRB) and its transboundary nature. An open-ended frame has been developed in chapter 3 to take the counterpart of international law and its clear boundaries of what qualifies as law. It also aims at being all inclusive, and possible extending, of the different legal sources, informal and formal, evolving and developing with the issue regulated. The TNLS frame combines both the physical and conceptual nature of the approach and aims to frame holistically the issue while being inclusive of the plurality of actors.

This new frame has allowed the consideration of a project in its transboundary context, both impacting the local, national, regional and international scales. A pluralist approach to such a legal environment allows for a representation and analysis of how the rules at each level, and from each scale and regime, operate, interact and are implemented.[946] This frame was purposely not related to a specific scale, like international, as the sum of the different riparian States. TNLS also was not considered as being at the project level, more specific but less informed of the transboundary spread impacts of it. The unique transboundary dimension of TNLS emphasizes cross-category dynamics. These are generally not captured by traditional legal categories nor by other integrative approach, most often considering inter-categories and inter-scales' relations.

A basin based TNLS aims to include any influential normative element within the geographical basin space instead of limiting and fragmenting governance by legal jurisdictions. Indeed, informal and transboundary elements can be a blind spot of traditional international law governance relating normativity to legal jurisdictions and traditional scales. For instance, transboundary communities affected by hydropower would normally only be represented by their respective national systems.

The relevance and importance of establishing a TNLS frame related to the basin and to transboundary characteristics of the issue is confirmed in international water law and of IWRM. Indeed, both field and instrument recommend approaching a water resource in its physical integrity in order to include all the scales, actors and legal regimes related to the resource. This approach is promoted as a means to connect the numerous and various layers of normative influence at the level of governance, with the idea to fit best the physical and abstract interconnected reality of the issue.[947]

For instance, the importance of transboundary, basin approach to frame the governance of hydropower in the LMRB can be seen in reference to transboundary impacts. The reference to transboundary impacts and EIAs by NGOs, CSOs or even academics show the need and the desire to introduce transboundary, basin perspectives in the regulation of hydropower. Indeed, the Xayaburi EIA was criticized for the lack of attention to transboundary dimensions of the project or the small extent of this analysis. Despite it being informal, soft law concerns, they are influential and represent the basin wide dimension of the projects.

In practice, the TNLS analytical framework has then tackled the issue from the perspective of the regional scale and actors like the MRC. They can be geographically and abstractly the closest scale to the notion of basin. As in chapter 3, TNLS can be

[946] Berman 'A pluralist approach to international law' (n 180) 322
[947] Muhammad Mizanur Rahaman, 'Principles of international water law: creating effective transboundary water resources management' (2009) 1(3) *International Journal of Sustainable Society*, 222 Bearden (n 597) 84

anchored on a physical basin and establish a map based on the unit of the basin while including a plurality of elements. This multi-dimensional picture suits both the basin (or sub-basin studied) and leaves apparent the diverse legal discourses present, including but not limited to the regional level.

Secondly, the change of setting within a TNLS to better promote legal pluralism addresses the communication about and between the plurality of normative elements included. The traditional international law categories were included and represented through the designation and communication about the 'informal' and 'formal' legal sources. The distinction of a hard law and soft law is clearly established in international law and refers to a clear, measurable difference in nature. The vocabulary itself to designate these normative elements entrenches the distinction and gap between the two notions. In order to go past these distinctions so as to consider globally a legal environment, the limitations within the mode of designation and communication need to be diminished. The vocabulary of formal and informal normative elements reproduces the distinction and divides created in traditional international law. Then, within TNLS, the use of a new designation of 'legal discourses' for any element having a normative relevance is creating a new mode of communication. Informal elements like the judicial claims of communities of the basin or NGOs' report on the negative aspects of a project are taken into account as expressing a normatively influential position or discourse. Their importance and influence are then put on an equal footing with more formal sources of regulation, like treaties or contracts. This takes the counterpart of the distinction between law and non-law where interactions were restricted by the immediate choice of formal legal sources over informal ones, through a hierarchical thinking. Interlinkages, dynamics and possible integration are facilitated by the change in communication between the different, but equally important, legal discourses.

The design of a transnational legal space to frame the legal environment of hydropower development in the LMRB has allowed the thesis to capture different actors, legal regimes and scales. It has also adopted a holistic basin-approach to capture diversity of 'legal discourses', allowing for a less compartmentalized perspective on legal categories and relations between them. The TNLS allows the inclusion of all elements having a normative influence on the legal environment of hydropower development. This especially refers to informal elements, developing outside of traditional legal categories, which were not already adequately integrated. As mentioned in the overall description of these elements in Chapter 4, communities, individuals, indigenous populations, companies and some NGOs have a normative participation which is meaningful but often ignored or secondary. Informal normative elements are an important and growing part of the legal environment of hydropower in the LMRB. For instance, the protests, claims and capacity building initiatives at the local level are developing a force to be reckoned with.

Their influence at the governance and judicial levels are growing. The importance of informal regulation can be seen among other things in relation to what has been described as the 'ASEAN way' of regulation. It relies mostly on non-binding channels, less traditional legal actors, scales and regimes.[948] The transnational legal space consciously created an open frame to non-legal, informal actors, scales and legal regimes to encompass a greater number and diversity of normative influences. It also helps to better consider plurality by allowing these elements to be considered part of the legal environment in a holistic way, and at the same level as formal legal elements. Informal and formal normative elements are considered to all play a role and to exert influence on the overall legal environment of an issue. This means the legal environment is diverse but connected, creating a cumulative normative effect and not an isolated one. Each actor, scale and legal regime projects legal discourses, with their normative objective, which TNLS refers to instead of their legal categories. The pluralist and holistic approach to the basin has expanded the scope of normative elements considered and has allowed their discourses to be included beyond their informal legal categories. In the TNLS, these informal normative elements are given a voice and are empowered by being represented and placed at the same regulatory playing field as formal laws and authorities. Actors of hydropower in the LMRB, such as local communities in Thailand, regional NGOs and advisers in the OECD for example, can be given more attention and influence within a TNLS. It would figuratively shift the focus from their legal categories of soft law or regional influence on them being considered as a legal discourse projecting a certain normative objective. The actual normative influence of certain informal actors, such as communities, could be given less attention according to their legal category in the assessment of the overall legal environment than their actual normative weight. Generally, the legal discourses projected by communities around environmental and social aspects of hydropower development would be considered as less impactful than coming from an authoritative, formal legal source. A TNLS frame would therefore create a space to include these types of normative influences and account for them at the same time as formal legal discourses so as to not marginalise their role. Through its pluralist and holistic approach, TNLS contributes to and aligns with the general call for law to support greater integration between the three pillars of sustainable development (economic, environmental and social). In the context of hydropower development in the LMRB, the inclusion of diverse legal regimes relates also greatly to representing the environmental and human rights legal regimes. This over-direction counterbalances the overall tendency towards economic development and benefits. In addition, the TNLS figuratively levels the disparities in representation between these different legal regimes. While represented in the legal environment, the consideration of environmental and human rights legal regimes can be

[948] Johns, Saul et al. (n 519) 159; Boer, Hirsch et al. (n 343) 61

disadvantaged because of the often soft law nature and informal actors associated with these legal regimes. The representation of a diversity of scales is also facilitated in the TNLS. Hydropower development in the LMRB is marked by a general focus on a few economic and State actors operating at the national or international levels. This is the case for Laos' national development plan and the investors' concurrent plan for hydropower development as a central resource of the country. Other actors of the LMRB, which are also involved directly and indirectly in a hydropower project, are not represented at the same level of involvement. The legal perspective and analysis of the issue can then be unbalanced and partial. Combining the consideration of national and international law with other local and regional scales is necessary in this context to allow for a more accurate and complete understanding of a project's legal environment.

In brief, through the development of a basin frame and of legal discourses designation, the idea of TNLS has both brought out the pluralist and holistic dimensions of the transnational law approach. The open frame created in the TNLS creates a different outlook, focusing less on an organised, straightforward and limited list of the normative elements. It is directed more towards the representative inclusion of all the possible legal discourses and to be also open-ended. This is important to allow a more pluralist approach to hydropower projects and especially for voices normally forgotten or not represented to be heard. The TNLS analytical framework, after changing the setting and communication mechanisms within the LMRB, can then consider broadly the dynamics and interactions occurring within the TNLS between the different legal discourses.

Thirdly, the attention given to different dynamics and interactions within a TNLS participates in better representing, analysing and governing legal pluralism, based on a TNL approach. TNLS has emphasized the interconnections present in the legal environment of hydropower in the LMRB. The previous modifications brought within a TNLS were designed to focus more on the interactions and dynamics between all the elements within the legal environment of hydropower on the LMRB. TNLS provides a useful outlook on the different dynamics naturally occurring, whether convergence, conflict or gap. This mapping of interactions, or their general classification and observation, is important because of their cross-influence and their cumulative impact on the legal environment. The generally separated and hierarchical categories within international law are limiting this outlook on the legal environment. However, these elements, being interconnected, have a cumulative impact and influence on the overall governance of an issue. These dynamics, whether converging, conflictual or evidencing a gap, are to be taken into account for an accurate, informed and efficient governance.

This was illustrated in the case of national EIA legislations. These legislations are often considered in isolation of the broader regional and global EIA normative standards. These

standards or recommendations can come from international organisations and associations (like the OECD or the Swedish International Development Cooperation Agency-SIDA[949]), NGOs (like Earthrights[950]) or judicial positions (Pulp Mills case[951]). They will often be different in their vocabulary, or detailed provisions but provide generally a similar duty and idea of impact assessment. Their relation to certain actors, scales or regimes can limit their influence. Within a TNLS, the opportunity to link these similar duties or observe and exploit their convergences is created by removing structural and terminology limits and barriers. As mentioned in chapter 4, an overall consideration and interconnected informed decision-making would have allowed Laos to know that the beginning of its work on the Xayaburi dam could be considered as breaching international law and its MRC commitments.

TNLS can help consider not only the negative interactions or conflicts mostly focused by traditional international law, but also the positive and missing interlinkages between the legal discourses in the LMRB. TNLS has pointed out different types of interactions which can occur in hydropower in the LMRB. The research introduced some of the expected conflicts, between economic interests and socio-environmental ones for instance. But it also mentioned convergences between socio-economic legal discourses or gaps such as the regulation of the tributaries of the Mekong. In addition, the lack of interactions or decisive evidence towards positive or negative dynamics can help direct legal discourses towards more convergence or to study closely their evolving positions and relations. For instance, this is the case of the lack of interactions or study on the relation between the Lancang-Mekong Cooperation (LMC) and the Mekong River Commission (MRC). Therefore, TNLS's approach showed the potential to provide an extended account of the possible interactions within the legal environment of hydropower in the LMRB. In turn, the governance of the LMRB can be more informed and accurate in its analysis of the legal discourses, their combined effect and their influence on a given hydropower project. Finally, these interactions can then be managing negative interactions, enhancing positive ones and filling the gaps in regulation. An improved, more integrated, harmonious and balanced governance can be built on this understanding and analysis.

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[949] OECD Development Assistance Committee, 'Guidelines on Environment and Aid, No 1. Good Practices for Environmental Impact Assessment of Development Projects'. (*OECD* 1992) <https://www.oecd.org/dac/environment-development/1887592.pdf> accessed 12 March 2021;
SIDA, 'Guidelines for Environmental Impact Assessments in International Development Cooperation' (*SIDA* July 1998) <https://ec.europa.eu/echo/files/evaluation/watsan2005/annex_files/SIDA/SIDA%201%20-%20Environmental%20impact%20assessments.pdf> accessed 12 March 2021

[950] Earthrights International, 'Environmental Impact Assessment in the Mekong Region. Materials and Commentary (first edition)' (Earthrights International October 2016) <https://earthrights.org/wp-content/uploads/eia_manual_final_0.pdf> accessed 13 March 2021

[951] International Court of Justice (2010) Case Concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay). International Court of Justice General List No. 135. Also available at http://www.icj-cij.org/docket/files/135/15877.pdf

The formulation of hydropower development in the LMRB as a TNLS has allowed the thesis to convey a pluralist, holistic and interconnected approach of the legal environment. The frame has highlighted the diversity and importance of informal actors, scales and legal regimes within the regulation of hydropower projects. It has contributed to considering various interactions affecting the legal environment and integration.

The use of a TNLS for hydropower development in the LMRB has created a more accurate representation of the legal environment and especially its pluralist and interconnected nature. This is essential to develop a critical and exact analysis of the legal environment. This informed analysis contributes to the comprehension and examination of the issue according to its legal environment. It is in turn the basis of hydropower decision-making and of a legal analysis and further development and intervention made to influence this issue. For instance, the gaps found in the legal environment can be better mapped with a TNLS, or a more informed and pluralist approach. This will in turn help make more accurate and strategic development in laws, instead of overlapping hard and soft law instruments. Therefore, the TNLS brings important insights into the way the legal pluralism of the issue can be analysed. The TNLS can also inform and guide trade-offs made within the legal environment of the issue. The visibility of legal discourses' threads and their interactions through the TNLS can participate to a conscious effort to reinforce convergences, limit conflicts and fill gaps. It could consider which trade-offs would provide a more balanced integration of all relevant interests and ensure integrated sustainable development in the issue. Trade-offs are unavoidable considering that diverse legal discourses are interacting and weighed against each other to exert different but cumulative impacts on the legal environment of the issue. More complex trade-offs are likely to occur in a legal environment where a lot of diverse legal discourses are included, like in a transboundary issue. However, the TNLS also allows for a representative, complete and dynamic reflection and analysis of this legal pluralist environment. It can therefore bring insights into the way trade-offs operate and should operate. The TNLS can present a full, balanced vision of the overall critical dynamics within the issue, as opposed to being solely focused on negative nor positive interactions. This can in turn participate to pointing out the convergences to be enhanced, the conflicts to be managed or addressed and the gaps to be filled. This would contribute to a balanced, integrated legal environment of hydropower development in the LMRB.

This more pluralist approach to hydropower in the LMRB highlights features already present in the basin. But it gives insights regarding a more complete, accurate and integrated representation and analysis of pluralism in this context. It avoids for instance misrepresentations and partial approaches.

TNLS approach and analytical framework can be used by decision-makers for a better governance and project planning. The requirement to consider pluralism and especially transboundary dimensions in project planning can help to develop awareness and habits of including informal elements, despite their traditionally limited influence.

In summary, transnational law has therefore proven useful in changing the approach of legal pluralism within international law. Its unique pluralist, holistic and interconnected nature has allowed to address legal pluralism in a better way, meaning a way that reflects the reality and accounts for the variety of actors, scales and regimes involved. In turn, this approach allows a more accurate informed and integrated representation, analysis and governance of complex issues like hydropower and transboundary issues.

4/ The importance of Transnational Law and the overall goal of integrated sustainable development

The analysis of the transnational law approach is meant to address its suitability to consider legal pluralism and govern better such complex issues than traditional international law. This is a key challenge and mission not only for an actualised and accurate regulation. But most importantly, TNL is important in its impact and link with people.[952]

An unsustainable project bringing extreme trade-offs and imbalances are looking past the less represented interests, such as the interests of local communities. The impact of an imbalanced development is the imbalances between the interests involved, then creating winners and losers of developmental projects. Sustainable development, in its rationale and recently in its 'no one left behind' idea, is meant for the people. The benefits of sustainable development should be falling back on everyone, even just as a beneficiary and not actor of these policies.

The importance of people and the awareness of their disadvantaged position is growing with the development of studies and interviews of the people affected by dam projects, by the media coverage of their negative situations and their protests. People are increasingly caving their own space in hydropower issues and in international law. The aim of transnational law is to participate and facilitate this effort to serve the people who are supposed to benefit from sustainable development.

B-The use of Transnational Law and the contribution to the study of the concept

[952] Bhatt (n 628) 8

In addition to the general purpose for the inquiry into TNL, the use of TNL also enlightens the theory of the concept as well. In chapter 3, this research has considered TNL and its theory, developed under various definitions. Then, based on their common characteristics, the research has established a distinctive TNL approach. It has then explored further the definition of TNL as a conceptual space to design a possible analytical framework.

Chapter 3 has addressed the lack of firm consensus over the precise definition of TNL and its specific features as legal theory. However, as suggested by several authors, this gap in the theory of TNL would not impair its understanding and use. It has led the current research to focus on the essence of the concept that is present in the various definitions. The inquiry of the research has contributed to studying TNL by considering common features attributed to the concept by the various definitions and by developing on one of the definitions suggested. First, TNL has been positioned as a concept which distances itself from traditional international legal theory and its strict conceptualisations by a more flexible, adaptable and multi-dimensional nature. Secondly, the study of the various definitions of TNL has enabled the research to lay out a general understanding and use of the concept of TNL. This understanding highlights its distinct pluralist, holistic and interconnected approach. Based on this deduced TNL approach, the research has suggested an analytical framework, using the concept of transnational conceptual space. Instead of engaging with a detailed and divisive definition of TNL and aiming to establish an in-depth and fixed version of the concept, the research has reinforced a general comprehension of the concept to focus on its core and consensual characteristics. In that aspect, the research has participated to giving an outlook of the patchwork of definitions of TNL. It especially took into account a deliberate flexibility and dynamism given to the concept by the literature.

Then, the research has designed an analytical framework based on the essential TNL approach inferred and most specifically based on the definition of transnational conceptual space. This analytical framework has explored a way to define and operationalise TNL. It has matched its features to the essence of TNL, which are necessary to integrate legal pluralism and which are notably missing in a traditional international law approach. The promotion of ‘legal discourses’ over well-established traditional legal categories has corresponded to the need for less compartmentalised, isolated and prioritized approach to a pluralist legal environment. The focus on dynamics and interactions within a legal environment can also be considered a goal or end-result from the use of a TNL approach.

The development of an analytical framework, despite the limited definition of TNL, has suggested how to consider the way ahead for a theoretical reinforcement of the concept.

The TNLS analytical framework has confirmed that the research could emphasize the focus on the aims and key points of the concept over clearly defining TNL. Then, the research can participate to guiding the development of TNL features which respond to the need for interconnectivity. Exploring this specific analytical framework has given information about a broader theory and approach to TNL. It has participated to the reflection on TNL characteristics and use. The need for a transnational, broad frame to include various scales, actors and regimes could be best operationalised by anchoring the conceptual TNLS onto the transnational space of the LMRB basin. The research has also added to the literature focusing on the definition of TNL as a conceptual space, influenced especially by Peer Zumbansen. An interesting aspect pursued in this research is the use of this definition, in a way first rejected by Zumbansen, as a physically transboundary space rather than conceptual. Nevertheless, for the case study of hydropower development in the LMRB and other potential issues, the two ideas can be linked. And the anchoring on the geographical space of an issue can be more practical and guide the conceptual spatial analysis.

So, the final contribution of the thesis regarding the theoretical concept of TNL was considered in its contextualisation within hydropower development in the LMRB. The choice of this specific case has also brought insight into the analytical framework and the general concept. This was done through the operationalisation and testing of its approach and of the general suitability of TNL to fulfil its given purpose in this research. Several authors mentioned in chapter 3 have highlighted the need and benefits for TNL from contextualising and applying it to a specific case or field so as to develop its on-going and still debated features. The benefits of a TNLS in the context of hydropower development in the LMRB also show benefits of the theoretical TNL approach. For instance, the useful perspective of an inclusive space allows very concrete actors, like local communities at the Lao-Thai border to express their legal positions. The study of convergences is practically showing the possible positive interactions between economic benefits and socio-environmental interests, like with improved renewable dam project with stricter environmental standards. The previous section addressed TNL's focus on dynamics and interconnections and the opportunity it creates for a more accurate representation and analysis of legal pluralism. The case study has participated to giving a practical insight to the development of TNL and its approach within the research. Considering the initial mismatch pointed at between traditional international legal theory and practice in chapter 2, the insight and feedback from applying TNL constitute a valuable insight to pursue for more attuned legal theory and legal practice.

In this research, the concept of TNL has been enriched through a theoretical inquiry into the concept and through a more practical contextualisation of it. The research has contributed to inferring fundamental and common characteristics attributed to TNL. It

has allowed to design an analytical framework from these characteristics and to apply the concept in a case study. Therefore, this research has reflected on the concept itself and on its on-going development. In addition, the research can offer reflections on TNL beyond its purpose given at the beginning of this research. These other purposes were formulated in the literature as expectations for TNL to engage in more depth with a reflection on international law.

C-The reflective aspect of Transnational Law into legal discourses and International Law

Beyond the specific purpose set for TNL in this research, the literature has formulated other characteristics or ambitions for the concept, among which a reflective nature. Zumbansen especially considers the reflective character of TNL to be an important contribution to international legal theory.[953] Through the interactions it represents, TNL creates the opportunity for legal discourses to exchange, reflect on themselves and evolve. This is also the case for international law more generally. First, this section will focus on the reflection that TNL facilitates within the legal discourses. They can then actualise themselves through conflictual or convergent interactions with other legal discourses. Secondly, the section will tackle the more conceptual self-reflection prompted by TNL within law and legal boundaries. The concept can then bring reflection on the theoretical concepts and on the broader frame of legal pluralism. The research now presents further insights into TNL, which go beyond the scope of the present study but that open the door for deeper reflection on legal pluralism.

1/A reflection on legal discourses through interactions: TNL's emphasis on a dynamic and actualising legal environment

TNL creates a space of reflection and self-actualisation for the legal discourses interacting. The various interactions taking place within a TNLS can create dynamics of challenge or consolidation between legal discourses at the contact of the other.[954] It can lead to internal changes and self-reflection.[955] Then, a TNL approach can allow to represent an evolutive and interconnected perspective on a legal environments and issues.

As previously described, interactions between legal discourses are the meeting points where several legal discourses advance their own normative objectives and rationale. Such interactions result in different dynamics of conflict, convergence or gap between legal discourses.[956] These interactions will affect the overall legal environment,

[953] Zumbansen, 'Where the Wild Things Are' (n 20) 192
[954] Berman 'Global Legal Pluralism' (n 180) 1216-1217 and 1227
[955] Melissaris (n 521) 62
[956] Berman 'Global Legal Pluralism' (n 180) 1158-1159

from the cumulative effect of applying different legal discourses. These interactions will also influence the legal discourses themselves, which can prompt a self-reflection through the different interactions.

Regarding the converging interactions taking place, two legal discourses are generally thought to share coinciding objectives or rationale. Consequently, the reflection triggered by such a dynamic would be reinforcing or comforting both legal discourses. Both discourses are confirmed by the other, then reinforcing the internal logic and expression of a specific actor, scale or regime. The interactions between human rights and environmental legal discourses often result in the strengthening of their own principles and normative aims. Following this dynamic of consolidation, the legal discourse can internally actualise its own functioning and refer to the other convergent legal discourse to reinforce its validity and impact. This reflection and actualisation can also bring cross-fertilization.[957] A converging interaction then leads to a positive exchange between the two discourses that reinforces the links between the two. Human rights and environmental legal discourses can then both use or refer to the principles, actors or rationale originating from the other legal discourse to strengthen their own. For instance, environmental human rights are being promoted, such as the right to a healthy environment, and regimes on indigenous populations' rights are intrinsically linked to environmental concerns.

On the other hand, conflictual interactions occurring within the TNLS can create a different reflection within legal discourses. Interactions are exchange points where both legal discourses communicate perspectives to the other. Here, they are competing or conflicting but participate to each other's development. Conflicts can lead to challenges in the communication and influence of legal discourses and can then create a nuance within legal discourses.[958] Conflicts of legal discourses rarely strictly oppose irreconcilable positions. But rather, they examine competing positions or differences to some degree incompatible. In addition, as highlighted by their dynamic nature, interactions are spontaneous intersections and they can change with time. Therefore, interactions are not set and, because of the possible evolution of legal discourses with every interaction, they do not necessarily lead to conflicts. The actualisation operated through meeting opposing legal discourses can also participate to their internal transformations and of their interactions. These spontaneous tensions and mismatches are challenging but insightful for a legal discourse. It can create introspection and nuance of the original position of a specific discourse. Legal discourses projecting a more economic position have been conflicting with human rights and environmental legal discourses. It has sometimes led to adaptations, nuancing and even cross-fertilization between the three fields.

[957] Viellechner (n 175) 323-324
[958] Colangelo (n 225)

In addition, the concept of TNL can have an influence and reflect on the trade-offs occurring. In the context of a specific legal environment, this research has hinted at the opportunity offered by a better understanding and analysis of interactions to better map trade-offs and to potentially direct decision-making and hydropower development to enhance convergences, fill legal gaps and avoid conflicts. Apart from this opportunity directed more towards decision-making, TNL can contribute to a deeper analysis on the exchanges operated in interactions, leading to challenges or reinforcement and to more or less imbalanced trade-offs. This analysis into these exchanges and their potential evolution can provide a bigger picture of the reflectiveness on legal fields, actors and scales facing legal pluralism.

TNL's reflectiveness can contribute to analysing legal regimes and legal environments with a focus on their evolution through interactions with external influences.[959] For example, the case study of hydropower development on the LMRB could be considered from the point of view of the evolution of its legal environment. TNL could analyse the shift of the legal environment of hydropower towards less economic-focused legal discourses trade-offs. Or it could study the gradual inclusion of environmental and social elements into investment legal discourses in the LMRB. So, the various interactions highlighted and enhanced within a TNLS lead to a reflection of the legal discourses on their internal functioning in relation to co-existing legal discourses. Therefore, TNL could engage with the dynamics and evolution within law in a more general sense and critically reflect on its boundaries and divides.

2/TNL as a space of critical reflection on international law and its boundaries

TNL creates the opportunity to reflect on international law and to consider its evolution and self-actualisation by engaging with the pluralism and dynamics challenging its traditional legal boundaries. This reflection has already pointed in the evolution of international and transnational environmental law for its effect on international law's traditional categories and Westphalian conceptualisation.[960]

As considered in chapter 2, the traditional approach of international law is challenged in its ability to reflect an increasingly pluralist and transnational set of issues. The debates on legal pluralism, fragmentation and on a gap between law in the books and in action have challenged the usefulness of traditional international law, which has prompted an introspection and possible reform.[961] This challenge mostly relates to its legal conceptualisations and categories, established traditionally around the State while not formally acknowledging other elements influencing legal environments. These

[959] This idea of the opportunity of the concept of transnational law allowing for a new and common perspective on historical socio-legal development has been mentioned by Cotterrell 'What Is Transnational Law?' (n 230) 503
[960] Bodansky (n 24) 18
[961] Zumbansen 'Transnational legal pluralism' (n 354) 158

conceptualisations, boundaries and divides are at the heart of the international legal system and define what is law and what is not. Through the continuous sorting of the plurality of actors, scales and legal regimes as being legal or not, international law self-actualises and reasserts its boundaries based on the tension between law and non-law.[962] As an alternative and fitted approach to pluralist legal issues, the theoretical concept of TNL can participate in a broader discussion on modern international law. As mentioned previously in relation to the case study, the consideration of dynamics of challenge and reinforcement in a legal environment creates a reflection on the legal discourses but also on international law. This diversity and constant engagement with boundaries and definitions of what is law influence the system and trigger a self-reflection and introspection of international law.[963] These dynamic forces pushing back and forth the boundaries and definitions of international law are triggering a reflection and evolution in international law which can be captured by the concept of TNL.[964]

The space of TNL established in this research, and referred to by Zumbansen's research, is establishing a conceptual space capturing these dynamics.[965] For Zumbansen, one of the key characteristics and purpose of the concept of TNL lies in its reflectiveness and its suitability to capture the evolution of international law through its focus on interaction.[966] Whether formulated as a space, as a process of evolution, or as a methodological inquiry[967] into the characteristics and boundaries of law, TNL is expressed as an insightful theoretical concept to reflect on international law and its internal dynamics and evolution. This, in turn, can lead to inquiries into the legal categories set in international law, the norm-creation process in modern international law or the adaptable and evolutive nature of international law.[968]

So, TNL participates to the broader discussion mentioned in chapter 2 regarding the role and suitability of international law to approach legal pluralism and modern international issues. In this more general discussion, TNL provides an important insight into an evolutive aspect of international law and its gradual adaptation in the face of the pluralism and dynamics within legal issues.[969] For Zumbansen, the concept of TNL importantly points out, through its reflectiveness and its own flexible and developing

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[962] Law evolves also through a tension between what is law or not, see for example Zumbansen 'Transnational legal pluralism' (n 354) 167; Luhmann (n 507)
[963] Zumbansen 'Transnational law, Evolving' (n 255) 904
[964] Zumbansen and Bhatt (n 413) 10
[965] Ibid 13

[966] Zumbansen 'Transnational law, Evolving' (n 255) 899; Zumbansen 'Transnational legal pluralism' (n 354) 141
[967] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 52
[968] Zumbansen, 'Neither 'public' nor 'private'' (n 287) 52;Berman 'A pluralist approach to international law' (n 180) 329
[969] Fisher, Lange et al. (n 152) section 4(1)

definition and boundaries, that law is also a process and should continuously adapt and reflect on its socio-legal context and the values it seeks to enforce.[970]

The perspective and reflective space TNL creates provides additional insights into the evolution and the dynamics within a legal environment, considered in the more theoretical context of general international law greatly influencing the content and functioning of any legal environments.

II-Challenges faced by Transnational Law: limits to its application and the lessons it can bring

The study of the concept of TNL faces challenges and limits in the way it guides the inquiry into international law and suggests the way forward. First, the impact of transnational on the introspection and reform of international law can be limited. Secondly, the limited details and precision of the concept challenge its practicality and its prescriptions. TNL also faces challenges with regards to the political implications and influence on the governance of an issue then limiting the application of the concept. Finally, the last challenge faced in the application of transnational law in the specific context of hydropower development in the LMRB in this thesis is its relation to the space unit of sub-basin.

A-The limits to the reflective and potentially reformative insights of TNL on international law's approach to legal pluralism

The first key challenge to the concept of TNL, and to the present research, is linked to the depth of the inquiry conducted and to its reflective impact on legal theory. Throughout the thesis, the research has participated to the overall discussion on international law's approach to legal pluralism and, more generally, to modern international issues. In many ways, the research and the use of TNL have positioned themselves in a context of reflection on, and even reform, of international law. The discussion over this idea of reform is often polarized in the literature as to whether international legal theory would require deep transformations or could be adapted with a 'few discrete fixes'.[971] This divide can already be seen in the discussions in the research over the technical or deep adaptation of international law to legal pluralism. On the one hand, authors have considered incorporating legal pluralism in the legal system as a challenge to international law's core characteristics, such as the existence of the State and the preservation of values of predictability and unity. On the other hand, the integration of legal pluralism could be promoted in a more superficial way, involving the

[970] Zumbansen 'Can transnational law be critical?' (n 380) 9-10

[971] Heyvaert (n 184) 225

development of technical tools and principles to manage and contain such core changes. But this last view has been criticized by Koskenniemi and others as being technical and presenting insufficient solutions to adapt international law to legal pluralism.[972] On that spectrum of international law reform to promote a more fitted approach to legal pluralism, the reflective input of TNL can be questioned in the way it suggests an in-depth or more minor changes to the legal system. Therefore, the contribution of TNL to this on-going theoretical discussion can lead to consider the principle as either too weak or too disturbing for reforming modern international law.

First, the concept of TNL is used in this research as a conceptual space of transnational law that could be associated to a rearrangement or 'fix' of the system. It can be viewed as opposed to deeper substantive modifications, suggested by the other possible definitions of the concept. For instance, the understanding and use of TNL as a substantive new layer of normativity, or as the end-result of the transformation of international law into a more transnationalised system, can be both examined as more in-depth, visible and prescriptive changes to international law. On the contrary, the procedural and conceptual spatial definitions of TNL can refer to supplementary approaches and technics to the existing legal system creating a coordinating and managing way of dealing with legal pluralism within international law.

The concept of TNL, especially as a space, can be considered in different ways in terms of the depth and the impact of its potential reflective and reformative input. First, it can be viewed as providing minor changes to the legal system because it does not transform core characteristics of international law and only distances itself from their centrality. This transnational space refers to existing international legal discourses which implies rather a change of arrangement and perspective to studying legal pluralism in international law. However, these changes can also be considered as opening the way for more substantive and in-depth changes in the system. A TNLS research, like the present one, can serve as a preliminary study on the use of transnational law to reflect on and reform law so as to regulate appropriately transboundary, pluralist issues. The results might prove the suitability and capacity of a TNL approach. Then it can create the need for a more elaborated, as well as a crystalized and substantive, development of transnational law.

Considering the importance and the well-established nature of traditional international legal theory, the reform of international law might not be appropriately and practically conducted through disruptive, fast and in-depth changes, even if necessary. States might disagree to join an approach that reduces their influence but also disrupts the current way of functioning and application of international law. The gradual consideration of the

[972] Dunoff (n 295) 154; Ingrid J Visseren-Hamakers, 'Integrative environmental governance: enhancing governance in the era of synergies' (2015) 14 *Current Opinion in Environmental Sustainability* 136, 138; Berman 'Jurisgenerative Constitutionalism' (n 462) 666

characteristics to change and the suggestion of alternatives could be a more appropriate way to reform international law.

Secondly, the use of TNL as a conceptual space to reflect on reforming in international law might not be superficial and technical. But it might present characteristics of an in-depth reconsideration of the system. While the suggested changes might not be detailed, concrete and substantive, the change in approach and mentality in international law, through TNL, can be of importance for a stable and core transformation of the system. The way of thinking and analysing legal issues is also a part of legal reasoning and of the application of international law. The analysis of legal issues, as considered in the thesis, relies on the categories, characteristics and approach set within the legal system. An examination of legal categories and sorting of law and non-law aspects of an issue are then operated. It automatically and strictly frames the issue with the traditional international legal conceptualisations, despite developments in practice and efforts to reform and reflect on the system. Therefore, a change of approach and perspective in international law can lead to an in-depth transformation of the legal system and the way it represents, analyses and applies to modern issues. As considered with the development of TNL and TNLS in the present research, the transformation of international law suggested can lie in a reflective engagement with the frame and formulation of existing 'legal discourses' to provide a different arrangement and look at an issue.

In addition, as introduced in the previous chapter, the definition of TNL and TNLS can be considered as a space, methodology or process of reflection on international law. In that, the concept of TNL and the research would rather offer a platform and opportunity to study the legal system and possible gaps and problems faced in the integration of legal pluralism, instead of a prescriptive reform type. As Zumbansen defends, TNL could be more metaphorically a lens and space for discussion about international law and would not be positioned either as an alternative to the legal system nor as a coordination mechanism to avoid conflicts of law.

Finally, the complexity of the topic can make it 'hard to identify effective and efficient strategies for reform'.[973] This makes the consideration of TNL as a reflective tool to reform international law a challenging position. The actual impact and depth of TNL's reflection on international law can be seen as still undetermined, as it varies according to approach taken by the researchers and definition set for the concept. The present research has defined its own understanding of TNL and of its possible impact and purpose in studying international law. But other insights and inputs could be explored with the development of the concept and of other studies.

[973] Turner (n 201) 238

B-The limited practicality and level of details in the general concept of TNL and its insights on the research and on international law: a blessing and a curse

It is worth mentioning that the comments on the challenges and limits of the application of TNL in the context of the case study also apply to the overall insights of TNL and of the research.

The vagueness of the concept and its lack of practicality and detailed implementation have been considered both in the theoretical examination of TNL (chapter 3) and in the insights provided into the case study (chapter 5 part I). However, the consideration of the vagueness and on-going development of TNL can affect the perceived extent of its impact as a suitable and valid theoretical concept to adopt in transboundary and pluralist legal issues. It can also be especially limiting in the context of the case study and of a practical contextualisation. Despite the justifications made for this characteristic flexibility of the concept, these factors could also affect the generalisation and consensus over the concept.

Firstly, the concept of transnational law in itself presents a challenge in establishing a precise descriptive and analytical framework. Its open-ended and still debated nature makes it difficult to reach a consensual and precise definition and to apply it. For instance, the lack of a specific criterion defining what qualifies as a legal discourse and what harbours legal influence is not given, in the theoretical approach and in the development of the analytical framework. This can have for consequences to not know what to include or not within the consideration of a legal environment. This could possibly deter decision-makers to include informal sources at all, to make their own assessment of what deserves to be included as a legal discourse or to include any type of interest or observation which is not formed to have any normative influence. The inherent flexibility in TNL can create limitations in how precise and rigorous its definition can be. The problem of rigor or lack of prescriptive nature of the approach was also criticized with the integrative policies of the nexus and the IWRM. The lack of precision in a specific approach can lead to having less consensus and overall acceptance, and therefore application, of the approach. If the transnational law approach is to be adopted in international law to consider more suitably legal pluralism, it needs to be understood by everyone and be usable, according to basic defined and precise criteria.

However, this challenge does not impair the research in its current scope and purpose. As mentioned in chapter 3 and in the aim of the research, the use of the concept should have a sufficiently clear direction and essential characteristics to direct the research into a

transnational approach. Flexibility and open-endedness were also addressed in chapter 3 as conscious biases adopted for transnational law to distance the concept from the more rigorous and limiting traditional legal conceptualisations.

Secondly, the consideration of the various interactions between legal discourses, in chapter 3 and in the case study, is limited to three types of dynamics. The possible dynamics mentioned in this thesis are overall negative and conflictual dynamics, positive and converging ones and gaps between the legal discourses. These three types might not cover the range of possible interactions between two legal discourses. An example could be the dynamic of compatibility, which was here mentioned in the context of positive dynamics but could be developed as a specific category of interaction. Other studies on interactions within sustainable development goals have considered more detailed approaches with more possible types of interactions. These approaches can nuance and more precisely describe the dynamics of the legal environment. This could bring a greater level of detail, information and guidance as to what interactions to enhance to create synergies and which ones to manage to avoid extreme trade-offs.

The current research has taken the direction in this case to broadly examine key dynamics which can introduce an informative enough outlook on the influences within the legal environment.

Finally, limitations of the research also intervene in the consideration of the specificities of hydropower projects in the LMRB. Key features and main characteristics of the case study have been introduced to contextualise the inquiry into legal pluralism. The examples and use of the Xayaburi dam project have illustrated the process of reflection.

The presentation of the case study and of the Xayaburi has not been exhaustive. It has selected actors, scales and regimes to introduce for a wide representation of the diversity and number of interests within hydropower development in the LMRB. The complex and rich background of each of these legal discourses could only be hinted at and referred to other sources dedicated to their full comprehension. This general outlook could first diminish a deep and full comprehension of the sources and weaken the significance of the use of this case study in understanding the application of a TNLS analytical framework.

However, considering the aim and focus of the research as well as the depth of existing data, the research has presented a manageable and adequate degree of details in considering some specific actors, scales and legal regimes intervening in hydropower development in the LMRB. The development of a selected number of legal discourses in chapter 4 part I has been guided by the need to present a variety of both formal and informal sources and actors at different scales. However, it was designed to introduce a sufficient sample of legal discourses of different natures, scales and from different actors to reproduce the idea of legal pluralism in hydropower in the LMRB.

The limitations regarding the precise characteristics and details of the theoretical framework and of the case study play a role in the depth of analysis of the contextualisation and of the overall research. However, these limitations addressed in the introduction have not impaired the purpose and scope of the inquiry. A comprehensive preliminary answer and argument were made, despite the challenge of a lack of detailed prescriptions. These limits, mentioned during the development of the thesis, have been justified first and foremost by the purpose and focus of the research. The aim here was to examine specifically the suitability, in essence, of transnational law's approach to legal pluralism within the issue. A preliminary and fundamental examination of the concept of transnational law and of the legal pluralism occurring in the issue is oriented towards sufficiently developing the thesis' inquiry.

C-The political limitation to Transnational Law: State's openness to change and securing interests

Another limitation that challenges the insights brought about by a TNLS in the LMRB relates to the political aspects of governance and in the context of hydropower that affect the legal environment. A TNLS perspective promotes a non-compartmentalised, pluralist, holistic and interconnected approach to hydropower. However, the political aspect of hydropower decision-making can influence the legal discourses considered. Then, deciding authorities can orientate the balance of the final decision one way or another, which has traditionally been in favour of economic interests. While transnationalisation and the influence of various types of actors, scales and regimes have developed naturally, in spite of the State and main political agendas, the position of politics is important to facilitate or frustrate the acceptance and development of pluralism. The steady resistance of international legal theory against legal pluralism and fragmentation can also be partly linked back to a political will (mainly of States) to maintain States' influence and protect the sovereignty of the national level and political independence. As considered in chapter 1, politics and law are connected in the operationalization of an objective like integration. So, politics also has a role to play in allowing and facilitating integration of a plurality of actors and regimes. Therefore, a TNL approach is also influenced and challenged by political discourses, which could limit its application within the hydropower fields and in other cases.

In the case of hydropower and natural resources regulation, the strong presence of the State directs decision-making. This topic is considered an issue of 'high politics' and the security of the State in terms of energy, food or water for instance.[974] Hydropower is

[974] 'High politics' understood as 'those issues of existential importance to the state and which concern its very survival' in Jeremy Youde, 'High Politics, Low Politics, and Global Health' (2016) 1 *Journal of Global Security Studies* 157, 157

touching upon many vital needs of the State's survival and functioning. Therefore, it involves a great amount of political decision-making and willingness. The involvement of various legal discourses and interests can lead to trade-offs and compromise on political agendas and interests. Predominant and influential political interests might not encourage legal pluralism nor adopt a TNL perspective, which could nuance their own influence and central authority. Each State in the LMRB has presented strong interests in the Mekong river and in hydropower development for vital aspects of their development, like food in Cambodia or electricity in Thailand. Based on these needs and on the sovereignty over their natural resources, many countries have justified their (sometimes unilateral) developmental projects on the river. This is especially visible in Laos, where the transboundary, transnational and cooperative actions, such as the compliance with the MRC procedures, could appear more like a curtesy than a commitment to balance national projects with other interests or consider a bigger frame.[975] The prominent objective of economic development (such as the aim of Laos to graduate from its Least Developed Country status through hydropower development) and the pressure of large investments into these structures can influence the governance of hydropower projects to consider or prioritize legal discourses matching policy objectives. These political considerations can shape hydropower governance and legal environment nationally and regionally. As mentioned in chapter 3, regional actors and legal discourses are greatly influential on hydropower in the LMRB, especially with China or even Thailand's investment in projects in Laos.

For instance, Boer, Hirsch et al. account for a multi-scalar system of politics of development and resources sharing, at all levels of governance.[976]

Politics do influence the extent of the outlook and the potential of legal pluralism considered with TNLS. For example, the inclusion and participation of some informal, non-State actors depend to some extent on the willingness of the State to give them a platform to be visible and to be integrated as a political and normative influence. Local actors, indigenous populations and communities tend to formally participate to hydropower projects through the national public participation process. Nevertheless, public participation can be set as a legal requirement within national legislation and as a legal expectation at different scales and in different legal regimes. Law can therefore guide

[975] Daovong Phonekeo, 'Pak Beng hydropower in the context of Lao development strategy and MRC sustainable development' (*Mekong River Commission document*, 22-23 February 2017) <www.mrcmekong.org/assets/Publications/Council-Study/PPT-on-Lao-hydropower-development.pdf> accessed 29 October 2019; 'Hydropower dams' (*OpenDevelopment Mekong*, 22 December 2017) <https://opendevelopmentmekong.net/topics/hydropower/> accessed 10 March 2021, section 'Dam Diplomacy: Laos'

[976] Boer, Hirsch et al. (n 343) 93

politics to create space for pluralism and diversity.[977] But, as hinted above, this is mainly done through a process of institutionalisation of these actors or legal discourses and the intervention of traditional, formal law. TNLS can be limited by political considerations and agendas because of its more informal and pluralist approach. This is a central limit to the contribution of law in improving hydropower development in the LMRB and to integration.[978] In the LMRB, strong national identities regarding hydropower and the use of the Mekong have been highlighted in chapter 4. Then, they play an important part in the integration of a plurality of informal actors, competing scales and fields. This could restrict the representation of pluralism in the LMRB called for by TNL. Although the concept could conversely help highlight informal legal discourses downplayed or restricted by national law and traditional international law through its non-traditional legal approach.

D-The limited consideration and application of Transnational Law within a sub-basin

Finally, a key challenge to the approach of the LMRB relates to the physical scope set in this research. The LMRB is often used as the reference point for the study of the Mekong river and hydropower development. Therefore, its framing as a TNLS is aligned with and feeding a broader literature on this context.[979] However, it is important to consider that the LMRB is a sub-basin divide, leaving out the upstream part of the river basin located in Myanmar and China. This is, in a way, justified by the deeply rooted focus existing in the LMRB, especially through the Mekong River Commission, and by the division generally made between the politics conducted upstream and downstream. However practical and still insightful, the vision selected is then a sub-basin approach and will not represent all the actors involved in the management of the river basin and of hydropower development there.[980] In that sense, the setting of a TNLS modelled on the physical delimitation of the transboundary LRMB is limiting the aim of TNL to provide a pluralist, holistic and interconnected approach to the issue. It is even differing from the general recommendations to manage shared water resources at the basin level with the IWRM. The current research, despite its focus on the LMRB, has also acknowledged the great influence of elements outside of the scope established, such as the important

[977] Berman 'The evolution of global legal pluralism' (n 206) 161; Berman 'Jurisgenerative Constitutionalism' (n 462) 679-695

[978] S. Hansson, S. Hellberg and J. Öjendal, 'Politics and Development in Transboundary Watershed: The Case of the Lower Mekong Basin' in Joakim Öjendal , Stina Hansson and Sofie Hellberg (eds) *Politics and Development in a Transboundary Watershed. The Case of the Lower Mekong Basin* (2012 Springer)

[979] The Lower Mekong River Basin is often used as a basic unit to study the Mekong river because of its administrative breakdown through the MRC. More information on the LMRB is available through this channel and the MRC common basin plans and policy adds to the choice of studying the LMRB. A cultural breakdown between Lower and Upper Mekong River Basin is also suggesting the LMRB as a unit for study.

[980] Dore and Lebel (n 838) part 'Politics of Scale and Level'

Chinese influence on the lower basin, sometimes even indirectly. In addition, the research is justified in its focus by the purpose to present a preliminary evaluation, to test the concept of transnational law and to consider the development of hydropower in the transboundary Mekong river, which currently occurs mainly in the LMRB. However, this limitation of the research, and of the insights from the use of transnational law in hydropower development of the LMRB in relation to its legal pluralism, can still bring lessons which can be transferred and generalised to place in a bigger context and reflection.

III-Generalisation and the development of a practical tool implementing Transnational Law: next steps for the concept

Valuable insights can be deduced from pursuing further studies on the generalisation of the concept of TNL and on the development of a practical tool based on the transnational legal approach developed in this research.

Further studies would therefore be required to palliate the limits of TNL presented above. The concept of TNL could benefit from being further used and developed, both in practice and in theory. For example, the examination in more depth of transnational law as a conceptual space or following the other definitions offered by the literature. In addition, the consideration of the concept of TNL could benefit from an in-depth comparison with other theoretical approaches that are reconsidering the conceptualisations and frame of the legal system to adapt to modern issues. The research mentioned some possible approaches in the first part of chapter 3. These further studies can help strengthen the concept of transnational law used in the present research and participate to broaden the understanding of its definition and impacts. Two possible next steps to consider will be discussed in the next section to address both the generalisation of the principle and extension of its scope of influence. In addition, it will mention the practical design of a tool or guidelines to implement the transnational legal approach into decision-making.

A-The generalisation of a TNL approach to other fields and to general international law: a ‘redemptive’ theory to provide a narrative of acceptance of legal pluralism in international law?

First, this section will examine the generalisation and use of the concept of TNL in other fields and issues of international law. With the growing transnational character of issues to regulate, the consideration of TNL has already extended to several fields. Developing fields include for instance transnational organised crime or transnational

family law.[981] The study of TNL as extending to other fields and issues can provide both insights into the concept itself and into its development for general international law.

Firstly, the concept of TNL could be examined in the context of general international law as well as in the more specific legal fields that have branched out of international law, as described in chapter 2. Then, TNL could be studied and further tested as a potentially appropriate way of approaching legal pluralism and fragmentation, legal integration and modern international law. TNL could be applied to specific fields, like it already has been done in Transnational Environmental Law for example. In addition, the generalisation of TNL could bring insights into general international law and help promote a new vision of existing international legal principles. The study and test of TNL in a more general way can consider the extension of its rational and approach to other fields and general international law.

Secondly, the generalisation of TNL should be considered to examine, strengthen and position TNL as a consensual and widely accepted theoretical approach to general international law. As mentioned in chapter 2, the discussion about modern international law and legal pluralism has fed the development of different theoretical concepts and redemptive approaches to a reorganisation or reform of international law, such as global administrative law. The study of the generalisation and transferability of the concept of TNL to other fields and to general international law would explore the potential for a universal and consensual adoption of TNL. The adoption of the concept in international law and the broadening of its scope and application depend on the evidence of its suitability and of its widespread acceptance in international legal theory. Therefore, the study of the generalisation of TNL would be useful to evaluate if the concept is a sound and overall compatible approach. It would examine its contribution to a more accurate and pluralist approach of international law.

After considering the application of TNLS to hydropower development in the LMRB and the insights it can bring to approaching legal pluralism, it is important to examine the practical transferability of this approach to other specific cases and to other issues. The question of transferability of the TNLS approach from the LMRB to other case studies is necessary to measure the solidity and usefulness of such a legal theory for transboundary rivers and generally. Despite essential characteristics set in chapter 3, the application and contextualisation of the TNLS is specific to the case and issue it regulates. For instance, the TNLS was anchored and framed on the geographical delimitation of the sub-basin and this framing would need to be adapted in other contexts. The delimited conceptual space in this case suited the delimitation of the physical sub-basin. This might vary according to

[981] Cotterrell, 'Still Afraid of Legal Pluralism?' (n 186) part II para. 3, The author mentions other transnational regulatory systems can be sports law, internet law, new lex mercatoria etc.

the cases and to the topics considered that might not have such a clear and transboundary physical context like hydropower on transboundary rivers.

As mentioned in chapter 4, the specific case of the Xayaburi dam project used has similar characteristics to other hydropower development projects on the LMRB. It could be used to infer a general consideration of the issue and case study. The TNLS used in this research can be developed with examples from other projects, especially from the plan for 11 dam projects on the mainstream of the Lower Mekong River Basin set in similar conditions.

In addition to the transferability within the basin, a TNLS approach can be taken within other basins. Many similar cases of transboundary river basins can benefit from the insights of framing a TNLS. Other shared river basins face similar issues with the representation and analysis of the various actors, scales and regimes. Most often, they are positioned outside of traditional legal categories. Such pluralist legal environments can often lead to detrimental legal fragmentation, conflicts and trade-offs in favour of politically stronger interests as well as legally recognised actors, scales and regimes. These similar situations to the LMRB can be seen with the shared Nile river basin or with the Amazon river basin. These transboundary rivers also experience concerns about the development of large hydropower projects, such as the Grand Renaissance dam in Ethiopia.[982] Similarly to the LMRB case, these hydropower developments can often be unilateral or partial in their integration of all relevant legal discourses. This then creates imbalances and costs, most often to environmental and social aspects, and unsustainable development. These issues are similarly marked by a strong State, national level and regime presence facing dissenting, overlooked legal discourses from local communities, NGOs or environmental regimes, for instance. In addition, the present research and case study have already considered general insights about some types of actors, scales and regimes generally involved in transboundary river basins and hydropower development. The insights and representation established in relation to the international scale, actors, legal instruments and regimes are applicable to every transboundary basin and international hydropower project. Therefore, these elements could already be used in the case study of another basin with a TNLS approach.

However, it is worth noting that transboundary rivers have distinctive features, legally, politically and even with regards to the characteristics of the river basin itself. Firstly, the legal features of a certain transboundary river will vary in terms of the consideration of some actors, scales or regimes. The legal status given to individual actors like indigenous populations or NGOs can differ. The existence of regional cooperation, bodies and regime

[982] Michael Hammond, 'The Grand Ethiopian Renaissance Dam and the Blue Nile: Implications for transboundary water governance' (*Global Water Forum Paper 1307*, February 2013)

like with the MRC can also influence the study of the legal environment. In terms of the legal regimes present in a basin, more or less economically focused basin development plans can promote or not hydropower, for example. Transboundary rivers will also present different political situations influencing the legal environment. It can refer to different dynamics between the basin's riparian States, to the national agendas or to the levels of development of the countries within the basin. Scientifically, the unique characteristics of a river basin will differ from the LMRB's, for instance with the number of riparian States sharing the resource or the fishery and ecosystem conditions linked to the watercourse. The development of influencing normative elements might vary depending on the case study chosen and its specificities, such as the advancement of the local scale of governance or the elaboration of hydropower rules. Therefore, the TNLS can provide guidance for the representation and analysis of other basins' pluralist legal environment with the condition of adapting the consideration of frame, legal discourses and dynamics to the specific case at hand.

The transferability of the insights of this specific case study can also be transferable to other issues than hydropower development. The issue of hydropower in the LMRB shares similar characteristics to many other issues facing legal pluralism. Many instances illustrate the challenge of integrating not only several actors, scales and specific regimes but also economic, environment and social aspects.

These issues generally relate to the topic and goal of sustainable development. They will also involve questions of adopting an integrated pluralist approach, of considering interlinkages and of operating an informed, possibly more balanced, trade-offs examination in regulating a given issue. Several issues related to sustainable development have gone through a gradual dynamic of an economic-focused development to adopting a more pluralist, integrated approach and the notion of three pillars. These types of issues could consider using a TNL approach or framing the issue within an adapted TNLS to benefit from a more pluralist, holistic and interconnected consideration.

A more specific type of issues that could benefit from the insight of a TNLS for hydropower regulation, and from TNL in general, is the legal environment related to the use of natural resources.[983] This issue also generally involves economic, environmental and social aspects, with expected competitive interactions and tensions between them. Natural resources management also relates to two characteristics present in hydropower regulation and interesting in the context of TNL, which are the strong link to the State and the often trans-category or transboundary nature of the resources. As mentioned in the research, natural resources regulation is a vital issue for State. Therefore, its legal

[983] Water management and other fields, like the management of natural resources share similar characteristics and need integration, see Varis, Enckell and Keskinen (n 29) 434

environment remains physically attached to territorial sovereignty. But it is also conceptually dependent on State decision and national law and scale. On the other hand, it is often seen that natural resources, like water, are transboundary and trans-category in terms of the regimes they appeal to and the actors attached to them. They cannot be regulated appropriately based solely on traditional State-centric legal conceptualisations. Transboundary rivers are an example of this tension between reality and governance, which is tackled in this research. The legal environment of transboundary water resources still often refers to the traditional permanent sovereignty over natural resources.[984] Despite the non-absolute nature of this right, this UN General Assembly resolution is still at the core of decision-making within natural resources and hydropower projects. It prioritises the role of the State and the national scale and regimes. This approach is especially permissive for the unilateral development of projects, as China has done on the Lancang-Mekong River Basin.

In light of such tensions in natural resources regulation and the need for a less State-centred and more transnational regulation, TNL would be suited and transferable to these types of issues. It could provide insights in framing such issues and the tensions explained above.

The TNLS approach used in the context of hydropower development in the LMRB brings insights which are also transferable. It can enlighten other fields and other specific contexts in relation to the legal pluralism.

B-The development of a practical tool and guidelines to operationalise and implement a TNL approach, beyond representation and analysis

Other future developments on the concept of TNL could study the idea of a more practical tool for decision-makers to analyse issues and inform their decisions with a more transnational legal approach.

Firstly, the development of a practical tool to implement a TNL approach would also participate to the growth and improvement of the concept itself. It would link its theoretical and analytical aspects examined in this research with a more practical consideration. The concept of TNL would be tested in a concrete decision-making environment. This would enlighten the implementation and impact of TNL on the regulation of issues beyond a more general legal insight.

Secondly, the implementation of TNL via the design of a practical tool would align with the requirement of a more efficient, accurate and reality-based legal approach. The mismatch between traditional international legal theory and practical developments was pointed out

[984] Sands and Peel (n 50) 192

in chapter 2. It has created imbalances and inaccuracies in the implementation of international law to issues. By comparison, TNL has been positioned as having a more accurate and attuned approach to represent and analyse legal pluralism and to reflect the reality on the ground of a given legal environment. Therefore, TNL-based guidelines could provide a more informed and practical guidelines. In addition, the development of a practical tool to apply a TNL approach can inform decision-making and project designs to reflect an integrated, pluralist and interconnected approach. This is important in relation to the ultimate purpose and desired outcome of integrated sustainable development. As considered with the diagram in chapter 1 presenting an implementation process from science to policy to law, the implementation aspect of the process of international law still requires attention. This step of appropriate implementation from policy could influence the ultimate outcome pursued. Further research on the concept of TNL would therefore need to consider more in detail the practical application of the concept and its approach. The practical tool in question can take several forms. A TNL practical tool could present guidelines or a checklist of elements to consider or steps to follow in the development of a given project. An example of reference could be the OECD guidelines on multinational enterprises mentioned in chapter 4. These guidelines have established a general and adaptable guide, offering optional steps to take for each stage along the development of a project. These guidelines aim to assess if a project is sustainable. With reference to a TNL approach and to the analytical framework established in this research, a template checklist of elements to consider during decision-making could be developed. It could point out the complex pluralist and transboundary network of legal discourses and the critical interactions to focus on. This more accurate and complete analysis of an issue and checklist could provide a more informed, balanced and more sustainable decision-making. This can prove interesting in the case of project planning, deemed insufficiently reflective of transnational characters and of diverse normative influences. This is the case for the Xayaburi dam's EIA as well as for other dam in planning. It can also be useful for other financial programs developing large infrastructures. The African Development Bank (AfDB) for instance, is developing financial support for many water infrastructure projects. These projects are submitted to the bank's Programme for Infrastructure Development in Africa (PIDA) which allows for countries to apply for funds by presenting a plan of their projects.[985] The programme has highlighted the importance of a transboundary informed planning.[986] The complexity of regulating water infrastructures, especially on

[985] 'Programme for Infrastructure Development in Africa (PIDA)' (*African Development Bank Group*) <https://www.afdb.org/en/topics-and-sectors/initiatives-partnerships/programme-for-infrastructure-development-in-africa-pida> accessed 11 March 2021

[986] 'Programme infrastructure development for Africa' (*African Union*) <https://au.int/en/ie/pida#:~:text=PIDA%20provides%20a%20common%20framework,spark%20growth%20and%20create%20jobs.&text=Unleashing%20intra%2DAfrican%20trade.> Accessed 28 March 2021

transboundary river basins, has been mentioned in the context of hydropower development. It importantly lies in the transboundary and interconnected nature of these projects. Therefore, an accurate and complete analysis reflecting these aspects is crucial to provide for a sustainable and solid planning and project. It would from the start take into account complex but key factors, such as plurality and transboundary dimensions. In this last example, a TNL checklist would be needed to provide a general and wide-ranging outlook of actors, scales and legal regimes likely to have an influence on the legal environment of projects. It would enable decision-makers and project submissions to be informed of the multi-dimensional and interconnected aspects. This informed and multi-dimensional analysis can lead to stronger and more sustainable water projects, solidly built on economic, environmental and human rights legal discourses and including a diversity of actors, scales and fields.

Finally, similarly to generalisation, the development of further studies on the design of a practical tool would participate to considering the big picture of the operationalisation of integration, introduced in chapter 1. The consideration of the practical implementation of a TNL approach into decision-making would provide a final insight into the suitability and impact of the concept. It would place TNL in the socio-legal context initially presented and allow for a deeper reflection on the contribution of TNL to the aim of integration in sustainable development as promoted by international law.

In addition to the possibility of considering the use of a TNLS in other fields and case studies, other steps can be suggested to further consider this theoretical approach and the integration of legal pluralism. First, considering the limits and challenges mentioned in the previous section, a following step would be to examine the basin in its geographical entirety. The examination of the sub-basin has brought positive insights from the use of a transnational legal approach to pluralism in hydropower. These insights could be examined in the broader context of the basin. This would provide a more exhaustive and accurate account of hydropower development on the entire transboundary river and geographical basin. It could then be related to an IWRM approach to the Mekong river basin. An overall IWRM commitment was made by the MRC and this integrative policy could be examined and mirrored with the study of TNLS. In addition, further studies could pursue a more detailed analysis by including a more exhaustive and critical mapping of the scales, actors and regimes involved in hydropower governance in the LMRB. The present research has proceeded to analysing the *prima facie* suitability of a transnational legal approach. For that, it has surveyed a general understanding of the pluralist legal environment in the LMRB. A more detailed consideration of these legal discourses could help studies wishing to establish a clear roadmap and exhaustive account of legal pluralism in the LMRB. This presents various challenges because of the extent of the possible scope. Nonetheless, it could help use the transnational approach in more depth

and get a more detailed transnational analysis of hydropower development in this specific case. Another possible way forward is to explore hydropower regulation and its legal pluralism not only within a TNLS or as a conceptual space but according to other definitions of transnational law presented in chapter 3. An interesting perspective, in line with the current research, would be to consider hydropower as a transnational legal field. This refers to one of the definitions of TNL that would also convey a pluralist, holistic and interconnected approach fitting hydropower regulation. It aims to frame substantive transnational rules as making up a new layer of normativity and possibly a new transnational legal system or field. Examining the field of hydropower as a transnational legal regime could reinforce a holistic and interconnected approach within the field. The various transboundary legal discourses could be emphasized as a unit and indivisible regime to make more evident the requirement of integration. Similarly to the micro analysis of transnational law mentioned in chapter 3, the field-specific application of TNL can help to emphasize the transnational dynamics and systemic characteristics linked to this field. It would possibly highlight and frame legal pluralism with more practical indicators than by defining a conceptual space. Using the concept of transnational law under another form, presented in the literature, might provide other appropriate ways of considering legal pluralism within hydropower development in the LMRB. The use of a case study within this research has contributed to give a practical analysis to the concept of transnational law and its related analytical framework. It has both allowed for a test and a justification of the concept in the issues it would actually regulate. It has aimed to keep in mind the detrimental gap highlighted between international legal theory and practice. It has also allowed to develop the concept of TNL itself. The case study reflected on the steps taken and hypothesis studied in this research. Therefore, the following section will reflect on the overall, more general and theoretical, lessons learnt from using the concept of transnational law and its purpose of approaching legal pluralism.

Conclusion

The research developed in this thesis has participated to the reflection on international law and its relation to legal pluralism in a modern socio-legal context. The particular focus here was to present a different perspective to this recurrent inquiry. This was conducted through the development and testing of the concept of transnational law.

First, the study has introduced the need for integration in sustainable development and in international law. In contrast, it has shown the inadequacy of international law to reflect the legal pluralism of this socio-legal context. In turn, it has created a mismatch between international legal theory and practice. Then, the concept of transnational law was introduced as a fitted theory and analytical framework to emphasize diversity and dynamics beyond and across traditional legal categories. This has been emphasized through a more pluralist, holistic and interconnected approach. The research tested this distinctive approach in the context of hydropower development in the Lower Mekong River Basin, which was formulated as a transnational legal space. This frame and study highlighted both conflicting, converging interactions and gaps in the legal environment.

This research aimed to evaluate whether the concept of transnational law was fitted to create a pluralist approach and how it could operationalise it in the context of hydropower development in the LMRB. The inquiry was guided by the following question:

‘How can transnational law present a more suitable approach to the plurality of actors, scales and regimes in multi-dimensional issues, like hydropower development on the Mekong River, and contribute to a reflection on legal pluralism and integration in law?’

The research has responded to this inquiry with the preliminary validation of transnational law as a suitable theoretical approach to legal pluralism. Its pluralist, holistic and interconnected approach and its design of a transnational legal space have allowed to tend towards a more integrative representation and analysis of the normative elements and their various dynamics. In examining this initial objective, the research has contributed to drawing valuable insights.

A key contribution of the research lies in the original design of an analytical framework based on the concept of transnational law, implemented in a specific case. This analytical framework contributes to establishing possible features of a transnational legal space. This is established through regards to the frame and language, which allow for a less constricted consideration of legal pluralism and of the dynamics influencing the overall legal environment. This design had for purpose to guide the representation and analysis of legal pluralism in hydropower development in the LMRB. It does so by suggesting features taking an opposite stance to traditional international legal

conceptualisations that normally limit the analysis to certain legal categories and dynamics. The transnational legal space designed in this research suggests one way to explore a practical configuration for transnational law. It can also suggest how to consider changes of approach to convey the pluralist, holistic and interconnected nature of the concept.

In addition to the creation of a transnational legal analytical framework, the research contributed to common debated topics, such as legal pluralism. It also added insights to different aspects of the general inquiry, such as international law and transnational law, hydropower and the Lower Mekong River Basin, as well as with sustainable development and its objective of integration.

The research has, through its general purpose, reflected on international law and its traditional characteristics. The final stance of TNL takes a nuanced but reflective view on international law, aligning with a majority of the literature. Traditional legal theory and legal categories are not rejected here. But the research concludes that international law as originally designed, especially as State-centric, is sometimes not adapted to the contemporary issues it regulates. The research has asserted that reflection and changes can be made to consider the realities and needs of pluralist issues. Especially so by distancing itself from a strict reliance on classifications and embracing more flexibility and nuance. For example, the role and importance of the State in international law is not disputed, but a more multi-centric approach to international law can be taken while analysing pluralist issues. This would contribute to gaining an accurate and informed insight. Therefore, the research has contributed to the broad discussion on modern international law and its characteristics by positioning its argument in favour of changes in the core approach of the system, regarding legal pluralism most specifically.

In this reflective context, the research has contributed to operationalising and further reflecting on transnational law. As shown in chapter 3, the theory surrounding the concept of transnational law is divided and not set to one definition, content and characteristics. However, authors have agreed that the contextualisation and operationalization of the concept could enlighten its definition and focus on the practicability of the notion rather than on a strict theoretical frame and limitation. The research has thus participated to the on-going inquiry into transnational law, especially in its definition as a conceptual space. Transnational law was considered in a specific and new context of hydropower development on a transboundary river then adding to the scenarios and fields in which a transnational legal perspective has been used.

The research has studied the case of hydropower development on the Lower Mekong River Basin and its legal environment. The setup of a transnational legal space has brought attention to a variety of actors, scales and regimes and to their dynamics

influencing the legal environment, either positive, negative or mismatching. This research has created a more accurate and integrative representation and analysis of this pluralist legal environment. These representation and analysis are feeding into an overview of the case. The latter is not always taken by studies on the LMRB and hydropower development bringing the focus on certain aspects of the issue or taken specific angles to the problem. These include studies of the MRC, of soft law instruments of the applicable national laws or a more socio-legal mapping of the issue. The perspective taken by the research contributes to an overall look and study of hydropower development in the LMRB to assess more generically, but more representatively, the legal context. The research contributes to a need and an objective formulated in hydropower regulation in the LMRB to reflect pluralism, convey integration and to pursue integrated sustainable development.

Finally, the research has also contributed to the broader discussion on, and promotion of, integrated sustainable development. The first part of the study has considered the role and importance of international law in the operationalisation of this objective towards creating sustainable development. By that, this research reasserted the need for an inter-disciplinary vision and effort in implementation. It requires, for instance, the consideration of an objective being reflected and promoted within science, policy and law at the same time. This research also contributes to the on-going research on and ambitions of the SDGs agenda. These mostly focus on interlinkages and synergetic readings based on convergences. Nexus, IWRM and other integrative approaches also show a similar objective and focus. The transnational legal approach of the hydropower projects on the LMRB can promote a more integrated legal environment and contribute to a perspective of integrated sustainable development in this field.

These contributions can display limitations and raise questions with regards to the level of details regarding both the analytical framework and the case study. The analytical framework of transnational legal space has been based on the ideas of a conceptual space, denomination of legal discourses and the focus on the various types of dynamics occurring between normative elements. Nevertheless, this analytical framework followed the purpose of giving an overall view of the issues considered, of building a general approach to later be adapted, and of a preliminary evaluation of TNL. It has allowed the thesis to avoid the pitfalls of traditional international law based on stricter legal categories, definitions and structure. The case study also adopted a more general outlook on the issue, which provided a preliminary examination of the context as a transnational legal space. It allowed for a complete and unrestricted angle of approach of the issue. The research has followed a more overall approach, not motivated by a specific end-result or angle of study. This has in turn facilitated the consideration of a broad and adaptable transnational law in hydropower development on the LMRB. The generic nature of the research conducted provides sufficient insights and positive feedback on transnational law

to create opportunities for further study of the concept and of more detailed analysis of the present case study.

The research opens the discussion on the use of transnational law as an appropriate legal concept and analytical framework to consider pluralist and interconnected issues, like hydropower development and basins like the LMRB. Further research could consider in more details and practical terms the use of transnational law. For example, a different setting could be explored, in terms of transboundary issue and case study. A natural following step to this research would be to address the development of tool, based on the insights from transnational law, for practitioners to build more informed decision-making and implementation reflecting adequately legal pluralism and dynamics.

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