

## ON FAILING FORWARD: NEOLIBERAL LEGALITY IN THE MEKONG RIVER BASIN

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### ABSTRACT

Collective inquiry is underway, in the United States and around the world, into relations between legal and neoliberal thought and practice, or “neoliberal legality”. Scholars in a number of jurisdictions are exploring what demands neoliberalism might make of law and lawyers and how legal norms, institutions and practices might express, or call into question, neoliberal precepts. This article contributes to this inquiry through attention to one particular characteristic of neoliberal experimentation in the development field: the propensity of neoliberal experiments to “fail forward”. That is, the failure of development projects to realize transformative promise with which they were explicitly invested has not tended to impede subsequent projects from proceeding on more or less unchanged policy premises. The claim of this article is that a particular, modular understanding of law, of a kind propagated in the influential writings of economist Milton Friedman (as well as elsewhere), has been critical to neoliberalism’s maintenance of forward momentum through such instances of apparent failure. Description of the legal regimes surrounding two hydropower development projects undertaken in the past decade in the Mekong River Basin in the Lao People’s Democratic Republic in Southeast Asia will be put forward in support of this contention. In this setting, forward failure has also been maintained, this article shows, through the productive intertwining of neoliberal reform agendas and the politico-economic ambitions of a one party state.

### INTRODUCTION

Collective inquiry is underway, in the United States and around the world, into relations between legal and neoliberal thought and practice, or “neoliberal legality”.<sup>1</sup> Scholars in a number of

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<sup>1</sup> This term, and related terms, have been scattered throughout legal scholarly literature over the past decade or more, law and society literature and scholarship in international law especially. *See, e.g.*, BOAVENTURA DE SOUSA SANTOS & CESAR RODRIGUEZ-GARAVITO, *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 11, 31-33 (2005); ANDREW LANG, *WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* (2011). Nevertheless, as David Singh Grewal and Jedediah Purdy highlight, with reference to “neoliberalism” in

jurisdictions are exploring what demands neoliberalism might make of law and lawyers and how legal norms, institutions and practices might express, or call into question, neoliberal precepts.<sup>2</sup> This article contributes to this inquiry through attention to one particular characteristic of neoliberal experimentation in the development field: the propensity of neoliberal experiments to “fail forward” in that “their manifest inadequacies have... repeatedly animated further rounds of neoliberal invention”.<sup>3</sup> In this context, the “inadequacies” in question are not so much those of any financial or developmental shortfall. Rather, the productive failures on which this article focuses concern the non-realization of expectations as to the likelihood of neoliberal policy measures to produce thoroughgoing transformation in the targeted society so as to foster widespread market participation. Neoliberal experiments “fail forward” when the transformative promise they carry in this regard goes unrealized without this dampening the ardor of that promise’s further pursuit.

The claim of this article is that a particular, modular understanding of law, of a kind propagated in the influential writings of economist Milton Friedman (as well as elsewhere), has been critical to neoliberalism’s maintenance of forward momentum through repeated instances of such failure. The relative inaptitude for failure of the stylized understanding of law that Friedman’s writings promoted has helped to ensure the durability of accompanying economic policies. Precisely as legal reform for

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general, it “may be unfamiliar to some American legal audiences”: David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *LAW & CONTEMP. PROBS.* (forthcoming, 2014), at <http://scholarship.law.duke.edu/facultyscholarship/3141>. Scholarly embrace of the term, or interest in the phenomenon ‘neoliberalism’ as such is, however, far from universal. *See, e.g.*, Bruce Caldwell’s reprimand that “the term ‘neoliberalism’ is not a doctrine that any of the principal actors [of the Mont Pèlerin Society and the Chicago School of free market economics] promoted or defended”: Bruce Caldwell, *The Chicago School, Hayek, and Neoliberalism* 15 SSRN (Mar. 10, 2009) at <http://dx.doi.org/10.2139/ssrn.1356899>. For the meaning given it here, *see infra* Part I.

<sup>2</sup> *See, e.g.*, the following scholarly workshops, held recently in Australia, Argentina, Finland, and the United Kingdom, respectively: The Politics of Legality in an Age of Neoliberalism, UNSW Australia Faculty of Law (Aug. 1-2, 2014), at <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/neoliberalismworkshopprogram0.pdf> (at which a version of this paper was delivered; hereinafter Politics of Legality Workshop); Sociedad Latinoamericana: Entre la Altermodernidad y la Gobernanza Neoliberal: El Desafío de la Fraternidad, Universidad de Buenos Aires Faculty of Law (June 16, 2014), at <http://www.derecho.uba.ar/derechoaldia/notas/sociedad-latinoamericana-entre-la-altermodernidad-y-la-gobernanza-neoliberal-el-desafio-de-la-fraternidad/+5287>; Imagining Post-Neoliberal Regulatory Subjectivities, University of Turku Faculty of Law (October 15-17, 2014) at <http://lawinthelighthouse.wordpress.com>; Understanding Neoliberal Legality: Perspectives on the Use of Law By, For, and Against the Neoliberal Project, University of Oxford (June 21, 2013), at <http://www.politics.ox.ac.uk/index.php/podcasts/neoliberal-legality-workshop-understanding-neoliberal-legality-perspectives-on-the-use-of-law-by-for-and-against-the-neoliberal-project.html>.

<sup>3</sup> JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON* 6 (2010).

development has been beset by cycles of “normative judgment”, so the way has been smoothed for neoliberal experimentation identified more with economics than with law, the latter insistent always upon its dealing only “with ‘what is,’ not with ‘what ought to be’”.<sup>4</sup>

Description of the legal regimes surrounding two hydropower development projects undertaken in the past decade in the Mekong River Basin in the Lao People’s Democratic Republic, Lao PDR or Laos, will be put forward in support of this contention, as instances of “actually existing neoliberalism”, at least in part.<sup>5</sup> Such development is a matter of particular concern to the United States, as evidenced by the creation, in July 2009, of the Lower Mekong Initiative within the U.S. Department of State.<sup>6</sup> In April 2014, a spokesperson for the US State Department emphasized the high stakes in play: “[T]oday...[i]ncreasing demands, rapid development, and climate change are putting greater pressure on the river – threatening the Mekong’s unique environment and the livelihoods of the people that depend on it”.<sup>7</sup>

As well as relating a tale a neoliberalism’s forward failure through law, this article’s re-description of Lao hydropower development will tell a story of co-production: between a neoliberal reform agenda and the politico-economic ambitions of a relatively repressive, one party state.<sup>8</sup> However florid may be the anti-state rhetoric of neoliberal texts at times, it has repeatedly been

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<sup>4</sup> On law and development’s subjection to successful cycles of judgment, see David M. Trubek, *The Owl and the Pussy-Cat: Is There a Future for Law and Development?* 25 WIS. INT’L LJ 235 (2007); DAVID M. TRUBEK AND ALVARO SANTOS (EDS), *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (2006). On positive economics’ allegiance to “what is”, see Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 3 (1953).

<sup>5</sup> Neil Brenner & Nik Theodore, *Cities and the Geographies of “Actually Existing Neoliberalism”*, 34 *ANTIPODE*, 349 (2002).

<sup>6</sup> Fact Sheet, U.S. Department of State, *The U.S. and the Lower Mekong: Building Capacity to Manage Natural Resources* (Jan. 6, 2010) at <http://www.state.gov/r/pa/scp/fs/2010/134808.htm>.

<sup>7</sup> Press Release, U.S. Department of State, *A Milestone for the Mekong River Commission* (Apr. 4, 2014) at <http://www.state.gov/r/pa/prs/ps/2014/04/224430.htm>.

<sup>8</sup> On the contemporary political culture and organization of Laos and the role of the State, see generally MARTIN STUART-FOX, *POLITICS AND REFORM IN THE LAO PEOPLE’S DEMOCRATIC REPUBLIC* (Asia Research Centre, Murdoch University, Working Paper No. 126, 2005); Martin Stuart-Fox, *Laos: The Chinese Connection*, 2009 *SOUTHEAST ASIAN AFFAIRS* 141 (2009); ERIC PAUL, *OBSTACLES TO DEMOCRATIZATION IN SOUTHEAST ASIA: A STUDY OF THE NATION STATE, REGIONAL AND GLOBAL ORDER*, 58-64 (2010); Holly High & Pierre Petit, *Introduction: The Study of the State in Laos*, 37 *ASIAN STUDIES REV.* 417 (2013); Roberto Bellini, *Building Civil Society in Lao PDR: The Decree on Associations* 24 *DEV. IN PRACTICE* 353 (2014).

observed that practices identified with neoliberalism may embolden rather than constrict state power, including power of an authoritarian bent. This dynamic was famously captured in Andrew Gamble's account of the rise of the "free economy and the strong state" in Margaret Thatcher's Britain.<sup>9</sup> In the Lao hydropower development setting, however, state authority has not been augmented through neoliberal programs under the rubric of "law and order", as in other instances.<sup>10</sup> Rather, this augmentation has been effected through an apparent devolution or handover of public power – that is, its submission to mechanisms of audit and consultation – at least for a time. To grasp this dynamic of the "anti-state" promotion of state power, Milton Friedman seems precisely the right thinker to which to turn. Among the contemporary tendencies that Friedman helped to propagate is that of combining strong policy commitments in favor of competition and individual (consumer) empowerment with relative indifference as to the form of government or conduct of those called upon to deliver upon those commitments. Friedman famously championed a "positive economics" oriented towards generating reliable predictions of the effect of policy levers, an approach that claimed to be "in principle independent of any particular ethical position or normative judgments".<sup>11</sup>

The first section of this article briefly introduces the sense in which neoliberalism is used in this discussion. The second section familiarizes the reader with contemporary Lao hydropower development, focusing on two recent projects known as Nam Theun 2 and Xayaburi. The third section links the legal regimes surrounding these projects with the highly stylized program for law and lawyers laid out by Milton Friedman in his classic 1962 text *Capitalism and Freedom*.<sup>12</sup> In this regard, it explains how the first of these projects, Nam Theun 2, might be construed as a failure, when viewed through the lens of Friedman's book, which failure did not seem to impede a reiteration of Friedman's model, with significant modifications, in the Xayaburi project. The fourth section of this article

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<sup>9</sup> ANDREW GAMBLE, *THE FREE ECONOMY AND THE STRONG STATE: THE POLITICS OF THATCHERISM* (1988).

<sup>10</sup> See generally STUART HALL, *DRIFTING INTO A LAW AND ORDER SOCIETY* (1980); Loïc Wacquant, *Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity*, 25 *SOC. F.*, 197 (2010).

<sup>11</sup> Friedman, *supra* note 4, at 4.

<sup>12</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962).

highlights the modularity of the conception of law operationalized in both of the Nam Theun 2 and Xayaburi projects and argues that this modularity has proven vital to the durability of the “model” of neoliberal legality and of the neoliberal development agenda more broadly. The fifth and concluding section of this article briefly foregrounds some of its implications for international law and development scholarship and practice.

## I. NEOLIBERALISM

Neoliberalism has “many authors, many birthplaces” and “has always been on the move”; it is, accordingly, notoriously difficult to pin down.<sup>13</sup> The term’s provenance may be traced textually to the late nineteenth century, when the French economist and economic historian Charles Gide, a champion of consumers’ and agricultural cooperatives, attacked the Italian economist Maffeo Pantaleoni, and other “adepts of Neo-liberalism”, for defending a “hedonistic world in which free competition will reign absolutely; where all monopoly by right or of fact will be abolished; where every individual will be conversant with his true interests, and as well equipped as any one else to fight for them; [and] where everything will be carried on by genuinely free contract”.<sup>14</sup> In the 1930s, amid the ascendancy of the economic ideas of John Maynard Keynes that prevailed until the mid-1970s, neo-liberalism again surfaced as a pejorative term directed towards those critical of state intervention in the economy through monetary and fiscal policy.<sup>15</sup> American political scientist Charles Merriam was derisive, for instance, of the writer Walter Lippmann’s “neo-liberal” attempt to rewrite classical liberal doctrine against the policy developments of the New Deal, by recourse to the work of two Austrian economists,

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<sup>13</sup> PECK, *supra* note 3, at 39.

<sup>14</sup> Charles Gide, *Has Co-operation Introduced a New Principle into Economics?*, 8 THE ECON. J. 490, 494 (1898). See Dag Einar Thorsen, *What is Neoliberalism?*, 2 CONTEMP. READINGS IN L. & SOC. JUST. 188, 197-199 (2010).

<sup>15</sup> GORDON FLETCHER, THE KEYNESIAN REVOLUTION AND ITS CRITICS: ISSUES OF THEORY AND POLICY FOR THE MONETARY PRODUCTION ECONOMY (1989); JOHN EDWARD KING, A HISTORY OF POST KEYNESIAN ECONOMICS SINCE 1936 (2002). The relationship of neo-liberalism to Keynesian thought and policy is, nevertheless, far from one of straightforward opposition. In responding to some economists critical of his work, Milton Friedman emphasized “what a great economist Keynes was and how much more [Friedman] sympathize[d] with his approach and aims than those of many of [Keynes’] followers”: Milton Friedman, *Comments on the Critics*, 80 J. POL. ECON. 906, 908 (1972).

Ludwig von Mises and Friedrich Hayek.<sup>16</sup> It was from a “thought collective” of re-thinkers of classical liberal economics from the late 1930s onwards – Mises and Hayek active among them – that what we now know as neoliberalism emerged.<sup>17</sup>

If neoliberalism was developed as an argument for government promotion of competitive capitalism against “Keynesian policy, social pacts of war, and the growth of the federal administration through economic and social programs”, it was also a rejection of classical economic liberalism’s call for states’ passive deference to “truck and barter” and its purportedly inflexible adherence to doctrine.<sup>18</sup> One element to which the “neo-” of neoliberalism relates was its dismissal of what Hayek termed the “wooden insistence of some liberals on some rules of thumb, above all the principles of *laissez-faire*”.<sup>19</sup> As such, neoliberalism is not reducible to a uniform code, nor to a politics of “Right” or “Left” prescription; rather, it invites relentless experimentation.<sup>20</sup> Common among neoliberal thinkers, nevertheless, is a commitment to “competitive order” and the necessity of maintaining conditions favorable to competition, including through the performance of “positive functions” by the state to enhance competition.<sup>21</sup> In its extension of this competitive imperative to all spheres of human existence, neoliberalism elaborates a “whole way of being and thinking” centered on the figure of the “entrepreneur” engaged in choice, action on the basis of choice and, above all, entrepreneurship of the self, in circumstances where foresight is presumed impossible.<sup>22</sup> Neoliberalism’s goals, Mises

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<sup>16</sup> Charles E. Merriam, *Review of The Good Society by Walter Lippmann*, 53 POL. SCI. Q. 129, 133 (1938). See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979*, 216-219 (Michel Senellart ed., Graham Burchell trans., 2008).

<sup>17</sup> PHILIP MIROWSKI & DIETER PLEHWE (EDS.), *THE ROAD FROM MONT PÈLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* (2009). On divergences between Hayek and Mises, see Joseph T. Salerno, *Mises and Hayek Dehomogenized*, 6 REV. AUSTRIAN ECON. 113 (1993); João Rodrigues, *The Political and Moral Economies of Neoliberalism: Mises and Hayek*, 37 CAMBRIDGE J. ECON. 1001 (2013).

<sup>18</sup> FOUCAULT, *supra* note 16, at 217; Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 4 (2003).

<sup>19</sup> FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 13 (Routledge 1944).

<sup>20</sup> Friedrich A. Hayek, *Competition as a Discovery Procedure*, 5 Q. J. AUSTRIAN ECON. 9, 10 (2002) (“[C]ompetition is important only because and insofar as its outcomes are unpredictable and on the whole different from those that anyone would have been able to consciously strive for; and...its salutary effects must manifest themselves by frustrating certain intentions and disappointing certain expectations”).

<sup>21</sup> Milton Friedman, *Neoliberalism and its Prospects*, 17 February 1951, FARMAND 89, 91-93 (1951)

<sup>22</sup> FOUCAULT, *supra* note 16, at 218, 226.

explained, are neither realistic representation of the human condition, nor the pursuit of just or rational ends, but rather the production of a “science of means” centered on the “categorical elements of choice and action”.<sup>23</sup> It aims not at government of a particular size or stripe, but rather government of a particular persuasion, namely, one all of the actions of which could be justified as promoting and preserving “the catallaxy”, that is, “the spontaneous order of the market”.<sup>24</sup> Crucially for purposes of this article, international norms and institutions have long been seen as vital to the propagation of such a neoliberal “common sense” worldwide.<sup>25</sup>

By way of elucidating with some precision an account of neoliberal legality representative of this “thought collective” within the confines of these pages, this article will later narrow its attention to one of its most prominent participants in the United States – Milton Friedman – and focus, furthermore, on just one of Friedman’s books (perhaps his best known): *Capitalism and Freedom*.<sup>26</sup> Nonetheless, Friedman’s 1962 text is not, of course, a summation of all that is or might be termed neoliberal, nor definitive in its rendition of neoliberal law. There are aspects of his account with which fellow neoliberals would probably have disagreed at the time of publication. Associations between the above-mentioned Austrian economists, on one hand, and the Chicago School of economics, with which Milton Friedman is identified, are far from straightforward and the Mont Pèlerin Society that brought them together remained, at all times, a “heterogenous group”.<sup>27</sup> Furthermore, there are dimensions of Friedman’s thought that would not find favor today among those who continue to evaluate all law and policy against a market-favorable benchmark.<sup>28</sup> This 1962 text, and the neoliberalism voiced in it, may

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<sup>23</sup> Ludwig von Mises, *The Treatment of “Irrationality” in the Social Sciences*, 4 PHILOSOPHY & PHENOMENOLOGICAL RESEARCH, 527, 531 (1944).

<sup>24</sup> Friedrich A. Hayek, *The Market Order or Catallaxy*, 2 LAW, LEGISLATION, AND LIBERTY 107-132 (1978).

<sup>25</sup> PECK, *supra* note 3, at 73 (tracking “the winding path of neoliberalism from crank science to common sense”). See, e.g., James T. Gathii, *Neo-Liberalism, Colonialism and International Governance: De-Centering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996 (1999-2000); James T. Gathii, *The Neo-Liberalism Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011); Tor Kvever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model*, 52 HARV. INT’L L. J. 288 (2011).

<sup>26</sup> FRIEDMAN, *supra* note 12, at 39.

<sup>27</sup> PECK, *supra* note 3, at 40, 51.

<sup>28</sup> See, e.g., Robert Moffitt’s observation that some contemporary trends in the U.S. policy environment promoted by conservative voices, such as the imposition work requirements for welfare, “run fundamentally in opposition” to

also be non-representative of Friedman’s later work, in which his tolerance for regulation – even market-complementary regulation – seemed to narrow considerably.<sup>29</sup> With these cautionary notes in mind, Friedman (posthumously) and this 1962 book may still be regarded as iconic of a neoliberal creed; Paul Krugman observed that Friedman has long served as the “ultimate avatar” of market fundamentalist economics; Ronald Chen and Jon Hanson have called him “America’s, and perhaps the world’s, best-known free marketer”.<sup>30</sup> In light of the modular view of law that he helped generate (as discussed in Part IV), it is striking that Friedman himself has become somewhat of an archetype or model of the neoliberal thinker and actor in the world.

In this context, let us now turn to a pair of development projects, evidencing the “complex ‘cutting’ of market and nonmarket modes of governance” that has tended to take place under the rubric of neoliberalism.<sup>31</sup> The focus of the next section will be the Nam Theun 2 hydropower project, financed in 2005 and operating since 2010 on a tributary of the Mekong River in Laos, and the far larger Lao project into which it “failed forward”: the Xayaburi Dam, under construction on the Mekong River mainstream, and scheduled to become operational in 2019.<sup>32</sup>

## II. INTRODUCING LAO HYDROPOWER: NAM THEUN 2 AND XAYABURI

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Friedman’s proposal for “negative taxation”, that is, a state payment to those whose taxable income is zero, the level of which is gradually ratcheted back as earned income rises: ROBERT A. MOFFITT, *THE NEGATIVE INCOME TAX AND THE EVOLUTION OF U.S. WELFARE POLICY*, NATIONAL BUREAU OF ECONOMIC RESEARCH 32 (Working Paper No. 9751, 2003) at <http://www.nber.org/papers/w9751.pdf>; FRIEDMAN, *supra* note 12, at 192.

<sup>29</sup> See Lanny Ebenstein, *The Increasingly Libertarian Milton Friedman: An Ideological Profile*, 11 *ECON. J. WATCH*, 81 (2014).

<sup>30</sup> Paul Krugman, *Milton Friedman, Unperson*, *N.Y. Times*, August 11, 2013, at A17 (claiming Friedman used to be the “ultimate avatar of conservative economics, [but] has essentially disappeared from right-wing discourse” because of the movement of US conservatives to the political right and their “reject[ion] [of] reality”); Ronald Chen and Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law* 103 *MICH. L. REV.* 1, 14 (2004).

<sup>31</sup> PECK, *supra* note 3, at 23.

<sup>32</sup> On the Nam Theun 2 Dam, see generally <http://www.namtheun2.com>; <http://www.worldbank.org/projects/P076445/lao-nam-theun-2-power-project-former-under-pe-p004206-len?lang=en>; <http://www.internationalrivers.org/campaigns/nam-theun-2-dam>. On the Xayaburi Dam, see generally <http://www.xayaburi.com>; <http://www.internationalrivers.org/campaigns/xayaburi-dam>.



The Mekong River Basin, cradling Southeast Asia's longest river, passes through the People's Republic of China, Myanmar (Burma), Laos, Thailand, Cambodia and Vietnam. About two thirds of the approximately 65 million people who live in the Basin depend on the river's aquatic resources for subsistence, as well as using river water for drinking, transportation and irrigation.<sup>33</sup> The Mekong River Basin, including its watershed or catchment area, comprises 97 percent of the land-locked territory of Laos and approximately 97 percent of the Lao population resides within it.<sup>34</sup> In 2012, that population was estimated to be 6.5 million people.<sup>35</sup> In 2007-2008, about a quarter of the Lao population were living below the national poverty line and approximately 37 percent were estimated to fall below the international poverty line, living on less than \$1.25 per day (measured at 2005 international prices adjusted for purchasing power parity).<sup>36</sup> In 2011, approximately 30 percent of rural villages with road access and 61 percent of villages without road access in Laos did not have electricity.<sup>37</sup>

Plans for large-scale hydropower development throughout the Mekong River Basin have been circulating since the 1950s.<sup>38</sup> Laos has shown longstanding enthusiasm for these and the prospect of export income that they offer, through sale of electricity to neighboring Thailand and Vietnam, even in the midst of war.<sup>39</sup> The first large hydropower dam in Laos, the Nam Ngum I Dam, was built in the

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<sup>33</sup> Guy Ziv, Eric Baran, So Nam, Ignacio Rodríguez-Iturbe, and Simon A. Levin, *Trading-off Fish Biodiversity, Food Security, and Hydropower in the Mekong River Basin*, 109 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 5609 (2012); MEKONG RIVER COMMISSION, STATE OF THE BASIN REPORT (2010), at <http://www.mrcmekong.org/assets/Publications/basin-reports/MRC-SOB-report-2010full-report.pdf>

<sup>34</sup> RAJESH DANIEL, LOUIS LOBEL, KANOKWAN MANOROM (EDS), GOVERNING THE MEKONG: ENGAGING IN THE POLITICS OF KNOWLEDGE, xv (2013); *Mekong Basin*, Food and Agricultural Organization of the U.N., Water Report 37 (2011), at <http://www.fao.org/nr/water/aquastat/basins/mekong/index.stm>. See also Avijit Gupta and Soo Chin Liew, *The Mekong from Satellite Imagery: A Quick Look at a Large River*, 85 GEOMORPHOLOGY, 259 (2007).

<sup>35</sup> *The Millennium Development Goals Progress Report for the Lao PDR 2013*, U.N. Development Program 12 (2013), at <http://www.la.undp.org/content/dam/laopdr/docs/Reports%20and%20publications/2013/MDGR2013.pdf>.

<sup>36</sup> *Id.* at 21.

<sup>37</sup> *Id.* at 29.

<sup>38</sup> Carl Middleton, Jelson Garcia, & Tira Foran, *Old and New Hydropower Players in the Mekong region: Agendas and Strategies*, in CONTESTED WATERSCAPES IN THE MEKONG REGION: HYDROPOWER, LIVELIHOODS AND GOVERNANCE, 23, 23-24 (François Molle, Tira Foran & Mira Käkönen, eds., 2009).

<sup>39</sup> The war known in the West as the Vietnam War or the Second Indochina War, and in Southeast Asia as the American War, was fought in Vietnam, Cambodia and Laos between 1955 and 1975. See generally MARILYN B. YOUNG, THE VIETNAM WARS, 1945-1990 (1991). On Lao political history prior to this, from nineteenth century French colonization

late 1960s and commissioned between 1971 and 1984 and a second, Theun Hinboun, was commissioned in 1998.<sup>40</sup> It would take until 1993, however, for the first of a cascade of major Mekong River Basin dams originally envisaged in the mid-twentieth century to receive a governmental mandate: the dam so mandated was Nam Theun 2.<sup>41</sup> Temporarily beset by liquidity problems and a regional slump in electricity demand amid the Asian financial crisis of the late 1990s, it would be a further twelve years – 2005 – before some twenty-seven financial institutions, led by the World Bank and the Asian Development Bank, would agree to finance the approximately US\$1.5 billion required for Nam Theun 2's development.<sup>42</sup>

Located on the Nakai Plateau in southern-central Laos, Nam Theun 2 is a 39-meter high, 436-meter long concrete gravity dam constructed on the Nam Theun, a tributary of the Mekong River; water released from it flows into another Mekong River tributary, the Xe Bang Fai. The project included development of a 1,070 MW power plant designed to export approximately 995 MW of electricity to Thailand, under a take-or-pay power purchase agreement with the state-owned Electricity Generating Authority of Thailand (EGAT), and to supply about 75 MW to the state-owned Electricité du Laos for Lao consumption. The special purpose vehicle created for the project, and the beneficiary of a 25-year concession from the Lao Government entitling it to build, own and operate the project and then transfer it back to the state at the end of the concession term, is the Nam Theun 2 Power Company Limited (NTPC). NTPC is a limited liability company created under Lao law and is 40 percent owned by EDF International (a wholly-owned subsidiary of the predominantly state-owned French company Electricité de France, EDF), 25 percent owned by Lao Holding State Enterprise

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onwards, *see* SØREN IVARSSON, *CREATING LAOS: THE MAKING OF A LAO SPACE BETWEEN INDOCHINA AND SIAM, 1860-1945* (2008).

<sup>40</sup> Middleton et al, *supra* note 38, 23-27; Ian Porter & Jayasankar Shivakumar, *Overview*, in *DOING A DAM BETTER: THE LAO PEOPLE'S DEMOCRATIC REPUBLIC AND THE STORY OF NAM THEUN 2*, 1, 7 (Ian Porter & Jayasankar Shivakumar eds., 2011).

<sup>41</sup> Porter & Shivakumar, *id.* at 2, 9-14.

<sup>42</sup> *Id.*, 10-15; Vincent Merme, Rhodante Ahlers & Joyeeta Gupta, *Private Equity, Public Affair: Hydropower Financing in the Mekong Basin*, 24 *GLOBAL ENVIRONMENTAL CHANGE* 20, 22 (2014); Nam Theun 2 Power Company website, at <http://www.namtheun2.com/about-ntpc/financing.html>.

(LHSE, a Lao state-owned company established in February 2005 to hold the Lao government's shares in NTPC), and 35 percent owned by Electricity Generating Public Company Limited (EGCO, a publicly listed company on the Thai Stock Exchange incorporated by EGAT and in which EGAT retains a shareholding of approximately 25 percent). The base project cost of US\$1.25 billion was funded 28 percent by equity and 72 percent by debt, with an additional US\$200 million of contingent costs financed equally with equity and debt. Additional provision was made in the Concession Agreement for unanticipated project impacts and breaches of contractual requirements to be covered, at least in part, by letters of credit, performance bonds, and insurance. Debt financing for the project (including half the contingencies) was provided by a number of multilateral and bilateral agencies, export credit agencies, and a consortium of sixteen private commercial banks: nine international U.S. dollar lenders and seven Thai Baht lenders. Debt guarantees against political risks, provided by the World Bank Group's International Development Association, the Multilateral Investment Guarantee Agency and the Asian Development Bank, covered approximately US\$186 million of the dollar denominated loans. Construction was carried out under a turnkey, price-capped engineering, procurement and construction contract between NTPC and EDF.<sup>43</sup>

The Nam Theun 2 project was an exceedingly ambitious undertaking for all involved. Under James Wolfensohn's leadership (from 1995 until 2005), the World Bank sought to make of this project an emblematic exercise in "Doing a Dam Better".<sup>44</sup> Reflecting the impact of a "post-Washington consensus", and the recommendations of the multi-agency World Commission on Dams, the World

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<sup>43</sup> Porter & Shivakumar, *supra* note 40, at 2-5, 14-15, 67-68, 81-83; *Nam Theun 2 Powers Ahead*, PROJECT FIN. INT'L, March 12, 2013, at <http://www.pfie.com/nam-theun-2-powers-ahead/21073485.fullarticle>; Nam Theun 2 Power Company website, at <http://www.namtheun2.com/about-ntpc/shareholders.html>; Multilateral Investment Guarantee Agency, Project Brief: Nam Theun 2, June 2006, at <http://www.miga.org/documents/NT206.pdf>. The Italian-Thai Development Public Company Limited, an engineering and construction company listed on the Thai Stock Exchange, originally held a 15 percent stake in NTPC, but disposed of this in 2010, with EDF International acquiring 5 percent and EGCO acquiring 10 percent on top of their respective original shareholdings: *ITD Sells Shares in Nam Theun 2*, WATER POWER & DAM CONSTRUCTION MAGAZINE, Oct. 14 2010, at <http://www.waterpowermagazine.com/news/newsitd-sells-shares-in-nam-theun-2>.

<sup>44</sup> Porter & Shivakumar, *supra* note 40, at 10-15.

Bank's Nam Theun 2 strategy was to try to "turn the resource curse on its head": that is, ensure better population-wide outcomes from natural resources development than had been achieved in other instances.<sup>45</sup> Such an experiment would, it was hoped, answer at least some critics of the World Bank's development paradigm, especially with regard to dam development.<sup>46</sup> For its part, the Asian Development Bank sought, through the Nam Theun 2 project, to ramp up efforts to promote a regional energy market, and enhance economic cooperation generally, within an area it had earlier designated the Greater Mekong Subregion.<sup>47</sup>

For its proponents, including the World Bank and the Asian Development Bank, Nam Theun 2 was also to be both a marker and a guarantor of Laos' impending transition from a centrally planned command economy to a market economy.<sup>48</sup> At the same time, consistent with a neoliberal thesis as to the "intimate connection" between economic freedom (understood as freedom from market-adverse state intervention) and political freedom (understood as freedom from physical coercion), it was speculated that the project would help "support reformers" and foster "an opening up of dialogue" within Laos.<sup>49</sup>

The prospect of Nam Theun 2 fostering such "dialogue" was not something that the project's multilateral lenders were prepared to leave to chance. Rather, they buttressed this prospect with an elaborate supervisory and consultative architecture specifically tailored to the project. International

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<sup>45</sup> *Id.* at 34; Joseph E. Stiglitz, *More Instruments and Broader Goals: Moving toward the Post-Washington Consensus*, 19 *REVISTA DE ECONOMIA POLÍTICA* 94 (1999). The "resource curse" refers to the observation that nations with an abundance of natural resources tend to grow less slowly – and, in some accounts, show poorer economic performance otherwise – than resource-poor countries: see Jeffrey D. Sachs and Andrew M. Warner, *The Curse of Natural Resources*, 45 *EUROPEAN ECONOMIC REVIEW* 827 (2001).

<sup>46</sup> See, e.g., Thayer Scudder, *The World Commission on Dams and the Need for a New Development Paradigm*, 17 *INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT* 329 (2001).

<sup>47</sup> TERESITA CRUZ-DEL ROSARIO, *OPENING LAOS: THE NAM THEUN 2 HYDROPOWER PROJECT 6-7* (Lee Kuan Yew School of Public Policy, National University of Singapore Working Paper Series: New Approaches to Building Markets in Asia, Working Paper No. 5, 2011) at [http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA\\_WP1105.pdf](http://lkyspp.nus.edu.sg/cag/wp-content/uploads/sites/5/2013/05/NATBMA_WP1105.pdf); Medhi Krongkaew, *The Development of the Greater Mekong Subregion (GMS): Real Promise or False Hope?* 15 *J. ASIAN ECON.* 977 (2004).

<sup>48</sup> Porter & Shivakumar, *supra* note 40, at 6.

<sup>49</sup> *Id.* at 48, 7. The framing of this relationship as an "intimate connection" is Friedman's: FRIEDMAN, *supra* note 12, at 8.

NGOs, CARE and the World Conservation Union (IUCN), were initially engaged to carry out a consultation process with those directly affected by the project – primarily, those residing in villages earmarked for resettlement. Later, after criticism of that initial phase, a new consultation methodology was developed by a “Lao-speaking Thai social scientist” based on segmentation of participants into “culturally and ethnically compatible groups” and a commitment to “talk[ing] less, listen[ing] more”.<sup>50</sup> Alongside this, two independent expert panels were mandated by the project’s Concession Agreement to monitor environmental and social impacts, in one case, and dam safety, on the other, throughout the life of the project, both of which report to the Lao government. An international advisory group was put in place by the World Bank to review the project.<sup>51</sup> This was all in addition to the monitoring and advisory roles usually assigned in connection with any cross-border project financing: independent engineer, technical, financial, environmental and legal advisors.<sup>52</sup>

Separate financing was made available in connection with the Nam Theun 2 project for the strengthening of public institutions responsible for revenue and expenditure management in Laos. Specific, directive arrangements were also put in place for project revenues, requiring their sequestration in a separately audited treasury account and their application, exclusively, to poverty reduction efforts.<sup>53</sup> During the project’s planning, negotiation and development, Laos also underwent an extensive law reform process, with the close involvement of foreign consultants funded under an array of bilateral and multilateral aid facilities. A range of Lao laws and decrees concerned with public administration, investment, property, natural resources and environmental protection can be traced,

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<sup>50</sup> Porter & Shivakumar, *supra* note 40, at 102. For accounts of the consultation process surrounding Nam Theun 2, see Naho Mirumachi & Jacopo Torriti, *The Use of Public Participation and Economic Appraisal for Public Involvement in Large-Scale Hydropower Projects: Case Study of the Nam Theun 2 Hydropower Project*, 47 *ENERGY POL’Y* 125 (2012) and, more critically, Sarinda Singh, *World Bank-Directed Development? Negotiating Participation in the Nam Theun 2 Hydropower Project in Laos*, 40 *DEV. & CHANGE* 487 (2009).

<sup>51</sup> Porter & Shivakumar, *supra* note 40, at 12, 19, 26, 51, 71.

<sup>52</sup> See generally E.R. YERSCOMBE, *PRINCIPLES OF PROJECT FINANCE* 34-38 (2013).

<sup>53</sup> Porter & Shivakumar, *supra* note 40, at 37-41.

directly or indirectly, to the Nam Theun 2 project.<sup>54</sup> At the time of its financial closing in 2005, Nam Theun 2 seemed poised to ignite a wide-ranging process of state and non-state transformation, as Michael Goldman suggested in 2001:

Teaming up with international mega-fauna and biodiversity conservationists, such as the World Conservation Union (IUCN), Worldwide Fund for Nature (WWF), and Wildlife Conservation Society (WCS), the World Bank and its partners are linking hydro-electric dam and transmission financing to an ambitious string of conservation and protected areas, mega-fauna running corridors, watershed conservation sites, eco-tourism projects, biodiversity research and development sites, and indigenous peoples' extractive reserves. Roads, markets, experimental farms, Lao-language schools, health clinics, and workshops in agronomy, resource management, family hygiene and birth control, comprise the proliferating list of social projects that are part of the package.<sup>55</sup>

This might all sound rather more like "liberal legalism" than neoliberalism, but the broad rationale for these arrangements remained, for the most part, an economic one – specifically a competitive capitalist, market-oriented one, even in the context of an otherwise centrally planned economy.<sup>56</sup> These measures were not established with the primary goal of securing individual or collective rights or enlarging political freedoms, although such aims may well have been held among those involved in the program. Rather, these measures were typically cast, by champions of Nam

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<sup>54</sup> Michael Goldman, *Constructing an Environmental State: Eco-governmentality and other Transnational Practices of a "Green" World Bank*, 48 SOC PROBS. 499, 506-510 (2001); Porter & Shivakumar, *supra* note 40, at 54-61, 161-163; World Bank, Update on the Lao PDR Nam Theun 2 (NT2) Hydroelectric Project 6-7 (2006), at [http://siteresources.worldbank.org/INTLAOPRD/Resources/NT2oct06\\_EngVersion.pdf](http://siteresources.worldbank.org/INTLAOPRD/Resources/NT2oct06_EngVersion.pdf).

<sup>55</sup> Goldman, *supra* note 54, at 506.

<sup>56</sup> The term "liberal legalism" is borrowed from Amy Cohen and William Simon, who use to "approximate" a "cluster of ideas" and institutional ideal types associated with rights-based political liberalism: Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 358, 360 note 10 (2010); William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Liberal Legalism*, 46 WM. & MARY L. REV. 127, 127 (2004). Wendy Brown sharpens political liberalism, and distinguishes it from economic liberalism (whether classical or neoliberal), as follows: "In the history of *political* thought, while individual liberty remains a touchstone, liberalism signifies an order in which the state exists to secure the freedom of individuals on a formally egalitarian basis. A liberal political order may harbor either liberal or Keynesian economic policies": Porter & Shivakumar, *supra* note 40, at 3.

Theun 2, as promoting the Lao state's "advancement" towards fuller participation in regional and global markets. Improved credentials surrounding "transparency, management, and accountability of economic resources" were justified as likely to boost Laos' capacity to "unlock[ ] the potential" of its unexploited riparian resources in the medium- to long-term (the region being one with "the lowest percentage of exploited hydropower of any region in the world"). The "improvements" outlined above were designed, on the whole, to equip Laos to compete more successfully in global capital markets and to make fuller use of the "strategic advantage" it was understood to enjoy in the regional energy market, as a producer of relatively low-cost electricity.<sup>57</sup>

In so far as its own goals were concerned, the Nam Theun 2 project posed considerable challenges for the Government of Laos, steered by the only legal political party in the country: the Lao People's Revolutionary Party. It sought to enter the global capital markets with no prior history of commercial indebtedness and a limited record of effecting public-private partnerships (Nam Theun 2 would be its third such partnership and, at the time, its largest).<sup>58</sup> It did so at a time when it enjoyed potential eligibility for Heavily Indebted Poor Country debt relief – hardly an incentive to prospective financiers.<sup>59</sup> Its immediate aim was to finance a hydropower development plan that would cost an amount equal to more than half its 2005 gross domestic product (GDP).<sup>60</sup> This it saw as crucial to the realization of its stated "vision for...achiev[ing] middle-income status by 2020".<sup>61</sup> To achieve this, the Lao Government was said to have recognized the need to "transform...international perceptions

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<sup>57</sup> Porter & Shivakumar, *supra* note 40, at 6-7.

<sup>58</sup> *Id.* at 161.

<sup>59</sup> On Lao's inclusion on the list of countries eligible for heavily indebted poor country relief until 2011, see *Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Status of Implementation and Proposal for the Future of the HIPC Initiative*, International Development Association and International Monetary Fund, November 8, 2011, 6-7, 9, at <http://www.imf.org/external/np/pp/eng/2011/110811.pdf>; *Heavily Indebted Poor Countries (HIPC) Initiative and Multilateral Debt Relief Initiative (MDRI) – Statistical Update*, International Monetary Fund, December 19, 2013, 6, at <http://www.imf.org/external/np/pp/eng/2013/121913.pdf>.

<sup>60</sup> *World Statistics Pocketbook: Lao People's Democratic Republic*, U.N. Statistics Division (2013), at <http://data.un.org/CountryProfile.aspx?crName=Lao%20People's%20Democratic%20Republic>.

<sup>61</sup> Porter & Shivakumar, *supra* note 40, at 158; Diana Suhardiman and Mark Giordano, *Legal Plurality: An Analysis of Power Interplay in Mekong Hydropower*, 104 ANNALS OF ASSOC. OF AMER. GEOGRAPHERS 973, 982 (2014).

and confidence in its efforts by strengthening its track record”.<sup>62</sup> Its reported goal was to do so, however, without submitting to “overly intrusive conditions”.<sup>63</sup>

From a financial perspective, the Nam Theun 2 project may be judged highly successful. Its economics have proven unusually robust, yielding excellent returns for investors.<sup>64</sup> This has undoubtedly been a factor in Laos’ impressive GDP growth of late: the country has recorded annual GDP growth averaging seven percent between 1999 and 2012.<sup>65</sup> In terms of its ability to deliver, or provoke economy-wide delivery, on a neoliberal reform agenda in Laos or the Mekong River Basin, however, this project may be deemed a failure, as will be explained in Part III below.

If Nam Theun 2 failed, though, it “failed forward” into a successor – another, quite different hybrid product of state and non-state reform agendas – the Xayaburi project. Like some precocious, style-conscious progeny of serious-minded parents, Xayaburi is far more expensive, far more streamlined in legal and financial structure, and far more audaciously located (given predicted downstream impacts) on the Mekong River mainstream.<sup>66</sup> The latter financing is one from which both the World Bank and the Asian Development Bank – and the wide-ranging reform agenda that accompanied Nam Theun 2 – are notably absent; debt financing for the project has been raised from five Thai commercial banks (one of them state-owned) and the Export Import Bank of Thailand.<sup>67</sup> The economic rationale for this project rests again with the rising appetites of Thai energy consumers,

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<sup>62</sup> Porter & Shivakumar, *supra* note 40, at 157.

<sup>63</sup> *Id.* at 42.

<sup>64</sup> JIM ELSTON, S. K. M. ECONOMICS & ANDREW WALKER, REVIEW OF NAM THEUN 2 HYDROELECTRIC DAM, LAO PDR: FINAL REPORT TO AUSAID 13-14 (2005), at <http://aid.dfat.gov.au/Publications/Documents/nt2hydroreport.pdf>; Porter & Shivakumar, *supra* note 40, at 88.

<sup>65</sup> Jayant Menon & Peter Warr, *The Lao Economy: Capitalizing on Natural Resources Exports*, 8 ASIAN ECON. POL’Y REV. 70 (2013).

<sup>66</sup> Claudia Kuenzer, Ian Campbell, Marthe Roch, Patrick Leinenkugel, Vo Quoc Tuan & Stefan Dech, *Understanding the Impact of Hydropower Developments in the Context of Upstream–Downstream Relations in the Mekong River Basin*, 8 SUSTAINABILITY SCIENCE 565, 571-2 (2013).

<sup>67</sup> Natee Synergy/PTT Public Company Analyst Site Visit Report, Xayaburi Hydropower Project (Feb. 8, 2014), at <http://ptt.listedcompany.com/misc/PRESN/20140208-PTT-analystSiteVisit.pdf> [hereinafter PTT Analysts Report].



associated with industrialization and urbanization, as was the case in Nam Theun 2.<sup>68</sup> Yet Xayaburi represents a very different incarnation of the neoliberal experiment to its forebear, Nam Theun 2.

Located in northern Laos, Xayaburi is designed as a 33-meter high, 820-meter long concrete gravity dam located on the mainstream of the Mekong River: the first hydroelectric dam to be constructed on the Mekong River mainstream outside of China.<sup>69</sup> The project includes development of a 1,285 MW power plant that will export approximately 1,225 MW of electricity to Thailand, under a take-or-pay power purchase agreement with the state-owned Electricity Generating Authority of Thailand (EGAT), and supply about 60 MW to the state-owned Electricité du Laos (EDL) for Lao consumption. The special purpose vehicle created for the project, and the beneficiary of a 29-year concession from the Lao Government entitling it to build, own and operate the project and then transfer it back to the state at the end of the concession term, is the Xayaburi Power Company Limited (XPC).<sup>70</sup> XPC is a limited liability company created under Lao law and is 50 percent owned by Ch. Karnchang Public Company Limited (CKPCL, a general construction and infrastructure development company publicly listed on the Thai Stock Exchange), 25 percent owned by Natee Synergy (an investment holding company that is a wholly-owned subsidiary of Global Power Synergy Company Limited, itself a wholly owned subsidiary of PTT Public Company Limited, an outcome of the privatization of the Petroleum Authority of Thailand, the latter now listed on the Thai Stock Exchange, but in which the Thai Government retains the largest shareholding), 12.5 percent owned by Electricity Generating Public Company Limited (EGCO, a publicly listed company on the Thai Stock Exchange incorporated

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<sup>68</sup> Darryl S Jarvis, *Institutional Processes and Regulatory Risk: A Case Study of the Thai Energy Sector*, 4 REG. & GOVERNANCE, 175, 181 (2010).

<sup>69</sup> Ch. Karnchang Public Company Limited, Feasibility Study: Xayaburi Hydroelectric Power Project, Lao PDR (2010), at <http://www.mrcmekong.org/assets/Consultations/2010-Xayaburi/xayaboury-dam-feasibility-study.pdf>

<sup>70</sup> Pisit Changplayngam & Kettiya Jittapong, *Work Restarts at Xayaburi Dam in Laos – Project Leader*, REUTERS, Aug. 16, 2014, at <http://www.reuters.com/article/2012/08/16/entertainment-us-thailand-laos-xayaburi-idUSBRE87F09H20120816>. Note, however, that the Concession Agreement term is described as 30 years in the Feasibility Study cited *id.* at I-1, and in the following document: Mekong River Commission Secretariat, Prior Consultation Project Review Report, March 24, 2011, 5, 10 (2011), at <http://www.mrcmekong.org/assets/Publications/Reports/PC-Proj-Review-Report-Xaiyaburi-24-3-11.pdf>

by EGAT and in which EGAT retains a shareholding of approximately 25 percent), seven percent owned by Bangkok Expressway (a company listed on the Thai Stock Exchange) and five percent owned by P.T. Construction and Irrigation Company Limited (a Lao-based company).<sup>71</sup> The project cost of about US\$3.8 billion is to be funded with approximately 71 percent debt and 29 percent equity. Debt financing for the project is comprised of approximately 88 billion Thai baht (about US\$2.7 billion) in syndicated loans provided by five Thai private commercial banks – Bangkok Bank, Kasikorn Bank, Krung Thai Bank, Siam Commercial Bank and TISCO Bank – and a loan guarantee from the Export Import Bank of Thailand.<sup>72</sup> As in Nam Theun 2, the Concession Agreement makes provision for unanticipated project impacts and breaches of contractual requirements to be covered, at least in part, by letters of credit, performance bonds, and insurance.<sup>73</sup> Construction is being carried out under a turnkey, price-capped engineering, procurement and construction contract between XPC and Ch. Karnchang (Lao) Company Limited, a subsidiary of CKPCL.<sup>74</sup>

Given its location on the Mekong River mainstream, Xayaburi has been subject to a process of inter-governmental consultation pursuant to the 1995 Mekong Agreement between Cambodia, Laos, Thailand and Vietnam.<sup>75</sup> Article 1 of the Mekong Agreement requires parties to “cooperate in all fields

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<sup>71</sup> It has been reported that PTT Public Company Limited plans to sell between 25% and 30% of the shares of Global Power Synergy Company Limited in an initial public offering on the Thai Stock Exchange in 2014: *Global Power Synergy to Launch IPO in 2014*, BLOOMBERG BUSINESSWEEK, Dec. 18, 2013; *Update on Global Power's IPO/Mulls of Star Petroleum*, BLOOMBERG BUSINESSWEEK, Mar. 7, 2014, both at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=30328918>.

<sup>72</sup> PTT Analysts Report, *supra* note 67; TISCO Financial Group Public Company Limited, Minutes of the Shareholder Ordinary General Meeting, Apr. 25, 2013, Bangkok, Thailand, 4-5, at [http://www.tisco.co.th/AttachFileAction.do?fileName=TFG\\_minutes%202013%20AGM\\_E.pdf](http://www.tisco.co.th/AttachFileAction.do?fileName=TFG_minutes%202013%20AGM_E.pdf).

<sup>73</sup> Interview with Xaypaseuth Phomsoupha, Director-General, Department of Energy Business, Ministry of Energy and Mines, Laos (Nov. 20, 2012) (on file with the author).

<sup>74</sup> *CK Karnchang Secures Deal for Hydropower Plant in Laos*, THE NATION, Aug. 15, 2013, at <http://www.nationmultimedia.com/business/Ch-Karnchang-secures-deal-for-hydropower-plant-in--30212617.html>; *on Company Overview of CH. Karnchang (Lao) Company Limited*, BLOOMBERG BUSINESSWEEK, at <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=30328918>.

<sup>75</sup> Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, Camb.-Laos-Thai.-Viet., 34 I.L.M. 864 [hereinafter Mekong Agreement]. For background on the Mekong Agreement, see Greg Browder, *An Analysis of the Negotiations for the 1995 Mekong Agreement*, 5 INTERNATIONAL NEGOTIATION 237 (2000); Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NATURAL RESOURCES LAW JOURNAL 499 (2000).

of sustainable development, utilization, management and conservation of the water and related resources of the Mekong River Basin” including in relation to hydropower. Article 5 of the Mekong Agreement requires parties to ensure that “notification” is provided and “prior consultation” conducted in relation to any intra-basin use of water (within the Joint Committee established under the Agreement, with representation from each participating riparian state). Articles 25 and 26 of the Agreement authorize the promulgation of procedures in this regard. In November 2003, the Mekong River Commission (the MRC, established under the Mekong Agreement) approved Procedures for Notification, Prior Consultation and Agreement (PNPCA) among the parties to the Agreement in respect of utilization and development of the Mekong River mainstream.<sup>76</sup> In August 2005, the MRC adopted guidelines to the implementation of the PNPCA.<sup>77</sup> The PNPCA process was put into operation for the first time, in September 2010, when the Government of Lao PDR gave formal notice to the MRC Joint Committee of its proposal to proceed with the Xayaburi project’s development. In 2014, the Australian Government – a provider of funding to assist implementation of the PNPCA – summarized the observations of analysts from whom it had commissioned a review of this process as follows:

The formal process for the Xayaburi PNPCA has involved submission of documents, working group meetings, national consultations, deliberations by the MRC Joint Committee and finally a decision by the MRC Council...The total process has been more complicated and has also included bilateral discussions, the launching and subsequent debate catalyzed by the mainstream dams Strategic Environmental

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<sup>76</sup> Mekong River Commission, Procedures for Notification, Prior Consultation and Agreement, Nov. 13, 2003 [hereinafter PNPCA], at <http://www.mrcmekong.org/assets/Publications/policies/Procedures-Notification-Prior-Consultation-Agreement.pdf>. On the PNPCA process, see R Edward Grumbine, John Dore & Jianchu Xu, *Mekong Hydropower: Drivers of Change and Governance Challenges*, 10 FRONTIERS IN ECOLOGY AND THE ENVIRONMENT 91, 95-96 (2012); Alistair Rieu-Clarke, *Notification and Consultation Procedures Under the Mekong Agreement: Insights from the Xayaburi Controversy*, 5 ASIAN JOURNAL OF INTERNATIONAL LAW 1 (2015), at doi:10.1017/S2044251314000022.

<sup>77</sup> Mekong River Commission, Guidelines on Implementation of the Procedures for Notification, Prior Consultation and Agreement Aug. 31, 2005, at <http://www.mrcmekong.org/assets/Publications/policies/Guidelines-on-implementation-of-the-PNPCA.pdf>.

Assessment, extensive lobbying by developers and concerned scientists, the Save the Mekong Campaign, film-making and media reporting.<sup>78</sup>

The consultation process conducted as part of PNPCA implementation, and monitoring architecture otherwise installed around Xayaburi, differ very markedly from their Nam Theun 2 corollaries. Most notably, consultations were convened in Cambodia, Thailand and Vietnam regarding Xayaburi, but no public consultation at all was conducted within Laos in relation to this project. Negotiation and dialogue appears to have been conducted almost exclusively at the government-to-government level, with mediation and some intervention by the MRC. Efforts made in Nam Theun 2 to release project-related information to the Lao public, in some instances in the Lao language, have not been replicated in Xayaburi. Expert input on the Xayaburi project was solicited via a group of fisheries and sediment experts, assembled to support the PNPCA Task Group of the MRC Secretariat. A Thai consulting firm, TEAM Consulting Engineering and Management Company Limited, conducted environmental and social impact analyses for the Lao Government and an international engineering consulting firm, Pöyry, delivered a further report to the Lao Government on the project's responsiveness to concerns raised by the MRC and other MRC countries.<sup>79</sup> No provision was made, however, for independent review of the Xayaburi project's performance and its social and environmental impacts on an ongoing basis. Likewise, there seems to have been no agreement to specify any particular handling of project revenues (beyond the direction of funds through certain

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<sup>78</sup> Julia Niblett, Assistant Secretary, Mekong, Philippines and Burma Development Branch, Australian Government Department of Foreign Affairs and Trade, Letter to Ms. Pianporn Deetes, Thailand Campaign Coordinator, International Rivers, undated, 2014, at <http://www.internationalrivers.org/resources/8300>. The MRC Council is the main decision-making body of the MRC and is composed, under Article 15 of the Mekong Agreement, of a representative from each participating riparian state at ministerial or cabinet level: Mekong Agreement, *supra* note 75. The Strategic Environmental Assessment is a study that was commissioned by the MRC in 2010 to assess the cumulative environmental impacts, costs and benefits of hydropower development proposed for the Mekong River mainstream: ICEM (International Centre for Environmental Management), MRC Strategic Environmental Assessment of Hydropower on the Mekong Mainstream (2010), at [www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf](http://www.mrcmekong.org/assets/Publications/Consultations/SEA-Hydropower/SEA-Main-Final-Report.pdf). The Save the Mekong campaign was reportedly started in 2009 in Vietnam, to oppose hydropower development on the Lower Mekong River mainstream: Thomas Fuller, *Dams and Development Threaten the Mekong*, N.Y. TIMES, Dec. 18, 2009, at A16.

<sup>79</sup> Rieu-Clarke, *supra* note 76, at 10-12.

accounts earmarked for debt service pursuant to financing agreements), nor do funds appear to have been made available for public sector institutional development or law reform in connection with the project. Compensation for resettled communities, plus local government development funding to be provided in connection with the Xayaburi project, were estimated by one official with whom we spoke to be in the order of US\$48 million in the project's budget.<sup>80</sup> An annex to the Concession Agreement for Xayaburi reportedly includes requirements as to minimum income levels that resettled communities must achieve within five years of resettlement, by reference to a baseline income level determined before the project's commencement. Compliance with these requirements is, however, to be monitored by the Lao Government itself, not through independent overseers of the kind authorized in relation to Nam Theun 2.<sup>81</sup>

In interviews conducted in 2012, Lao Government officials made clear that they regarded the wide-ranging reformist interventions and external oversight of Nam Theun 2 as no longer appropriate to Laos' situation, in light of its now proven track record of creditworthiness. Xaypaseuth Phomsoupha, Director-General of the Department of Energy Business in the Ministry of Energy and Mines in Laos, referred to the Nam Theun 2 Concession Agreement as a "second generation" agreement, the scope of which had been expanded well beyond that agreed in the Theun Hinboun project, to meet the "requirement[s] of international private funders". "After the success of Nam Theun 2", the official continued, "we move[d] to the third generation [that is, the Xayaburi Concession Agreement]... The concession of Nam Theun 2 is too complicated and it is very difficult, even for well trained lawyers to understand. We have to make it easy".<sup>82</sup> Another senior Lao Government

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<sup>80</sup> Interview with senior Lao Government official (Nov. 22, 2012) (on file with author).

<sup>81</sup> Interview with Xaypaseuth Phomsoupha, Director-General, Department of Energy Business, Ministry of Energy and Mines, Laos (Nov. 20, 2012) (on file with author). For a limited insight into community resettlement plans being implemented in connection with Xayaburi, see Pöyry, Xayaburi Hydropower Project Progress Update, Dec. 2013, at [http://laoenergy.la/admin/upload\\_free/cb0bfaff9558d1d767476cca252b287db01489d896530d59f21b32b60061690d8a0caa7a48c9c16ab901cf1da8a9c74611.Xayaburi%20Status%20Dec%202013.pdf](http://laoenergy.la/admin/upload_free/cb0bfaff9558d1d767476cca252b287db01489d896530d59f21b32b60061690d8a0caa7a48c9c16ab901cf1da8a9c74611.Xayaburi%20Status%20Dec%202013.pdf)

<sup>82</sup> Interview with Xaypaseuth Phomsoupha, Director-General, Department of Energy Business, Ministry of Energy and Mines, Laos (Nov. 20, 2012) (on file with author).

representative lamented the time and expense associated with consultation and negotiation. Reflecting on the experience of consulting with neighboring countries regarding the Xayaburi project since 2010, this representative remarked:

For me what we want to see from this experience of going through it for the last two or three years, I like to see agreement that I think is practical and to be implemented, not an agreement so then...we then have to spend a lot of money on the lawyers.<sup>83</sup>

As much as it embodies a relatively pared-back, non-consultative model of project development, Xayaburi seems also to signal a new expansion and intensification of hydropower in Laos. According to the Director-General of the Energy Business Department of the Lao Government, as of January 2012, it was one of ten hydropower projects under construction in Laos with private financing.<sup>84</sup> Others claim that some 60 dams – indeed, up to 70 dams – are being planned in Laos, including nine on the Mekong mainstream.<sup>85</sup> The Mekong River Commission Secretariat contemplates 71 tributary hydropower schemes operating in the Mekong River Basin by 2030 and reports that eleven dams have been proposed for the Lower Mekong River mainstream, including six dams in Lao territory.<sup>86</sup>

### III. FRIEDMAN'S NEOLIBERAL LEGALITY IN TWO LAO EXPERIMENTS

Nam Theun 2 and Xayaburi were cast above as neoliberal experiments – a move quite common among critics of development practice in Laos. Geographer Keith Barney has argued, for example,

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<sup>83</sup> Interview with senior Lao Government official (Nov. 22, 2012) (on file with author).

<sup>84</sup> Xaypaseuth Phomsoupha, *Project Financing in Laos' Hydropower for Export of Electricity to Thailand*, 10 *HYDRO NEPAL: J. WATER, ENERGY & ENV'T* 7 (2012).

<sup>85</sup> Nathaniel Matthews, *Water Grabbing in the Mekong River Basin - An Analysis of the Winners and Losers of Thailand's Hydropower Development in Lao PDR*, 5 *WATER ALTERNATIVES* 392, 392-3 (2012); Porter & Shivakumar, *supra* note 40, at 158.

<sup>86</sup> Mekong River Commission Secretariat, *supra* note 70, at 5.

that “a form of ‘frontier-neoliberalism’” is under assembly in Laos.<sup>87</sup> It is important to recognize, nonetheless, that the story of the two Lao dam projects described above is partially a story of resistance to neoliberal policy thinking. EGAT, the primary purchaser of electricity from both these projects, was earmarked for privatization in the late 1980s, pursuant to structural adjustment loan conditions attached to IMF and World Bank financing. However, EGAT’s privatization was resisted by a coalition of labor unions, consumer groups, Thai nationalists and academics, compounding the effect of EGAT’s own longstanding political patronage.<sup>88</sup> Provision made in the late 1990s for public private partnerships in the Thai energy sector represented a compromise on this front, made in light of EGAT’s precarious debt position. But EGAT has retained significant shareholdings in all of the partnerships so authorized, including EGCO, effectively maintaining its monopoly position.<sup>89</sup> Laos, too, can be seen as having held out against neoliberal imperatives, to some extent. Despite having adopted a range of reforms since the late 1980s consistent with movement to a market economy, Laos has largely withstood repeated demands from the IMF that it tighten its fiscal policy by, among other things, rationalizing public expenditure.<sup>90</sup>

It is possible, nonetheless, to assimilate both the Nam Theun 2 and Xayaburi projects to a paradigm of neoliberal legality advanced in Milton Friedman’s 1962 book *Capitalism and Freedom*.<sup>91</sup> Friedman’s text is by no means the most sophisticated or developed example of neoliberal thinking about law. Friedrich Hayek, in particular, put forward a far fuller and more nuanced account of law as

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<sup>87</sup> Keith Barney, *Laos and the Making of a ‘Relational’ Resource Frontier*, 175 *GEOG. J.* 146 (2009).

<sup>88</sup> Jarvis, *supra* note 68, 183; Suppanika Wattana, Deepak Sharma & Ronnakorn Vaiayvuth, *Electricity Industry Reforms in Thailand: A Historical Review*, 2 *GMSARN INT’L J.* 41 (2008).

<sup>89</sup> Pronchai Wisuttisak, *Regulation and Competition Issues in Thai Electricity Sector*, 44 *ENERGY POL’Y*, 185 (2012).

<sup>90</sup> See, e.g., *Lao P.D.R. Assessment Letter for the Asian Development Bank and World Bank*, IMF Policy Papers, Aug. 15, 2005, at <http://www.imf.org/external/NP/pp/eng/2006/081505.pdf> (calling for “expenditure restraint” and “fiscal discipline”); *IMF Executive Board Concludes 2010 Article IV Consultation with the Lao People’s Democratic Republic*, IMF Public Information Notice (PIN) No. 11/12, Jan. 31, 2011, at <http://www.imf.org/external/np/sec/pn/2011/pn1112.htm> (criticizing “[e]xpansionary fiscal and monetary policies”); *IMF Executive Board Concludes 2013 Article IV Consultation with the Lao People’s Democratic Republic*, IMF Press Release No. 13/472, Nov. 26, 2013, at <http://www.imf.org/external/np/sec/pn/2011/pn1112.htm> (calling for “a more ambitious tightening”).

<sup>91</sup> FRIEDMAN, *supra* note 12.

an “instrument of production” in a market economy, indicative of his university education in law.<sup>92</sup> It is, nevertheless, a claim of this article is that the very schematism of Friedman’s characterization of law – what I will later characterize as its modularity – accounts, in part, for its resilience. In Friedman’s account, law is to be both unerring guarantor of baseline conditions for the market to operate and a mechanism to ensure the “wide[r] dispers[al]” of economic power in the interests of competitive freedom.<sup>93</sup> A push-me-pull-you set of impulses towards law more or less along these lines has played out in the two Lao projects described above, albeit quite differently in each case. It is these ambivalent legal dynamics on which this section will now focus, beginning with an overview of Friedman’s model of legality.

Friedman’s model of legality is just that – a model – as Part IV will explore further.<sup>94</sup> It is, accordingly, possible to enumerate its features quite schematically. First, Friedman equated law primarily with government; indeed, it is only in the later chapters of the book *Capitalism and Freedom* that Friedman favors the terms law, legislation or regulation at all; early chapters refer solely to “institutional arrangements” and “government”. Lawful authority is, in Friedman’s account, something that governments deploy; everything else is choice. Law in Friedman’s work is thus, first and foremost, public law, his prioritization of contracts notwithstanding. The exposition of private law’s making and operation in *Capitalism and Freedom* is extremely scant. Private law entails only the exercise of

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<sup>92</sup> HAYEK, *supra* note 19, 55 (“[Formal rules] could almost be described as a kind of instrument of production, helping people to predict the behavior of those with whom they must collaborate, rather than as efforts towards the satisfaction of particular needs”). See generally FRIEDRICH A. HAYEK, *I LAW, LEGISLATION, AND LIBERTY* (1973). On Hayek’s education at the University of Vienna in law and political science, see ALAN O. EBENSTEIN, *FRIEDRICH HAYEK: A BIOGRAPHY* 28, 38 (2003). Ebenstein remarks that “[h]is focus in time became rules, or law” (at 99).

<sup>93</sup> FRIEDMAN, *supra* note 12, at 15.

<sup>94</sup> *model*, *n. and adj.* OED Online (June 2014): “A representation of structure, and related senses.... A three-dimensional representation, esp. on a small scale, of a person or thing or of a projected or existing structure... An object of imitation”. Writing of economic modeling, Allan Gibbard and Hal R. Varian maintained that “a model is involved whenever there is economic reasoning from exactly specified premises... The story [told by a model] may be vague... [but] [t]he structure itself must be specified with the precision needed for mathematical reasoning... All economic models have this, at least, in common: a model poses a question of the form, ‘What would happen if such and such were the case?’ in such a way that it can be answered deductively”: Allan Gibbard and Hal R. Varian, *Economic Models*, 75 *J. OF PHIL.* 664, 666-8 (1978). See generally Mary S. Morgan & Margaret Morrison, *Introduction*, in *MODELS AS MEDIATORS: PERSPECTIVES ON NATURAL AND SOCIAL SCIENCE 1* (Mary S. Morgan and Margaret Morrison eds., 1999); Mary S. Morgan & Margaret Morrison, *Models as Mediating Instruments*, in *MODELS AS MEDIATORS: PERSPECTIVES ON NATURAL AND SOCIAL SCIENCE 10* (Mary S. Morgan and Margaret Morrison eds., 1999).



freedom within the “rules of the game”.<sup>95</sup> No account is taken in this book of Robert Hale’s early-to-mid-20<sup>th</sup> century studies of private coercion in law, or other contemporaneous developments in private law theory.<sup>96</sup> No account is taken of private law making in modes in which choice is subordinated to contractual boilerplate, standard forms or the replication of “financeable” deal structures.<sup>97</sup>

The work of law, for Friedman, is the production and consumption of a background level of conformity in reliance on which people can enter into economic arrangements of their own choosing, with the latter viewed solely through an economic lens. “It is desirable...that we use government to provide a general legal and economic framework that will enable individuals to produce growth in the economy, if that is in accord with their values,” Friedman observes.<sup>98</sup> Friedman’s concern with law extends, in this mode, to the “maintenance of law and order” which Friedman equates to the prevention of “physical coercion of one individual by another”.<sup>99</sup> It also extends well beyond that – to laws requiring and making some provision for children to receive a minimum amount of general schooling, for instance, which “add[ ] to the economic value of the student”.<sup>100</sup> As for powers of non-physical coercion, or coercion by state agencies or corporate intermediaries, Friedman would have us address these only to the extent that they correlate with market monopoly, “whether enterprise monopoly or labor monopoly”, both of which should be subject to antitrust laws in his view.<sup>101</sup> Even then, some monopolies are tolerable for Friedman, with “private monopoly...be[ing] the least of the[se] evils”,

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<sup>95</sup> FRIEDMAN, *supra* note 12, at 15.

<sup>96</sup> Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

<sup>97</sup> Fleur Johns, *Performing Party Autonomy*, 71 LAW & CONTEMP. PROBS. 243 (2008); FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW: UNRULY LAW 109-152 (2013) [hereinafter NON-LEGALITY IN INTERNATIONAL LAW].

<sup>98</sup> FRIEDMAN, *supra* note 12, at 38.

<sup>99</sup> *Id.* at 14, 34. Friedman also included the following among the government functions that he regarded as legitimate: “defin[ing] property rights, serv[ing] as a means whereby we could modify property rights and other rules of the economic game, adjudicat[ing] disputes about the interpretation of the rules, enforc[ing] contracts, promot[ing] competition, provid[ing] a monetary framework, engag[ing] in activities to counter technical monopolies and to overcome neighborhood effects widely regarded as sufficiently important to justify government intervention, and... supplement[ing] private charity and the private family in protecting the irresponsible, whether madman or child” (at 34).

<sup>100</sup> *Id.* at 85-107, 88.

<sup>101</sup> *Id.* at 132.

because of its “shortrun effects”.<sup>102</sup> So long as government delivers effectively on its law and order promise – so understood – Friedman is happy to leave issues of state-sponsored or privately held concentrations of power to the hand of history, his “fundamental fearful[ness] of concentrated power” notwithstanding.<sup>103</sup> Musing on how to effect “radical change in the structure of [non-democratic] society”, Friedman suggests that one must rely on efforts of “persuasion” financed by “a few wealthy individuals” acting in “the role of the patron”, as well as on the “almost inevitable” power-dispersing effects of the market.<sup>104</sup>

It is in the midst of power-dispersal that Friedman sees law playing a second key role: in the mode of an “umpire to interpret and enforce the rules decided on”, including through the “mediat[ion] [of] differences among us on the meaning of the rules”.<sup>105</sup> This sense of law is, however, even less developed than Friedman’s account of law as government. At times it is blurry and diffuse, with legal norms and institutions comprising part of a “general customary and legal framework” designed to enable “decision-makers... [to] tak[e] into account the cumulative consequences of... policy as a whole”.<sup>106</sup> At other times, it is almost caricatured in the perfect coherence and uniformity of its arbitral operation. Friedman acknowledges that legal rights are “complex social creations rather than self-evident propositions”.<sup>107</sup> Nonetheless, he expresses naïve horror at the prospect that “[c]ontracts entered into in good faith and with full knowledge on the part of both parties to them [might be] declared invalid for the benefit of one of the parties!”.<sup>108</sup> Yet, despite its near-perfection in Friedman’s account, the role of law as a mediation machine is still secondary; primacy is given to the role of the market in allowing people to circumvent injustice.<sup>109</sup> Where law falls short in mediating conflict,

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<sup>102</sup> *Id.* at 28-29. On the neoliberal reformulation of classical liberal doctrine with respect to monopoly, see Rob Van Horn, *Reinventing Monopoly and the Role of Corporations*, in *THE ROAD FROM MONT PÉLERIN*, *supra* note 17, at 204.

<sup>103</sup> FRIEDMAN, *supra* note 12, at 39.

<sup>104</sup> *Id.* at 16-17.

<sup>105</sup> *Id.* at 15, 25.

<sup>106</sup> *Id.* at 25, 53.

<sup>107</sup> *Id.* at 26.

<sup>108</sup> *Id.* at 60.

<sup>109</sup> *Id.* at 108-109.

abundance comes to the rescue. In Friedman’s telling, there are almost always multiple, competing routes available to detour around discrimination, oppression or exploitation. Consumers are to be protected by the presence of other sellers; sellers by the presence of other consumers; employees by the presence of other employers, and so on.<sup>110</sup>

In Laos, the Nam Theun 2 project gave life to these two rather mismatched versions of law: first, in its creation of a tailored legal environment around the project through purpose-built legislative initiatives, regulatory exemptions, and government undertakings; and second, in the architecture of monitoring and mediation it installed.

The investment that NTPC shareholders committed to make in the Nam Theun 2 project was of such duration (25 years) as is commonly understood in finance markets to “require” contractual assurances and other guarantees of legal stability.<sup>111</sup> Consistent with this expectation – and with Friedman’s vision of law affording a “framework” conducive to the maintenance of “voluntary cooperation” among actors engaged in economic activity<sup>112</sup> – the Nam Theun 2 project’s Lao-law-governed Concession Agreement included a contractual undertaking on the part of the Lao Government that it would not amend Lao law or regulation in such a way as to cause project costs to increase or project revenues to decrease by amounts in excess of certain thresholds. Should the Lao Government introduce any such change in law, it may exempt the company from its scope or it will be liable to compensate NTPC. The Concession Agreement has also obligated the Lao Government to

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<sup>110</sup> *Id.* at 14-15.

<sup>111</sup> On the idea of the market itself having certain “requirements” or issuing certain demands, see NON-LEGALITY IN INTERNATIONAL LAW, *supra* note 97, at 139. On the history of including stabilization clauses in agreements between states and foreign investors, see Timothy B. Hansen, *The Legal Effect Given Stabilization Clauses in Economic Development Agreements*, 28 VA. J. INT’L L. 1015, 1319 (1987) (remarking on these clauses having been “robustly debated in the 1970s and 1980s”); Doak R. Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, OIL, GAS & ENERGY LAW JOURNAL (OGEL) 2, 18 (2002), at [www.ogel.org/article.asp?key=2366](http://www.ogel.org/article.asp?key=2366) (tracing these clauses to post-World War I investment by the US in Latin America in the aftermath of a series of nationalizations).

<sup>112</sup> FRIEDMAN, *supra* note 12, at 13.

procure for the benefit of NTPC and its associates all Lao regulatory approvals required for the project and to maintain those without amendment or revocation except in accordance with their terms.<sup>113</sup>

NTPC was afforded, in the Agreement, water rights, rights of access to public roads, rights of import and export, and rights of access to, use and possession of land. The company and certain of its contractors were granted exemptions from a range of Lao taxes and duties, but the company remained required to pay a lump sum upon grant of the concession, a profit tax and a resource usage charge in accordance with the Concession Agreement. The “umpire” (in Friedman’s terms) in relation to all these contractual undertakings was located outside the Lao court system; disputes between the Lao Government and NTPC arising under the Concession Agreement are referable to a specially convened “Consultation and Dispute Committee”, an “Expert”, or an arbitral panel assembled under UNCITRAL Arbitration Rules with the Singapore International Arbitration Centre Chairman wielding appointment authority.<sup>114</sup> These covenants were reinforced by the Multilateral Investment Guarantee Agency’s, the World Bank’s and the Asian Development Bank’s provision of political risk coverage to lenders to the project in respect of any breach by the Lao Government of its contractual obligations leading to an arbitral award against the Government which the covered lenders could not enforce within a specified period.<sup>115</sup>

The Power Purchase Agreement between EGAT and the NTPC, governed by English Law, is similarly designed to encase the project in a framework of stability and privately arbitrated dispute resolution. It obligated both parties to construct their respective facilities by specified dates with a view to the project becoming commercially operational in a timely manner. Thereafter, NTPC agreed

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<sup>113</sup> Özgür Can & Sheldon Leader, *Nam Theun 2 Hydroelectric Project: Memorandum of Legal Issues in Relation to the Concession Agreement: An Analysis for Mekong Watch*, May 30, 2005, at [http://mekongwatch.org/PDF/ca\\_analysisfinal.pdf](http://mekongwatch.org/PDF/ca_analysisfinal.pdf); *Nam Theun 2 Hydroelectric Project: Summary of the Concession Agreement between the Government of the Lao PDR and the Nam Theun 2 Power Company Limited as of November 2005*, at <http://www.namtheun2.com/documents/project-documents/118.html> [hereinafter *Concession Agreement Summary*].

<sup>114</sup> *Id.*

<sup>115</sup> Multilateral Investment Guarantee Agency, *supra* note 43; CRUZ-DEL ROSARIO, *supra* note 47, at 10.

to sell its power exclusively to EGAT (or EDL, under its counterpart agreement, or any wholesale Thai electricity market into which EGAT may decide to integrate NTPC) in exchange for which EGAT agreed to pay a tariff calculated in accordance with a pre-determined formula for the 25 year term of the Agreement, on a take-or-pay basis. EGAT's obligations in this respect were secured by a number of Thai bank guarantees or cash deposits. In a similar fashion to the Concession Agreement, provision was made for dispute resolution by a standing committee of party representatives, a panel of three experts, or through arbitration in Singapore, under UNCITRAL Arbitration Rules. The Government of Laos also made certain undertakings to EGAT directly in a related agreement.<sup>116</sup> Alongside this, Thailand and Laos entered into a Memorandum of Understanding regarding the provision of future electricity supplies to Thailand, as a successor to earlier memoranda on this theme.<sup>117</sup>

In these ways, and by virtue of the surrounding law reform measures to which reference was made in Part II, a specially designed jurisdictional field was demarcated around the Nam Theun 2 project, the legal features of which do not correspond to the situation of any other company, individual or agency in Lao PDR. This is a hybrid creation of Lao public law (a range of legislative instruments and decrees) and private law (contract) that, in both its public and private law dimensions, leans on or borrows from international legal regimes of various kinds (including multilateral financial institutions' political risk guarantees, UNCITRAL Arbitration Rules and bilateral memoranda of understanding). By virtue of an annex to the Concession Agreement specifying social impact mitigation, resettlement terms and resettlement compensation to be provided by NTPC, those resident in resettled villages were also brought within the scope of the project's distinct jurisdiction and the life conditions authorized or inaugurated thereby.<sup>118</sup> The professional lives, social status and material conditions of those working

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<sup>116</sup> Nam Theun 2 Hydroelectric Project: The EGAT Power Purchase Agreement Summary for Public Disclosure, at <http://www.namtheun2.com/documents/project-documents/118.html>; Economic Consulting Associates, *The Potential of Regional Power Sector Integration: Nam Theun 2, Generation Case Study* (July 2009), at [http://www.esmap.org/sites/esmap.org/files/BN004-10\\_REISP-CD\\_Nam%20Theun%202-Generation.pdf](http://www.esmap.org/sites/esmap.org/files/BN004-10_REISP-CD_Nam%20Theun%202-Generation.pdf).

<sup>117</sup> CRUZ-DEL ROSARIO, *supra* note 47, at 9; Economic Consulting Associates, *ibid.*

<sup>118</sup> Nam Theun 2 Power Company website *supra* note 42; Economic Consulting Associates, *supra* note 116.

in institutions established in connection with the Nam Theun 2 project has also been reshaped through that association.<sup>119</sup>

Practices surrounding the Nam Theun 2 project (though not directly proceeding from it) may also evidence what Peck refers to as “place-specific assaults on institutional and spatial strongholds of...social collectivism” of a kind that Friedman would have championed.<sup>120</sup> The Lao Women’s Union (LWU), for example (a key site of Lao political organizing since 1955, enshrined in the Lao Constitution as one of the nation’s main “social organizations”), appears to be in the process of being succeeded by national gender “machinery”, namely, the National Commission for the Advancement of Women in Lao PDR created in 2002, under the rubric of gender-mainstreaming: a policy approach advanced by the United Nations Development Fund for Women (UNIFEM).<sup>121</sup> One manifestation of the LWU’s transitioning, or a process conducive to it, may have been LWU members’ “[t]raining and capacity building...in consultation techniques and participation as members of PCPD [Public Consultation, Participation and Disclosure] Teams” for the Nam Theun 2 project.<sup>122</sup>

In its very stylization, and its far-reaching character, this synthetic jurisdiction evoked Friedman’s aspiration for the creation of self-sustaining “institutional arrangements” that might “provide a stable...framework for a free economy”: a market economy, that is, in Friedman’s parlance.<sup>123</sup> While the Nam Theun 2 project by no means installed a system of competitive capitalism in Lao PDR, it did generate new sites of political and economic authority – the NTPC in particular –

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<sup>119</sup> Sarinda Singh, *Developing Bureaucracies for Environmental Governance: State Authority and World Bank Conditionality in Laos*, 44 J. CONTEM. ASIA 322, 325-6, 337-8 (2014) (discussing how the education, training, work experience, salaries and working conditions of officials employed by the Watershed Management and Protection Authority established and funded in connection with the Nam Theun 2 project compared to those of their “district compatriots”).

<sup>120</sup> PECK, *supra* note 3, at 26. Friedman’s societal ontology did not entertain the prospect of collective organizations; it was limited to the individual, the family, the household and the enterprise: FRIEDMAN, *supra* note 12, at 12-14.

<sup>121</sup> LAO CONST. of 2003, art. 7; Damdouane Khouangvichit, *Socio-Economic Transformation and Gender Relations in Lao PDR* 53-59 (2010) (Unpublished Ph.D. dissertation, Umeå University), at <http://www.diva-portal.org/smash/get/diva2:318827/FULLTEXT01.pdf>

<sup>122</sup> NAM THEUN II POWER COMPANY, SOCIAL DEVELOPMENT PLAN, vol. 1, ch. 4, at 7 (2005), at <http://www.namtheun2.com/documents/project-documents.html>.

<sup>123</sup> FRIEDMAN, *supra* note 12, at 38-39.

as actual or prospective competitors to the Lao State and it nested these authorities and the Lao Government in an elaborate network of rules. As such, these arrangements gave effect to Friedman's aim of having law maintain a "dispersal of power" and minimize "irresponsible government tinkering" by giving preference to "rules instead of authorities".<sup>124</sup> Relocated villagers have been encouraged, by the Concession Agreement and related arrangements, to look to NTPC rather than the State to address their social needs and pursue economic opportunities (especially in light of the Concession Agreement's requirement that NTPC give some preference to Lao citizens in employing project personnel).<sup>125</sup> Collectively, the people of Laos have also been directed by the Nam Theun 2 project to envisage their economic future through the lens of a productive alliance with Thai energy consumers, imagining themselves co-positioned with those consumers in a legally mediated trade relationship premised on looking *through* rather than *to* the Lao State.

If, however, Nam Theun 2 was to usher in economic conditions of Milton Friedman's imagining, it has manifestly failed. Villagers in the project's vicinity do seem to have become increasingly enmeshed in debt relations, through the micro-credit operations of the Village Credit and Savings Fund established in connection with the project.<sup>126</sup> Nonetheless, the capacity of villagers to engage in the sort of "entrepreneurship of [the] [self]" that Friedman envisaged individuals pursuing is limited by their ongoing difficulty meeting subsistence needs.<sup>127</sup> Degrees, qualities and directions of villagers' aspiration may vary, even in the case of a single individual.<sup>128</sup> Nonetheless, as Rigg has argued, the people of the Nakai Plateau on which the Nam Theun 2 project is located seem caught in

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<sup>124</sup> *Id.* at 39, 51.

<sup>125</sup> Concession Agreement Summary, *supra* note 113, at 12.

<sup>126</sup> DAVID MCDOWELL, THAYER SCUDDER & LEE M. TALBOT, 22<sup>ND</sup> REPORT OF THE INTERNATIONAL ENVIRONMENTAL AND SOCIAL PANEL OF EXPERTS 30 (2014), at [http://www.worldbank.org/content/dam/Worldbank/document/EAP/lao-pdr/1405\\_LA%20NT2\\_POE%20Report%20%2322%20and%20LOM.pdf](http://www.worldbank.org/content/dam/Worldbank/document/EAP/lao-pdr/1405_LA%20NT2_POE%20Report%20%2322%20and%20LOM.pdf) [hereinafter POE REPORT NO. 22].

<sup>127</sup> FOUCAULT, *supra* note 16, at 226.

<sup>128</sup> Holly High, *The Implications of Aspirations*, 40 CRITICAL ASIAN STUDIES 531 (2008) (arguing that those in resettlement villages in Laos employ "an experimental and aspiration-oriented mode of engaging with the project" that prompted their resettlement "and, through it, the state").

a “resource squeeze” arising from the combination of “a wealth-creating process driven by the opening up of new market opportunities...and a poverty-creating process driven by the erosion of traditional activities”. As Rigg explains, “over-exploitation or under-production in one realm spills into another”.<sup>129</sup>

For Friedman, as already noted, the ultimate safeguard of liberty is abundance. There was little of this in evidence in the Nam Theun 2 project resettlement village that we visited, where the marketplace built for local trade of produce stood unused. An AUSAID-commissioned review of the project confirmed what several of villagers told us: that poor quality soils in resettlement areas have meant that the agricultural activities that villagers were encouraged to take up do not meet their subsistence needs, while competition for river fish has intensified.<sup>130</sup> In May 2014, the Panel of Experts reporting to the Lao government on social and environmental impacts of the project reiterated that there were “important problems” with all of the “five pillars” of sustainable livelihood that had been envisaged in project planning.<sup>131</sup>

There seems to have been relatively little evidence, too, of the economic power gained by the Nam Theun 2 project company NTPC, its investors, partners and advisors “offset[ting]” pre-existing concentrations of political power, as Friedman envisaged.<sup>132</sup> Friedman acknowledged that relations between economic and political freedom are complex and not unilateral, but he still maintained that a neoliberal version of competitive capitalism leads to less inequality and greater political freedom than alternative systems of organization.<sup>133</sup> Laos can hardly be described as the terrain of competitive capitalism. Nevertheless, as noted above, the NTPC has offered some competition to the state in its

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<sup>129</sup> J.D. Rigg, *Forests, Marketization, Livelihoods and the Poor in the Lao PDR*, 17 *LAND DEGRADATION & DEV.* 123 (2006).

<sup>130</sup> JEFF BALL, JIM ELSTON, MARJORIE SULLIVAN & ANDREW WALKER, *REVIEW OF NAM THEUN 2 HYDROELECTRIC DAM, LAO PDR: FINAL REPORT TO AUSAID* iv (2005), at [http://aid.dfat.gov.au/Publications/Documents/nt2\\_hydro\\_report.pdf](http://aid.dfat.gov.au/Publications/Documents/nt2_hydro_report.pdf)

<sup>131</sup> POE REPORT NO. 22, *supra* note 126, at 10.

<sup>132</sup> FRIEDMAN, *supra* note 12, at 39.

<sup>133</sup> *Id.* at 10, 169-170.



provision of social services to Lao villagers and information to the Lao public. Yet any expectation, pursuant to Friedman's teachings, that this competitor's rise might have lessened material inequality or boosted political freedom has not so far been borne out. Laos' Gini coefficient is rising at a rate second only to the People's Republic of China in Asia, despite impressive GDP growth.<sup>134</sup> Villagers near the project are now well versed in answering surveys and engaging in rituals of consultation, but many remain fearful and reluctant to speak out, either against the project company or the Lao Government.<sup>135</sup> With regard to political freedom beyond the project's immediate setting, one might turn to any one of the (much criticized) indices that seek to quantify states' relative performance in this regard.<sup>136</sup> In 2005, Laos was ranked 155<sup>th</sup> among the 167 countries listed in the Press Freedom Index published by the French-based organization Reporters without Borders. By 2014, it had dropped to 171<sup>st</sup> among 180 nation states so indexed.<sup>137</sup> Likewise, Laos was 77<sup>th</sup> among 159 nation states surveyed in Transparency International's Corruption Perceptions Index in 2005. By 2013, it was ranked 140<sup>th</sup> among 175 nation states so listed.<sup>138</sup>

Consistent with Friedman's view that the introduction of market-promoting policy settings around non-governmental actors could generate an "interwoven network of free institutions" over the long-term, it was a prevailing expectation of the Nam Theun 2 project that it would serve as a "standard setter" for future political and economic development in Lao PDR.<sup>139</sup> The Decision Framework for

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<sup>134</sup> JUZHONG ZHUANG, RAVI KANBAR & CHANGYONG RHEE, RISING INEQUALITY IN ASIA AND POLICY IMPLICATIONS 7 (Charles H. Dyson School of Applied Economics and Management, Cornell University, Working Paper No. 2014-14, 2014) at <http://dyson.cornell.edu/research/researchpdf/wp/2014/Cornell-Dyson-wp1414.pdf>; Rigg, *supra* note 129, at 126 ("Perhaps the most significant theme to be highlighted in socio-economic studies carried out in Laos since the mid-1990s has been the recognition that...economic growth ha[s] been accompanied by a worrying increase in inequality").

<sup>135</sup> Shalmali Guttal & Bruce Shoemaker, *Manipulating Consent: The World Bank and Public Consultation in the Nam Theun 2 Hydroelectric Project*, 10 WATERSHED 18 (2004).

<sup>136</sup> See generally, Sally Engle Merry, *Measuring the World: Indicators, Human Rights and Global Governance*, 52 CURRENT ANTHROPOLOGY S83 (2011).

<sup>137</sup> Reporters Without Borders, World Press Freedom Index, at <http://en.rsf.org/laos.html>

<sup>138</sup> Transparency International, Corruption Perceptions Index, at <http://www.transparency.org/research/cpi/>

<sup>139</sup> FRIEDMAN, *supra* note 12, at 202; Rob Laking, *The Nam Theun 2 Hydro Project: A Better Kind of Dam?* Paper for the Annual Conference of the Aotearoa New Zealand International Development Studies Network, Victoria University of Wellington, New Zealand (December 3-5, 2008), at <http://www.devnet.org.nz>, at 3.

Processing the Proposed NT2 Project, published by the World Bank in 2002, asserted that “it is critical to the success of the project that sustained progress on reforms be maintained over the long-run”.<sup>140</sup> Contrary to these expectations, though, the Xayaburi project’s development has been premised on a conscious dispensation with the reformist template of Nam Theun 2 among Lao decision-makers, as highlighted above. Meanwhile, cross-border trade with Laos notwithstanding, the EGAT monopoly on Thai electricity markets that has long stuck in the craw of neoliberal commentators seemingly remains as intractable as ever. One Thai commercial banker with whom we spoke expressed the sort of deference with which the Lao Government today seems to be met in the financial markets, now that it is flush with the financial success of Nam Theun 2 and associated access to new sources of capital: “[I]n Laos, ...the one that we have to listen to is the Lao Government. It’s the Lao Government, it’s not anyone else”.<sup>141</sup> Far from “offsetting” the “coercive power of the state”, as Friedman envisaged, the neoliberal experiment of Nam Theun 2 seems to have augmented it, all while keeping alive the sense that Laos is somehow en route to profound and ultimately emancipatory change.<sup>142</sup>

These experiences in Laos do not refute Friedman’s thesis about the relationship between political and economic freedom. One would need a larger canvas in order to do that. In any event, one might query whether Friedman’s theoretical model is of a sort that could ever really be proven true or not, all the more so when assessed against “evidence” gathered decades after Friedman was writing.<sup>143</sup> Rather, these observations explain how the Nam Theun 2 project might be understood as a failure in neoliberal terms, for purposes of its “failing forward” into Xayaburi.

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<sup>140</sup> WORLD BANK, DECISION FRAMEWORK FOR PROCESSING THE PROPOSED NT2 PROJECT 4 (2002), at [http://siteresources.worldbank.org/INTLAOPRD/Resources/NT2\\_Decision\\_Framework.pdf](http://siteresources.worldbank.org/INTLAOPRD/Resources/NT2_Decision_Framework.pdf).

<sup>141</sup> Interview with Thai bank executive (Nov. 26, 2012) (on file with author).

<sup>142</sup> FRIEDMAN, *supra* note 12, at 202.

<sup>143</sup> Friedman, *supra* note 4, at 9, 14 (Arguing that the assessment of economic theories or hypotheses by whether their assumptions are shown to be empirically accurate is fundamentally mistaken, Friedman wrote: “Factual evidence can never ‘prove’ a hypothesis; it can only fail to disprove it”; “Truly important and significant hypotheses will be found to have ‘assumptions’ that are wildly inaccurate descriptions of reality . . . A hypothesis is important if it ‘explains’ much by little . . . if it abstracts the common and crucial elements from the mass of complex and detailed circumstances . . . and permits valid predictions on the basis of then alone. To be important, therefore, a hypothesis must be descriptively false in its assumptions”). For discussion of this essay’s reception, criticism and influence, see Thomas Mayer, *Friedman’s Methodology of Positive Economics: A Soft Reading*, 31 *ECON. INQUIRY* 213 (1993).

If it marks the failure of the reformist aspirations with which the Nam Theun 2 project was embedded, the Xayaburi project remains, nevertheless, an expression of the “rolling dynamic of experimentation” by which neoliberal restructuring has been characterized – a dynamic “in many ways sustained by repeated regulatory failure”.<sup>144</sup> Xayaburi continues to instantiate Friedman’s conviction that promoting free trade internationally represents the best available route to “an enormous accession of political and economic power” for all participating, premised on their realization of “reciprocal benefits”.<sup>145</sup> Xayaburi has also maintained at least some of the “‘market conforming’ regulatory incursions” identified with Nam Theun 2, as noted above. It certainly continues Laos’ enthusiastic “embrace of public-private partnership”: a characteristic regulatory incursion of neoliberalism.<sup>146</sup> Xayaburi may, accordingly, be viewed as a less engineered version of neoliberal experimentation, but a version of neoliberal experimentation nonetheless.

In terms of trying to understand how and why the forward momentum of neoliberal experimentation was maintained in Laos, failure notwithstanding, there are likely to have been many factors in play. It may be that the attractive investment returns gleaned from the Nam Theun 2 project explain this propulsion in large part.<sup>147</sup> It could be that the positive brand value that has accumulated around the Nam Theun 2 project – in light of both its timely construction and its financial complexity – has been a factor favoring its replication (or rather, its remaking) in Xayaburi.<sup>148</sup> The claim of this article is, nevertheless, that neoliberalism’s ambivalent modeling of law, apparent in Friedman’s text – as a force both for maintaining state authority and generating pathways for detouring around it –

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<sup>144</sup> Jamie Peck, Nik Theodore & Neil Brenner, *Postneoliberalism and its Malcontents*, 41 *ANTIPODE* 94, 106 (2010).

<sup>145</sup> FRIEDMAN, *supra* note 12, at 73.

<sup>146</sup> PECK, *supra* note 3, at 23.

<sup>147</sup> Merme et al, *supra* note 42, at 24, 27 (citing a figure of 38% return on equity for the Lao Government over the Concession Agreement term and sector-wide returns of 15% to 20% for shareholders generally).

<sup>148</sup> *Id.* at 26 (“The financial complexity itself has become a marketing tool... in the case of NT2, the creation and management of its financial scheme provides a reputation that is mobilized in acquiring new projects. While the [World Bank] strongly promotes the success of the financial construction of NT2... its financial participants actively promote their success in being able to deal with extensive, multifaceted and risky investments, involving a great number of actors, and their ability in defining guidelines for complex large infrastructural projects”).

might have helped, in part, to create conditions for that forward failure. It is to the neoliberal framing of law as a model to which we will now turn.

#### IV. MODULAR LAW AND ITS RESILIENCE

In Xayaburi, as noted above, the elaborate contractual architecture of dialogue, audit and monitoring put in place around Nam Theun 2 has been almost entirely stripped away. Even so, the sense that legally supervised development and legally mandated access to information – more or less along the lines of the Nam Theun 2 project – might yet deliver more to the Lao people has proven remarkably resilient in the context of hydropower development, unfulfilled promises notwithstanding. Outside of Laos, in Thailand especially, an array of organizations continues to clamor for information and contest decision-making surrounding both Nam Theun 2 and Xayaburi in every available legal forum, as if, through sheer intensity of parallel activity and commentary, to uncork in Laos that ever-flowing wellspring of Friedman’s account: “free discussion and voluntary cooperation”.<sup>149</sup> Within Laos, too, Holly High has remarked upon “the apparent ‘success’” that state-sponsored discourses of modernity, including their legal dimensions, have had in “capturing the modernist yearnings of poor people”:

Far from resisting the notion that resettlement may lead to improved and desirable lives, poor people have embraced this narrative. What they rejected and resisted was the state’s failure to actually deliver on this promise, or make the narrative a reality. Thus, discourses of modernity break free from the control of any one source (state or society)

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<sup>149</sup> FRIEDMAN, *supra* note 12, at 22. See generally International Rivers, Xayaburi Dam: Timeline of Events (Feb. 2013), at [http://www.internationalrivers.org/files/attached-files/xayaburi\\_dam\\_timeline\\_of\\_events\\_feb\\_2013\\_0.pdf](http://www.internationalrivers.org/files/attached-files/xayaburi_dam_timeline_of_events_feb_2013_0.pdf); Bank Track, Dodgy Deal: Xayaburi Dam, Laos (June 25, 2014), at [http://www.banktrack.org/manage/ajax/ems\\_dodgydeals/createPDF/xayaburi\\_dam](http://www.banktrack.org/manage/ajax/ems_dodgydeals/createPDF/xayaburi_dam); Press Release, Earth Rights International, Austrian Firm Violates Ethics Guidelines in Destructive Mekong Dam Project, Reported to Home Government (Apr. 9, 2014) at <http://www.earthrights.org/media/austrian-firm-violates-ethics-guidelines-destructive-mekong-dam-project-reported-home>.

and are appropriated, interpreted, and misinterpreted in ways that can only partly be understood in terms of domination and resistance.<sup>150</sup>

An understanding of neoliberal legality (or legally engineered, trade-promoting development) as a reliable route to enhanced economic and political power and wellbeing, more or less faithful to Friedman's, has thus emerged from this two-part sequence of projects remarkably unscathed. Any failure on the part of the Nam Theun 2 project to live up to expectations seems to have been understood in terms of contingent and contextual factors – above all, non-market factors – rather than as a basis for questioning the premises upon which the project was structured. Shannon Lawrence's sense of how one should understand and address the disappointments of the Nam Theun 2 project is representative in this regard, in its focus on factors outside the project's policy legal or economic structure:

In a country with a one-party authoritarian government, no independent judiciary or independent civil society organizations, no free press, and a ranking as one of the world's 25 most corrupt countries by Transparency International...dams have left a legacy of broken promises and uncompensated losses.<sup>151</sup>

As failure gets deflected towards considerations of context, culture and local legal and political institutions, these afford justification for “doubling down” on neoliberal commitments and templates, rather than inspiring innovation beyond or against them.<sup>152</sup> Central to this capacity for market-promoting development templates to survive their failures (indeed thrive upon them) is their modularity. Neoliberal policy thinking has tended to trade in standardized designs, made up of discrete, separable, scalable and transferable elements. This has been crucial to its global success.

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<sup>150</sup> High, *supra* note 128, at 549.

<sup>151</sup> Shannon Lawrence, *The Nam Theun 2 Controversy and its Lessons for Laos*, in *CONTESTED WATERSCAPES IN THE MEKONG REGION: HYDROPOWER, LIVELIHOODS AND GOVERNANCE*, 81, 82 (François Molle, Tira Foran and Mira Käkönen, eds., 2009).

<sup>152</sup> I take the use of phrase “doubling down” in this context from remarks by Thomas Biebricher, in discussion surrounding a presentation by Chris Butler, at the Politics of Legality Workshop, *supra* note 2.

“Law”, in this tradition, is the subject of particular, recurrent modular configurations, according to a seemingly incommensurable set of briefs that it is called upon to carry – precisely the impossible mix of mandates that Milton Friedman’s *Capitalism and Freedom* offers up for law.<sup>153</sup> Neoliberal law must be utterly “impersonal”, uniform and reliable in its operations, it must be transformative of every aspect of life, yet it must also be purportedly minimal in scope and ambition, never straying beyond a limited list of functions.<sup>154</sup> Law must correct for a wide range of “neighborhood effects” (or externalities), but must not encourage “governmental intervention” to do so.<sup>155</sup> It must preserve at all costs the integrity of economic arrangements voluntarily concluded, however inscrutable to the public.<sup>156</sup> Almost everything beyond this that might be considered harmful, unjust or problematic is to be left to the workings of “taste”, choice, persuasion, patronage and the seemingly infinite abundance of options that economic life can deliver, so long as people maintain “belief in freedom itself”.<sup>157</sup> If power concentrates, in state hands or others, then this is, in Friedman’s words, a “danger we cannot avoid”, but it is always a lesser danger than failure to stay that course signposted as a route towards competitive capitalism.<sup>158</sup>

So disarticulated, law becomes modular and thereby, to some degree, insulated from question. All the claims made of and for law in *Capitalism and Freedom* – regarding impersonal reliability, non-intrusive protectiveness and the like – are invested with the tenor of a hypothesis. They amount to a model, a “game” with rules, not an emergent or extant reality.<sup>159</sup> As Friedman wrote of the “theory” that the “science” of economics aims to develop:

Such a theory is, in general, a complex intermixture of two elements. In part, it is a ‘language’ designed to promote ‘systematic and organized methods of reasoning.’ In

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<sup>153</sup> FRIEDMAN, *supra* note 12.

<sup>154</sup> *Id.* at 15, 34.

<sup>155</sup> *Id.* at 30-32.

<sup>156</sup> *Id.* at 14.

<sup>157</sup> *Id.* at 15-21, 111.

<sup>158</sup> *Id.* at 202.

<sup>159</sup> *Id.* at 15, 25.

part, it is a body of substantive hypotheses designed to abstract essential features of complex reality.<sup>160</sup>

Cast as both “language” and “hypothesis”, the characterization of law in *Capitalism and Freedom* is not expected to correspond directly to “real world” experience.<sup>161</sup> Accordingly, where legal reforms reflective of a Friedman-esque policy agenda do not deliver materially upon one or other of the promises that they carry – of, say, reduction in “governmental intervention” and/or spontaneous improvement in economic freedom – this need not cast the agenda itself into question. On the contrary, observations along these lines are just as likely to fuel the furtherance of neoliberal experimentation. “The necessity of relying on uncontrolled experience rather than on controlled experiment makes it difficult to produce dramatic and clear-cut evidence to justify the acceptance of [the] tentative hypotheses [of neoliberal theory]”, Friedman remarked, and the very same factors seemingly make it difficult to *dispense* with neoliberal hypotheses as well.<sup>162</sup> “Observed facts are necessarily finite in number; possible hypotheses, infinite”, Friedman continued. “If there is one hypothesis that is consistent with the available evidence, there are always an infinite number that are”, Friedman wrote, such that “[t]he choice among alternative hypotheses equally consistent with the available evidence must to some extent be arbitrary”.<sup>163</sup>

Friedman’s tales of law and life are, he cautions, arbitrarily chosen, “tentatively accepted generalizations” and it is their very tentativeness that ensures the durability of their acceptance.<sup>164</sup> Compounding this is a sense that innovation beyond or against these generalizations is, in Friedman’s description, not something for which a community can organize. Rather, it must await the advent of inspiration approaching the divine:

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<sup>160</sup> Friedman, *supra* note 4, at 7 [footnote deleted].

<sup>161</sup> *Id.* at 31.

<sup>162</sup> *Id.* at 40.

<sup>163</sup> *Id.* at 10.

<sup>164</sup> *Id.* at 39. I discuss the durability of models in other legal and financial settings, and their in-built tolerance for failure, in Fleur Johns, *Financing as Governance*, 31 OXFORD J. LEGAL STUD. 391, 402-406 (2011).

The construction of [new] hypotheses is a creative act of inspiration, intuition, invention; its essence is the vision of something new in familiar material. The process must be discussed in psychological, not logical, categories; studied in autobiographies and biographies, not treatises on scientific method; and promoted by maxim and example, not syllogism or theorem.<sup>165</sup>

Even so, law does not wholly escape blame in relation to neoliberalism's setbacks, as the quote from Shannon Lawrence cited above made clear. The modular understanding of law set out in *Capitalism and Freedom* is not one designed for the *avant-garde*. Rather, models of law in Friedman's telling always trail economic models or "hypotheses"; it is in the latter's service that the former are devised. This pairing, too, is vital to neoliberalism's capacity for forward failure.

As between the "tentatively accepted generalizations" of economics and those of law in Friedman's writing, it seems relatively rare for a truth-claim or a justice-claim (that is, a plea for the model itself to be more realistic or more just) to be leveled at an economic model.<sup>166</sup> Certainly, Friedman counsels comparison of "the actual with the actual" when evaluating the relative effects of "the market" and "governmental intervention".<sup>167</sup> Yet this comparison is one that he feels able to dispose of quite summarily in the market's favor:

If a balance be struck, there can be little doubt that the record is dismal. The greater part of the new ventures undertaken by the government in the past few decades have failed to achieve their objectives...Governmental measures have hampered not helped...development.<sup>168</sup>

In contrast, Friedman cannot or will not declare any particular "actual" instance of competitive capitalism a failure for two reasons: first, because Friedman simply does not seem to *see* (or at least,

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<sup>165</sup> Friedman, *supra* note 4, at 43.

<sup>166</sup> On the market's resistance to considerations of justice in the work of Hayek, *see* Cohen, *supra* note 56, at 385.

<sup>167</sup> FRIEDMAN, *supra* note 12, at 197.

<sup>168</sup> *Id.* at 199-200.



does not present to his readers) evidence of failure on the part of market-conforming endeavor; and second, because any such failure is made, in his account, to attach to the actual as compared to the ideal. Any “actual operation of the market” will, Friedman emphasizes, inevitably fall short of its “ideal operation”.<sup>169</sup> To criticize the ideal for the failings of the actual as against the ideal would be to misconstrue the character of an “ideal type”, Friedman admonishes.<sup>170</sup> Yet the ideal type of “governmental intervention” is not so redeemed in his work; rather, it is made to stand and fail by its supposedly “dismal” record in the realm of the actual.

However modular may be its rendering, neoliberal legality does not seem as well-disposed as neoliberal economic models to deflect truth-claims and justice-claims, in part because it is far more likely to face such claims than an economic model. Instead, a neoliberal legal model tends to “take the fall”, idiomatically speaking, for unrealized promises that might otherwise be traced to its economic counterpart: the ideal type of a free market economy. When Shannon Lawrence lamented the Nam Theun 2 project’s “legacy of broken promises and uncompensated losses” in the quote above, it was to law – and to the recurrent themes of contemporary law and development work: reform and training of the judiciary, addressing corruption and the like – that she turned for explanation, blame-laying and a sense of what remains to be done better. Similarly, it is on non-market, Lao-specific and mainly legal conditions on which Nathaniel Matthews focused in a 2012 article decrying the “water grabbing” occurring in the Mekong River Basin, namely: “[t]he government of Lao[s]’...lack of capacity to regulate development, the existence of corruption and a closed state that controls [International NGOs] and forbids grassroots civil society”.<sup>171</sup> Accordingly, it is the social and legal reform agenda most closely associated with these deficiencies that gets shed in the transition from Nam Theun 2 to

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<sup>169</sup> *Id.* at 197.

<sup>170</sup> Friedman, *supra* note 4, at 34.

<sup>171</sup> Matthews, *supra* note 85, at 406.

Xayaburi, not the overarching neoliberal economic model, deployed and redeployed seemingly without much question among proponents.

Both the modularity of neoliberal accounts of law, and those accounts' protective shepherding of the model of a free market economy, underpin the capacity of neoliberal policy programs to combine with a remarkable range of institutions and agendas and to do so in a way that ensures that any "failure" of those programs will be localized and attributed to context: to non-market, social and legal conditions especially. Friedman's account of law – and the wide-ranging legal and social reform program that followed from that account in the case of Nam Theun 2 – is at once so short-form and so ambitious that it seems designed for failure and consequent abjuration. Recall that program's scope in Nam Theun 2: it extended from water conservation to family planning.<sup>172</sup> The program of economic transformation with which these reforms were bound up seems relatively modest by comparison: competition and consumption are more or less all that was said to be required, plus reform aimed consistently at their promotion.

Neoliberalism's polycephalous yet short-form account of law aids, in particular, neoliberalism's splicing with one party state power. In this regard, the work of law is functional but also faith-making; perhaps the most that law does, in the interest of sustaining a neoliberal reform agenda in one party states, is to keep alive the appetite for choice-borne, information-fueled freedom that is at once a source of that state's prospective legitimacy and a potential harbinger of its demise. Law-borne faith in the power and freedom of the act of informed choice is the crucible in which the sense of neoliberalism having so far failed and the sense of it maintaining unassailable forward momentum are alloyed. This is again why the social and legal reform agenda associated with Nam Theun 2 bore the brunt of that project's failures: because it was those aspects of the reformist program that traded most explicitly and promiscuously in the language of faith, aspiration, capacity and

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<sup>172</sup> Goldman, *supra* note 54, at 506.

promise. It was not the Nam Theun 2 project itself so much as its social and legal mitigants – the related resettlement program, for instance, and associated public and private sector initiatives – that enlivened futurist hope in the Lao community at large.<sup>173</sup> When aspirations so elicited were not realized, laws and institutions concerned came to seem at fault, or indeed the people themselves, rather than the economic architecture the project was to entrench. By engaging directly, albeit in abbreviation, in terms of what could and should be, explicitly legal or social dimensions of the neoliberal model for development helped to both sustain that model and shield it from critical inquiry in the transition from Nam Theun 2 to Xayaburi in Laos.

## V. CONCLUSION

Could it be mere coincidence that Milton Friedman carved out “magnificent dams spanning great rivers” from the derision that he otherwise afforded government reform projects at the end of *Capitalism and Freedom*?<sup>174</sup> Perhaps, in some magical and improbable leap of the imagination, through time and space, Friedman was evoking the Mekong, and the strong-arm states that line its banks; the very states that would, decades later, boldly carry forward versions of his vision of a state being transformed, through patronage, aspiration and trade, into an economy that it might eventually be “appropriate to treat...as if it were competitive”.<sup>175</sup>

This article has explored how it is that such a vision could have been maintained, in Laos, in the face of the apparent failure of its predictions and promises to materialize. In Lao hydropower development, as discussed, the neoliberal hyperbole of the Nam Theun 2 project failed forward into the relative obduracy of the Xayaburi project. In so doing, parties and policy-makers in each case

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<sup>173</sup> High, *supra* note 128.

<sup>174</sup> FRIEDMAN, *supra* note 12, at 199.

<sup>175</sup> *Id.* at 120.

mobilized a modular account of law, comprised at once of measures designed to ensure the state's rigorous stability and mechanisms to enable the circumvention of state authority. That hybrid model of law has, in turn, become the target of criticism and reform effort in relation to the projects' perceived failings (in the case of Nam Theun 2 especially), allowing the economic model with which it was paired to emerge relatively unscathed and readied for further renewal.

What, then, does this account of neoliberal legality's durable modularity imply for those who would continue to probe "the tension between capitalist and democratic imperatives" in the Mekong River Basin and elsewhere?<sup>176</sup> Let me begin with what it does not support. Recognition of the power and resilience of a neoliberal juridical model does not suggest that commentators and critics should aim to defuse or improve that model by recourse to context, the "grassroots" or any other mode of laying claim to popular authenticity. On the contrary, this article has shown just how easily criticism of this kind tends to run off the back of the neoliberal development paradigm or, in the alternative, serves to justify its iterative extension.

The foregoing account similarly does not support any conclusion that models – of law, economics, or anything else – and the practice of thinking with models are hard-wired with a particular politics. To think with a model is not necessarily neoliberal, any more than dispensing with a model would be necessarily progressive or anti-neoliberal. Moreover, neoliberal thought frequently operates in relation to law in other modes: through the intricacies of legal doctrine and judicial decision-making, for instance.<sup>177</sup>

A model may elicit "design thinking" but the propagation of models in neoliberal thought need not have been the outcome of such thinking.<sup>178</sup> Compelling studies of neoliberal thought suggest that

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<sup>176</sup> Singh Grewal & Purdy, *supra* note 1, at 22.

<sup>177</sup> James M. Cooper, *Competing Legal Cultures and Legal Reform: The Battle of Chile*, 29 MICH. J. INTERNAT'L L. 501 (2007-2008).

<sup>178</sup> See generally Rim Razzouk & Valerie Shute, *What is Design Thinking and Why is it Important?*, 82 REV. EDU. RESEARCH 330 (2012).

its influence may rather be attributable to “a combination of dogmatism and adaptability, strategic intent and opportunistic explanation, programmatic vision and tactical smarts, principle and hypocrisy”.<sup>179</sup> Certainly, this is the way that Milton Friedman seems to have understood the makings of success as a public intellectual, that is, as a matter of generating “the ideas that are lying around” when a crisis occurs, or is perceived to have occurred, or “develop[ing] alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable”.<sup>180</sup>

It may be as a tale of success through failure, more or less in these terms, that the story of Nam Theun 2, Xayaburi, and the legal and policy infrastructure surrounding each of these projects, might resonate for those who worry both about the extraordinary prevalence of neoliberal public reason in law and development work today, and about some of its apparent down sides. The “inevitab[ility]” of approaching law reform in poor countries through a neoliberal prism is something that Friedman, his colleagues, students and acolytes, worked hard to bring about, by forging somewhat unlikely alliances across geographic borders, disciplines and institutions and laboring to “keep [alternatives] alive”, especially in modular form. Those critical of the Nam Theun 2 and Xayaburi development models, or of other projects like them, might learn from the example of Friedman, and others in the neoliberal “thought collective”, to develop interventions which do not merely embellish those models, or aid their forward failure, but rather pose alternatives to them.

Alternative models to those of neoliberal hydropower development discussed in this article are still alive in the Mekong River Basin, as well as among the many different types of market economy observable throughout the world.<sup>181</sup> For instance, pico-hydropower (comprised of hydro-electric turbines installed at the household or village level that generate up to 1 kW of electrical power, or up

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<sup>179</sup> PECK, *supra* note 3, at 4.

<sup>180</sup> MILTON FRIEDMAN, *CAPITALISM AND FREEDOM: FORTIETH ANNIVERSARY EDITION* xiv (2002) (1982).

<sup>181</sup> On available room for choice among alternative market economies and within any one such economy, *see* DAVID KENNEDY & JOSEPH E. STIGLITZ (EDS.), *LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE TWENTY-FIRST CENTURY* (2013).

to 5 kW according to some definitions) is well-established across Laos. Here, it maintains a “tension” within Lao energy politics “between centralized production for export and domestic off-grid rural electrification” and among energy-generation practices having vastly different degrees of adverse environmental and social impact.<sup>182</sup>

The terrain of pico-hydropower – having so far operated with minimal infrastructural, policy or financial support from either public or private sources – may be conceived of as a field of spontaneous market order or “catallaxy”.<sup>183</sup> Yet it could also be understood as a field in which various coalitions of actors are organizing, or might yet organize, to help keep alive alternative formulations of a market economy, or vocabularies of public reason, to those championed by Friedman.<sup>184</sup> Experiments and models oriented around pico-hydropower and other sustainable energy-generation practices might fail in any number of ways, but they might yet fail forward in ways newly responsive to the abiding truth claims and justice claims that neoliberal models of law so frequently seem unable or disinclined to answer.

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<sup>182</sup> Mattijs Smits & Simon R. Bush, *A Light Left in the Dark: The Practice and Politics of Pico-Hydropower in the Lao PDR*, 38 ENERGY POLICY 116, 117 (2010). See also Jeffrey Susanto & Samuel Stamp, *Local Installation Methods for Low Head Pico-Hydropower in the Lao PDR*, 44 RENEWABLE ENERGY 439 (2012).

<sup>183</sup> Hayek, *supra* note 24. This is indeed how the prevalence of pico-hydropower is characterised in Smits & Bush, *id.* at 121-2, 125-6; and Susanto & Stamp, *id.* at 439.

<sup>184</sup> For an illustrative instance of regional actors generating alternative models and assumptions to those on which Nam Theun 2 and Xayaburi rest, see CHUENCHOM SANGARASRI GRAECEN & CHRIS GRAECEN, PROPOSED POWER DEVELOPMENT PLAN (PDP) 2012: FRAMEWORK FOR IMPROVING ACCOUNTABILITY AND PERFORMANCE OF POWER SECTOR PLANNING (2012), at <http://www.palangthai.org/docs/PDP2012-Eng.pdf>. Far from rising resource values inevitably leading towards the emergence of clear property rights and rules, in accordance with standard neoliberal assumptions. Daniel Fitzpatrick shows how a range of factors may make reversion to, or emergence of, open or contested access regimes just as likely: Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996 (2006). An illustrative discussion of “shifting common-property arrangements”, “local-level claims and incremental processes of enclosure” in Laos is provided by Nattaya Tubtim & Philip Hirsch, *Common Property as Enclosure: A Case Study of a Backswamp in Southern Laos*, 18 SOC’Y & NATURAL RESOURCES: AN INTERNAT’L J. 41, 57-8 (2004). The idea of contending or parallel registers of public reason, and their amenability to comparative study, draws upon Sheila Jasanoff, *Bhopal’s Trials of Knowledge and Ignorance*, 42 NEW ENG. L. REV. 679, 688-692 (2008).