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## Development Projects, Indigenous Peoples’ Land Rights and Rights Implementation

### 1 Contextualising the Interface between Development Projects and Indigenous Peoples’ Land Rights

The last three decades have witnessed the explosion of oil, gas, mineral and infrastructure development projects involving multiple companies, international financial institutions, transactions and financial flows from different countries. This development is taking place in diverse geographical locations, in contexts of political and social instability and, frequently, upon land that is inhabited by groups who claim indigenous status. Whilst there are historical precedents for these types of development project from colonial times which show similar characteristics,<sup>1</sup> the

<sup>1</sup> The emergence in the nineteenth century of John Rockefeller’s Standard Oil saw the beginning of the modern oil industry. Standard Oil developed into one of the world’s first and biggest multinational corporations, quickly followed by Royal Dutch Shell in the West Indies. The building of road, rail and canal projects was a feature of the colonial period with projects involving the cooperation of the government, the colonial state, individual investors and private companies – the Rothschild family were active in financing many oil and mining projects. So, in colonial Africa, the Beira Railway was built to boost trade from and to South Africa. The discovery of copper deposits provided the conditions for Tanganyika Concessions Limited, a company with extensive mining and financial interests in Central Africa, to develop the Benguela Railway. For more examples focusing on the politico-economic context of colonial era development projects see J Lunn, ‘The Political Economy of Primary Railway Construction in the Rhodesias, 1890–1911’ (1992) 33(2) *The Journal of African History* 239–254. From a legal dimension, scholars belonging to the field of third-world approaches to international law focus on the relationship between capital, imperialism and international law. Specifically, the creation of international financial institutions such as the World Bank Group that have replicated colonial relations through complex forms of modern development finance practices. See A Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2007). An iteration of this continuation can be seen in the creation in 1948, of the UK government’s development finance institution, the Colonial Development Corporation, which continues today under the name of the CDC Group PLC. M Cowen, ‘Early Years of the Colonial Development Corporation: British State Enterprise Overseas during Late Colonialism’ (1984) 83(330) *African Affairs*, 63–75. For a recent and rare opinion on the relationship

modern projects I am concerned with contain some new features; for instance, in the plurality of public and private actors that fund a project from multiple locations and through a dense network of technical private contracts and policy standards and in this regulated setting, the diminished presence of the state. Many of the technical features of this network will intertwine with a larger pre-existing political-sociolegal framework which can include legacy issues over land. Another new feature of these projects is that they are taking place in a new era of increased recognition of indigenous peoples as holders of distinct rights at international and national levels. In this context, companies and their financiers seek to retrofit an economic, legal and political process to a project in the form of the contractual and policy mechanisms I analyse in this book. The result is that modern development projects often begin life with highly polarised starting points between the community, concessionaire and its financiers and the state. In this triangularity of players and the private regulatory setting, legal and social relations are reframed, community expectations can shift from the state to the private sector and the state can make decisions on issues of public interest purely on the basis of an investor's sensibilities.

In development narratives, industry and infrastructure have become indistinguishable with foreign direct investment in two areas: primary industries for natural resource development and the construction and operation of asset infrastructure.<sup>2</sup> Modern natural resource and infrastructure development projects are a core part of the privatisation practices within the heavily criticised Washington Consensus<sup>3</sup> bundle of policy prescriptions for mobilising development. Those prescriptions are aimed at opening up the market to business through policies

between international banking and finance, the city of London and imperialism see T Norfield, *The City: London and the Global Power of Finance* (Verso 2017).

<sup>2</sup> K Bhatt, 'Industry and Infrastructure', in K de Feyter, G Erdem Türkelli and S de Moerloose (eds.), *Law and Development Encyclopedia* (Edward Elgar, Forthcoming); M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2009).

<sup>3</sup> Coined by the English economist John Williamson in the 1980s, the Washington Consensus refers to a set of free market economic policies such as tax reform, financial liberalisation, privatisation practices and secure property rights that are supported by prominent international financial institutions. Leading economists Stiglitz and Chenery have, since the 1990s, criticised these policies for their disastrous impacts on inequality and their contribution to the global financial crisis. J Stiglitz, 'The Price of Inequality' (2013) 30 *New Perspectives Quarterly* 52.

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promoting decreased state intervention, financial liberalisation and secure investor property rights in order to give the market free rein.<sup>4</sup> Under this development agenda, unlocking vast reserves of wealth would, it was believed, lead to overall increases in gross domestic product and income which will ultimately lead to a trickle-down of wealth. Increasing foreign direct investment into industry and infrastructure are therefore seen as fundamental for ‘development’; providing engines along a linear path of *economic* development, progress and modernity in the host country.<sup>5</sup> Transnational financial transactions and their underlying documentary network are key tools for facilitating this agenda whilst also bringing international economic arrangements into closer contact with issues of land, survival and precarity.

Whilst the connection of indigenous people to land is highly diverse differing from group to group, there is a common root in this relationship to land and water that is radically different from the Western notion of property. For indigenous people, land and water are regarded as sacred, inextricably connected to their identity, culture, sense of meaning and survival. Unlike Western notions that view land and the resources within it as property rights, to be exclusively owned and enclosed for productive potential and value creation,<sup>6</sup> indigenous worldviews may not differentiate between the earth and the resources it supports, seeing land in a wider concept that relates to the collective right to survival as a people, for the reproduction of their culture and for their own development and plans for life.<sup>7</sup> Thus large development projects become major hotspots for a significant clash of worldviews

<sup>4</sup> L. Minkler, *The State of Economic and Social Human Rights: A Global Overview* (Cambridge University Press 2013) 63.

<sup>5</sup> Although the work of Amartya Sen provides a human-centred counter-approach. See A Sen, *Development as Freedom* (Oxford University Press 2001).

<sup>6</sup> This of course links to the colonial premise that only enclosed, settled and intensive cultivation of land can be regarded as a ‘proper’ or ‘effective’ occupation of land. See T Flannagan, ‘The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy’ (1989) 22(3) *Canadian Journal of Political Science* 589 and J Gilbert, ‘Nomadic Territories: A Human Rights Approach to Nomadic Peoples’ Land Rights’ (2007) 7(4) *Human Rights Law Review* 681.

<sup>7</sup> Report of the Rapporteur, Meeting of the Working Group on the Fifth Section of the Draft Declaration with special emphasis on ‘Traditional Forms of Ownership and Cultural Survival, Right to Land and Territories’, Organisation of American States, Committee on Juridical and Political Affairs, OEA/Ser.K/XVI. GT/DADIN/doc.113/03 rev. 1, 20 February 2003.

and fundamentally diverging views over land as individual property and land as an individual and collective *relationship* upon which cultural and economic survival are rooted.

In this context, a state can become complicit in furthering the Western worldview of land purely as a property right by granting licences without community consent or failing to implement laws to recognise and demarcate traditional land. The social experience of dispossession can occur where a government acquires traditional land through compulsory acquisition laws and then leases a bundle of private rights to that land to a company for development reasons. A government might become involved in these projects indirectly as a minority shareholder. In that case, a dilemma will arise between the state's public law obligations to respect the property and human rights of its citizens and its role as an investor with property rights in the form of contractual royalty payments or future shareholder dividend payments, depending on the deal struck. This tension incentivises the state to ensure the timely completion of the project and to accept the social and legal consequences of its investment activity in terms of potential land displacement and related land, property and human rights violations for indigenous communities who claim breach of their customarily observed land rights.

The increase of infrastructure, extractives and even renewable projects will result in more triangular sociolegal clashes involving indigenous peoples, the state and private actors, signalling a future of systemic legal challenges in the blurring of roles, responsibilities and expectations within this modern triangularity. In the context of an enterprise-led state and the concrete and stable macroeconomic structure of contracts that are designed to push a project forward, what does the recognition and implementation of indigenous peoples' rights to land look like? Under these conditions, whether or not the state recognises traditional land rights under formal law is less important than how the state practically protects (or actively fails to protect) and implements those rights through the largely private mechanisms of a large development project which it agrees to but has limited control and influence over.

These triangular tensions can result from state and investor disregard of the social and environmental impacts of these projects, many of which do not respect the free, prior and informed consent (FPIC) of indigenous peoples. Development projects can constitute land grabbing as they run the risk of further impoverishing already marginalised communities in

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times of intensification of natural resource competition.<sup>8</sup> Whilst many land grabs are done illegally, some are done more silently through legal means within state investor private concession contracts that prioritise and protect investors' rights over all others, despite legal protection for customary rights to land, as illustrated in Papua New Guinea.<sup>9</sup> Through the types of contract and behaviour I will discuss, land grabbing becomes a legal action, protected and ultimately justiciable through an international arbitration mechanism typically embedded within the boilerplate provisions of a concession contract. This type of contractual and state-supported land grabbing in contexts of resource extraction is exceedingly difficult for communities and their counsel to even gain insights into, let alone regulate and discipline, casting doubt on the legal, moral and developmental assumptions supporting these projects. In 2017, Verisk Maplecroft cited the practice of banks, development finance institutions (DFIs) and corporations that finance and operate land transactions abroad as a key human rights risk area for business. This is because financiers will run an increased risk of becoming implicated in forced evictions, human rights violations, food sovereignty issues and land grabs.<sup>10</sup> The issue for concessionaires, financiers and communities is that land grabbing can occur legally, through the type of state-backed laws and contractual networks discussed in this book that are shaped through a mixing of confidential private contracts, policies, state laws,

<sup>8</sup> Understanding land grabbing as structures that perpetuate control, through ownership, concession, contracts or general power by any persons or entities – public or private, foreign or domestic for purposes of speculation, extraction, resource control or commodification at the expense of indigenous peoples and without sharing benefits equitably.

<sup>9</sup> It is estimated that in recent years, 12 per cent of Papua New Guinea, 5.5 million hectares, has been leased out to foreign corporations. Dozens of foreign companies have signed land deals under a government scheme called Special Agriculture and Business Leases despite the country's constitutional protection of customary land rights. F Mousseau, 'On Our Land: Modern Land Grabs Reversing Independence in Papua New Guinea', The Oakland Institute in collaboration with Pacific Network on Globalisation (2013) [www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI\\_Report\\_On\\_Our\\_Land.pdf](http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_On_Our_Land.pdf). Other examples of land grabbing could include the US\$25.5 billion Lamu Port South Sudan Ethiopia infrastructure project that will cut across indigenous territories and the Lower Sesan II dam hydropower development project in Cambodia. In 2019, the Supreme Court of India in *Wildlife First & Ors. v Ministry of Forest and Environment & Ors*, Writ Petition(s)(Civil) No(s). 109/2008, ordered the eviction of millions of India's indigenous Adivasi people whose claims under the Forest Rights Act 2009 were rejected. That act recognises India's indigenous peoples' rights to their ancestral lands, with the order seen as a form of land grabbing.

<sup>10</sup> Verisk Maplecroft, 'Human Rights Outlook 2017'.

private actors and state actors. This means that legal and behavioural aspects of the contractual arrangements, mechanisms and behaviours surrounding development projects can also be said to support land grabbing, if done without rigorous due diligence which captures these detailed interfaces.

I have spent many hours trawling through the fantastic work of the Dutch NGO BankTrack which on its aptly titled database of ‘dodgy deals’<sup>11</sup> presents, in a thoughtful and accessible way, profiles of projects that have damaged the environment or society around the project and because of this, constitute an investment risk to the banks financing them. Many are or have been subject to civil society campaigns and settled informally. A quick journey around this goldmine of information demonstrates the sprawling geography of these projects from North to South, East to West – India, Turkey, Brazil, Zambia and Australia are a few. If you are interested in knowing more about one of these projects, a quick click on a dodgy deal displays a list of the transnational actors involved (companies, commercial banks, national and regional development banks, the state), the social, environmental, human rights or gender-related impact of the project on local communities and the formal and informal legal network underpinning the investment. Based on BankTrack’s research of a project, the latter regime might comprise a ‘transnational plural’ collection of state-made laws and regulations, specific international legal instruments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>12</sup> and informal normative sources; these include relevant environmental and social performance standards of a funding DFI such as the International Finance Corporation (IFC), European Bank for Reconstruction and Development (EBRD), or a political risk insurance provider such as the World Bank’s Multilateral Investment Guarantee Agency (MIGA). The website is a testament to a thirst for inward investment and governmental acceptance of the negative effects of that trend.

When things go wrong with these projects, which they invariably do, the experiences of communities living in the shadow of these projects is abysmal. The catastrophic case of the 1992 Sardar Sarovar irrigation/hydroelectric project in India, partly financed by the World Bank,

<sup>11</sup> BankTrack website, [www.banktrack.org/search#category=dodgydeals](http://www.banktrack.org/search#category=dodgydeals).

<sup>12</sup> Adopted by the United Nations General Assembly, 2 October 2007, A/RES/61/295.

displaced nearly 120,000 people including many isolated tribal Adivasi<sup>13</sup> indigenous communities. Following ardent local NGO advocacy, the case fuelled a bank debate on how exactly it was implementing its resettlement and indigenous peoples' policies and the way it was 'doing business'. Sardar is sadly just one of many 'development' disasters involving indigenous people. In 1995, another debacle occurred, this time involving the IFC. The bank had financed the Pangu Hydroelectric dam on the Biobío River in Chile, a project that threatened to displace and destroy the livelihoods of thousands of indigenous communities and, like Sardar, following local advocacy from environmental and indigenous organisations, pressured institutional change within the IFC. Along with these, BankTrack's website provides many recent examples of this continued trend of development project legalised land grab and dispossession.

Constituting a highly organised species of legal arrangement that conflates multiple legal norms makes development projects hard cases to regulate from a purely state-focused human rights perspective. Development projects tell us something about the general character of and values within national and international law in the context of globalisation and how that character has provided the conditions for a number of highly specialised legal disciplines that have come to challenge and unseat state power itself. My experiences, like many other practitioners, tells us that for many, the proper units of legal order are not the state or constitutional law at all, or sadly, not communities, but special highly organised subsystems of private law, such as project finance, made up of contracts, policies, decision-making and behaviours that live beyond the state. It remains a challenge for processes seeking to implement human rights in clear, predictable and fair ways to upset the apple cart of this carefully orchestrated set of arrangements.

## 2 Focus of the Book

The objective of this book is to highlight the phenomenon of the large transnational development project. Involving companies, financial institutions, states, non-governmental organisations and people with a special sociocultural, economic and spiritual connection to land (typically called indigenous peoples), these projects sit at a unique interface of public and

<sup>13</sup> Adivasi is the collective term for India's indigenous peoples and forest-dweller communities.



private law – state law, regulation, policy, voluntary standards and private contracts – and disciplinary thinking. More specifically, I consider how, under the conditions of a development project and its contractual framework and safeguarding policy architecture,<sup>14</sup> private entities and judicial and non-judicial mechanisms frame, conflict with and informally delegate out the recognition and implementation of rights to land for indigenous people. Through the lens of the development project, we can assess the interfaces between local jurisdictional, international and regulatory (in policy and contract) regimes on indigenous peoples' land rights with transnational behaviours and neoliberal values of development and financing. In doing so, we observe how the public and private actors, and mechanisms involved in large development projects can accelerate rights violations, contribute to precarity and influence rule of law values regarding fair, clear and predictable legal outcomes. The result has significant consequences for regulation (or lack thereof) of development, the protection of indigenous peoples' special relationship to land and resources and extraction of natural resources globally.

Development projects also provide an analytical lens through which to examine how different sources of indigenous rights cope with and stand up to powerful contractual and policy mechanisms and related transnational behaviours. In this way, they provide a direct lens into the

<sup>14</sup> Specifically, the use of private environmental and social performance standards dealing with issues of land and indigenous peoples, discussed in more detail in Chapter 2. Starting in the 1980s, the World Bank's in-house policy on involuntary resettlement and indigenous peoples', were shaped into Operational Directives and revised throughout the 1990s and early 2000s. The development finance community replicated the bank's resettlement policies with the OECD producing guidelines on resettlement planning in 1991. The European Bank for Reconstruction and Development produced its first environmental policy in 1991 and indigenous policy in 2008, the Asian Development Bank formulated a resettlement policy in 1996 and indigenous policy in 1998, the Inter-American Development Bank adopted resettlement policy in 1998 and an indigenous policy in 2006 and the African Development Bank produced a resettlement policy in 2002 (although it refuses to establish a stand-alone indigenous policy). The IFC as private arm of the World Bank, produced its own involuntary resettlement policy in 2002 and indigenous policy in 2006. The following year, the Equator Principles were approved by ninety financial institutions across thirty-seven countries covering over 70 per cent of project finance debt worldwide, to form a corpus of globally valid norms for commercial banks involved in project finance that were modelled on IFC standards. M Cernea, 'The "Ripple Effect" in Social Policy and Its Political Content: A Debate on Social Standards in Public and Private Development Projects', in M Likosky (ed.), *Privatising Development: Transnational Law, Infrastructure and Human Rights* (M. Nijhoff Publishers 2005), 65–104 for a history on involuntary resettlement policies within international financial institutions.



nature, values and prioritisation of different common law and international law sources of indigenous rights when they confront the hidden matrix of contracts, policies and behaviours that facilitate a formidable development paradigm of our time – the development project. Is the voice of international or domestic law cast into the shadows of these frameworks, visibility muted as a result of the mixture of private contracts, powerful actors, a recalcitrant state and its own inherent values? I discuss these issues as I map the legal framework around development projects in Chapter 3. I explore how concessionaires and financiers are able to rally powerlessness (in the vagueness of that legal framework) and power (in the many tools of contractual power illustrated in later chapters) to displace social risks such as a competing indigenous land claim to insulate the project from any risks that could jeopardise their return on investment.

In the chapters which follow, I seek to map the legal terrain around the understudied universe of transnational development projects as they increasingly interface with indigenous peoples' rights to land. I analyse how the transnational legal and policy architecture governing those projects recognises and in some cases, implements or alienates those rights. This is a bewildering task not least for the universe of transnational actors and fragmented array of norms that become visible once we peel back the layers of a project.

### 3 Linking Project Finance and Indigenous Peoples' Land Rights

Linkages between the contracts and policies used for asset-based project financing and indigenous land issues such as FPIC are an under-investigated field. Conversations with transactional lawyers working in project finance and natural resource governance demonstrate two contradictory characteristics. First, there is an understanding that the international finance market has entered a new stage. In the post 2008 financial climate, this stage is characterised by reduced debt liquidity, growing political uncertainty and greater demands for understanding the social consequences for companies of transnational operations. There is also a growing appreciation amongst business that failure to make provisions for the participation and consultation of indigenous peoples' can result in economic challenges such as reputational problems, crushing project delays, spiralling cost and social conflict in a project area. Policies for local financing, content and the increased recognition of the importance of conducting social risk due diligence for avoiding or

mitigating human rights impacts through, for example, increased use of social impact assessments, are becoming the common sense thing to do. On paper at least.

Second, and this is the contradiction, when I delve deeper into what this actually means in practice (specific changes to existing loan covenants, borrower completion certificates and other loan terms to expressly incorporate FPIC issues being just a few examples) and ask who is doing this work, there is a tangible pushback and hesitancy to discuss these issues. This might come from a place of genuine uncertainty and lack of confidence in articulating the synergies between indigenous land rights, FPIC and financing and what the international legal framework looks like in this context, a point suggested in a study examining the advisory relationship between law firms and their clients on the human rights impacts of project operations.<sup>15</sup>

Yet, irrespective of governments, corporations and financial institutions have a responsibility to do no harm in the context of these projects, as understood in the UN Guiding Principles on Business and Human Rights and are expected to conduct due diligence to discharge this responsibility. Whilst these paper commitments are deeply persuasive, the devil has always been in implementation. Given the pushback around discussing the project finance synergies, lenders and borrowers maybe taking an easier road. This path blindly relies on environmental and social loan conditionality covenants. These are often included in project financing transactional documentation, and incorporate, for instance, IFC performance standards, as a way of demonstrating good citizenship, a commitment to doing business and human rights and even as a tool for showing private sector commitment to the Sustainable Development Goals. In some cases, performance standard covenants in a loan agreement could be helpful as they require a borrower to enter into a full blown due diligence exercise resulting in consultation and a negotiated access- and benefit-sharing agreement with indigenous communities, although aspects of these settlements can be criticised, as discussed in Chapter 7. In other cases, as illustrated in later case studies, safeguarding policies are simply never implemented or often, for reasons that have begun to emerge within community complaints filed with ombudsman mechanisms, policies and practices fail to hit the mark when

<sup>15</sup> 'Law Firms' Implementation of the Guiding Principles on Business & Human Rights: Discussion Paper', Advocates for International Development (2011) and the *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016).