CONCESSIONAIRES, FINANCIERS AND COMMUNITIES

Unrelenting demands for energy, infrastructure and natural resources, and the need for developing states to augment income and signal an 'enterprise-ready' attitude, mean that transnational development projects remain a common tool for economic development. Yet little is known about the fragmented legal framework of private financial mechanisms, contractual clauses and discretionary behaviours that shape modern development projects. How do gaps and biases in formal laws cope with the might of concessionaires and financiers and their algorithmic contractual and policy technicalities negotiated in private offices? What impacts do private legal devices have for the visibility and implementation of indigenous peoples' rights to land? This original perspective on transnational development projects, explains how the patterns of poor rights recognition and implementation, power(lessness), vulnerability and, ultimately, conflict routinely seen in development projects will only be fully appreciated by acknowledging and remedying the pivotal role and priority enjoyed by private mechanisms, documentation and expertise.

KINNARI I. BHATT is a postdoctoral researcher at Erasmus University Rotterdam. She worked as a project finance lawyer with leading global law firms White & Case and Milbank, Tweed, Hadley & McCloy in London and Asia and acted as a legal adviser to the Ministry of Mineral Resources in Sierra Leone. She advises NGOs on issues of equitable natural resource management and has taught courses on legal aspects of international finance and project finance at the University of East Anglia and University College London.

CONCESSIONAIRES, FINANCIERS AND COMMUNITIES

Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects

KINNARI I. BHATT
Erasmus University Rotterdam

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108484657
DOI: 10.1017/9781108689106

First published 2020

Printed in the United Kingdom by TJ International Ltd., Padstow, Cornwall

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Bhatt, Kinnari I, 1978– author.
Title: Concessionaires, financiers and communities : implementing indigenous peoples' rights to land in transnational development projects / Kinnari I. Bhatt, Erasmus Universiteit Rotterdam.
Description: Cambridge, United Kingdom ; New York, NY, USA,: Cambridge University Press, 2020. | Based on author's thesis (doctoral - University of Greenwich., 2016) issued under title: Rights to land, fragmentation and fairness : the problem of transnational legal governance for indigenous groups. | Includes bibliographical references and index.
Identifiers: LCCN 2019040369 (print) | LCCN 2019040370 (ebook) | ISBN 9781108484657 (hardback) | ISBN 9781108723459 (paperback) | ISBN 9781108689106 (epub)
Subjects: LCSH: Indigenous peoples–Land tenure–Developing countries. | Economic development projects–Law and legislation–Developing countries. | Land tenure–Law and legislation–Developing countries.
Classification: LCC K3248.L36 B48 2020 (print) | LCC K3248.L36 (ebook) | DDC 333.3089–dc23
LC record available at https://lccn.loc.gov/2019040369
LC ebook record available at https://lccn.loc.gov/2019040370

ISBN 978-1-108-48465-7 Hardback

To the memory of my inspirational mother, Pallavi,
who left too soon.

CONTENTS

Preface: The Bigger Picture *page* xi
Acknowledgements xviii

1 Development Projects, Indigenous Peoples' Land Rights and Rights Implementation 1
1 Contextualising the Interface between Development Projects and Indigenous Peoples' Land Rights 1
2 Focus of the Book 7
3 Linking Project Finance and Indigenous Peoples' Land Rights 9
4 Chapter Outline 12
5 Core Themes 17
5.1 Fragmentation and (In)Visibility 18
5.2 Power(lessness), Delegation and Priority 18
5.3 Fairness and Predictability in the Rule of Law 19
5.4 Integration as Part of Remedy 20

2 Characteristics of Indigenous Peoples and Development Projects 23
1 Indigenous Peoples 23
2 On Transnational Development Projects 24
2.1 Algorithmic, Boilerplate, For-Profit Structures 25
2.2 The Special Role of Financial Actors: Delegating Safeguarding Policies and the Interface with Rights 26
2.3 Diminished Role of the State 39
3 Is This Legal? 46

3 In the Shadows of the Operational Development Project: Coping Strategies, Lacunas and Fragmentation in the Formal Legal Framework 52
1 Summarising the Implementation Gap and Values in the Formal Legal Framework 52
2 Legal Strategies for Implementing Free, Prior and Informed Consent 54
3 Challenges around Implementing Consultation Strategies 57

3.1 Lack of Indigenous Veto and Legal Priority to Development 57
3.2 Powerful Interests Fragmenting Legal Rights 59
4 Unveiling Legal Values on Implementing Rights to Property through Jurisprudential Strands 62
4.1 A Disingenuous Approach to Aboriginal Rights and Title 62
4.2 A Neoliberal Approach to the Development of Aboriginal Rights 65
5 Underdeveloped Compensation Strategies 68
6 Poor Enforcement 69
7 Deficits in Legal Accountability for Private Actors in Transnational Development Projects 71
8 Lost in the Space of International Law: The UN Guiding Principles, Transnational Development Projects and Fragmented Private Due Diligence 77

4 Bridging the Gap through the Elephant in the Room? Private Mechanisms and Behaviours for Implementing Indigenous Peoples' Rights to Land 83

1 An Introduction to Private Mechanisms in Development Projects 83
1.1 The Effectiveness of Private Mechanisms in Two Fields 84
1.2 Can Integration of Public and Private Mechanisms Help or Hinder Effectiveness? 87
2 Opening the Black Box of Asset-Based Lending 88
3 Contractual Interfaces and Behaviours: Tensions between Project Finance Mechanisms, Policy Implementation and Indigenous Rights to Land 90
3.1 What Is Project Finance? Secure Investment and Insecure Rights 92
3.2 Three Phases of Project Finance Interface with Indigenous Peoples' Land Rights 98
3.3 Private Documentation and Behaviours Relating to the Three Phases of Indigenous Interfaces 98
3.4 The Development Stage 99
3.4.1 Existing Practices on Land and Resettlement in the Development Stage 101
3.4.1.1 The Preliminary Information Memorandum 101
3.4.1.2 Concession Contracts 102
3.4.1.3 Host Government Support Agreements and Non-discrimination Clauses 106
3.5 The Construction and Financing Stages: Raising the Red Flag 108
3.5.1 The Impact of Interest Rates and Liquidated Construction Damages 110

3.5.2 The Hidden Dynamics and Dilemmas of Completion Guarantees 111
3.5.3 Completion Certification 112
3.5.4 The (Un)happy Interface of Finance Documents with Lender Performance Standards 113
3.5.4.1 Promising Compliance through Lender Performance Standards 114
3.5.4.2 Conditions Precedent 117
3.5.4.3 Event of Default Lite 118

5 Discretion, Delegation, Fragmentation and Opacity: Impacts of Financing Mechanisms in Mongolia and Panama 123

1 The Oyu Tolgoi Project in Mongolia 124
1.1 Connecting Project Finance with the Political Economy of Development in Mongolia 127
1.2 The Oyu Tolgoi Investment Agreement 129
1.3 Aligning the Implementation of Lender Performance Standards with Market Thinking 129
2 The Barro Blanco Project in Panama 136
2.1 Deficient Lender Due Diligence, Project Financing and International Law 139
2.2 The Ombudsman Panel: Translating Applicable Law and Creating a Legal Black Hole 140

6 Pricing for Poverty: Project Finance, Power Purchase Agreements and Structural Inequities in Uganda 145

1 Background to the Project 147
2 The Relationship between the Power Purchase Agreement, People-First PPPs and the Sustainable Development Goals 150
3 What Can We Learn from the Bujagali PPP? 151
3.1 Delegating Resettlement to Private Actors: Links between Law, Policy and Vulnerability 152
3.2 The Nexus between Power Pricing and Poverty 156

7 Negotiating Land Outcomes: A Comparative Look at Concessionaires, Indigenous Peoples and Power 162

1 The Problematic Conditions around Agreement-Making 163
2 Gaps in Existing Studies 165
3 Concessionaire Mischief: Illustrations from Agreements in Russia and Suriname 167
4 The Rio Tinto Approach in Australia: Communities as Project Stakeholders 174
5 Leaving Your Principles at Home? A Comparative Look at Rio in Mongolia 181

8 **Moving Forward** 184
1 Regulatory Deficit 184
2 Contractual Clauses 189
3 Incentives and Culture 191
4 Ecosystem of Remedies 192
5 Proposed Remedial Agenda 192
5.1 Legal and Regulatory Oversight 193
5.2 Codes of Practice 198
5.3 Research and Advocacy 203

Index 205

PREFACE

The Bigger Picture

A few years ago (I'm not sure exactly when), I stumbled across a letter on the Internet written by a villager in Uganda describing how he had been displaced from his home to make way for the construction of the huge Bujagali hydroelectric power plant on the River Nile. The file I had downloaded was a complaint written directly to the headquarters of the African Development Bank's ombudsman and mediation service. It talked of the villager's struggle to obtain access to water and electricity despite the irony of being in sight of one of the world's largest hydroelectric plants. In it, the villager claimed a special 'indigenous' sociocultural, spiritual and economic relationship to that land and traditionally observed land rights but pointed out that the state did not recognise his indigenous status under the Ugandan constitution. I had, I suppose, become accustomed to hearing stories like these given the daily diet of global scandals in which multinational companies are implicated. This letter was different. To my surprise, the villager's letter contained a handwritten note imploring the ombudsman panel to 'please look at the margin'.

I had done some work on the Bujagali project and was broadly aware of its financial structure. On reflecting upon the letter and my experiences in practice, I was convinced that there was an interesting social and legal story to be told about what was happening inside these types of transnational development project that innately injures their ability to be drivers for the development agenda; specifically, the link between the private law financial structures, transactional terms and the behaviours that guide them and their real-world human implications. In Bujagali specifically, it meant exposing the incentives created through hefty 'micro' interest payments on asset-based lending project finance loans (as the villager so eloquently stated: its 'margin') and the impact those rates can have on communities around the project site. I was sure that the villager was making the general point about how crushing interest rates (common for projects in which lenders are highly exposed to political,

commercial, legal or technical risk) are typically treated as pass-through costs under the terms of the Power Purchase Agreement (PPA) between the project company (the investors) and the government: the Ugandan Electricity Board (UEC) in this case. This means that the UEC, under the PPA, is obliged to pay sums equal to the interest on debt at actual cost, without having any control on the financing terms. As an electricity buyer, this is clearly a bad deal for the government as it is bound, through the PPA, to bear the brunt of the financing cost in the tariff. However, like all electricity providers, the UEC will then pass on these spiralling costs to its customers: local Ugandans. These linkages were made palpable in the letter. The displaced villager had hit the nail on the head, making the 'beyond border' connection between far-off financing terms and their local effects on him as a land-dependent person, so tangible within his hand-scribbled addition to the letter.

At the time, I had just finished eight years advising on the legal framework around the financing and development of all types of road, rail, port, oil, gas and mining development project in emerging markets. I had, in between the late nights, become increasingly convinced that the types of project I worked on were sites of legal interest. Reading the letter took me back to the time when the senior partner I worked with told me, with immense glee, of how, through the loan agreements and dozens of other documents required to build the supporting financial and operational structure behind a development project, we were 'legislating' in the jurisdiction of the project. Sometimes our clients were also providing private grievance mechanisms and thus a form of access to justice for communities affected by the projects. This meant inputting clauses into the debt instruments waiving the standard borrower–lender confidentiality provisions. Ombudsman panel members could then have sight of the documentation as part of any compliance investigation triggered by a community complaint lodged with that grievance mechanism. Whilst the state was visible, its voice was only heard through the concession agreements, host government guarantees or project-specific letters of comfort. Through these documents, it wore the hat of an 'enterprise-led' entity, an economic project participant, self-interested in keeping the project at full steam in order to collect taxes for the national budget and keep future donors, companies and development finance institutes interested in investing in the country, now, and in the future. States know that one development project that is successfully funded, closed, constructed and operated creates a stable and predictable precedent for reaping the fruits of future investment.

In this context of brusque deadlines and an overwilling state, I began to wonder just how rights-compatible all of these contracts actually are, and the conversations about how we were supposedly 'legislating' sent shivers down my spine. Yet, I felt that my colleague had a point. The scale of these projects, the tangible contribution to a country's gross domestic product, the level of state involvement through, for example, private law contracts and also domestic legal reforms to accommodate them, is remarkable. Many development projects are geographically situated in countries with little or no experience of the size of inward investment required to mobilise a project and subsequently require the implementation of new legislation to protect the rights of the concessionaire and the project's financiers. In some countries, this translated into new Emiri decrees or primary and secondary legislation that permitted the vast level of private land ownership, related collateral required to finance the project and altered domestic laws requiring, for instance, the public auction of assets in the event of insolvency. The latter allows lenders to exert their priority security interests by appointing a private receiver in an insolvency event to take control of their investment. An immensely clear and predictable legal framework was constructed behind closed doors that pushed the project ahead through carefully designed construction contracts, loan agreements, guarantees, offtake (sales) agreements, power purchase agreements and concession agreements, to name a few. The fact that a sacred cow of national sovereignty – law making – was being so heavily influenced by financial investors' needs gave me pause for thought. Where do the voices of communities figure in complex deal-making processes and do development projects signal a shrinking space for democratic governance?

At the same time, I saw that it was not entirely clear to practitioners exactly what binding law really says on a topic of human concern and vulnerability such as indigenous peoples' rights to land in the context of a public-private development project that interfaces with so many private agreements. I wondered about the role of so-called formal law in these projects: could it be part of the problem through the values it protects and produces in these projects? Are there gaps and uncertainties within the law itself that developers can exacerbate through their routine decision-making and use to their commercial advantage? The experiences I have just discussed, and others like it, started me on a trajectory of thinking about how large development projects produce power and powerlessness and impact upon the application of the rule of law today within development project contexts. This thinking continued through

my work experiences and into my research trajectory as I became increasingly focused on how the projects I worked on and their contractual and policy architecture interfaced with the recognition and implementation of indigenous peoples' rights to land and the compatibility of those regimes with issues of rights and vulnerability.

After leaving private practice, I worked as a legal advisor to the Ministry of Mineral Resources in Sierra Leone on a project funded by the World Bank and the UK government's Department for International Development. I worked with the Environmental Protection Agency and a group of environmental and social experts to draft the first set of environmental and social mining regulations. Post the civil war, the government of Sierra Leone has pursued an aggressive policy of promoting large-scale investment by using the country's large land-based resources to attract investment. A number of investors are acquiring large tracts of land for mining and plantation investments of which the Addax biofuel project is, perhaps, one of the better known examples. I saw that the physical struggles between concessionaires and local communities can also, surreptitiously, be found within the state and its institutions. Whilst preparing a cabinet paper for the Minister of Mineral Resources, I recall one conversation with a lawyer in the Attorney General's Office in which he advised me to distinguish development oustees from refugees, the point being that I needed to drive home the legal difference in rights between the former subject and the latter when it came to the governance of the private sector investment regime within Sierra Leone.

I went back to my desk and thought about this. Whilst he was *factually* right to draw attention to the situational difference between communities seeking refugee status and those moved to make way for a project, I started to think about whether a state would recognise communities that observe a sociocultural, spiritual and economic relationship to that land in the context of development, and if so, how? The conversation again brought home, in a tangible way, the importance of development projects as sites of interest to practitioners, policy advisors and researchers concerned with law, vulnerability, development and practices around 'doing development' in a polarised, real-world political, economic and social context.

In the later example, concerns arose as to how development projects and the behaviours that contextualise them implicate questions of legal identity, rights and access to justice. Behind the legal question were, of course, real political and economic tensions between the state's desire to attract inward investments and new financial actors into the country, and

the need to limit its sovereign role as protector of public interest in order to facilitate capital flow and prevent capital flight. The instruction to nip in the bud any possible but unlikely argument that the state owes legal rights and remedies to displaced communities as 'refugees' reflects the state turn from protecting public values towards maximising investor returns. For me, these anecdotes confirmed that the phenomenon of development projects are important living sites in which legal values are created in a setting in which the distinctions between public and private norms are so deeply fragmented and collapsed so as to be almost meaningless, on a day-to-day practical basis. They are sites in which power has become so concentrated in the hands of investors that the private mechanisms brought to bear on a project by its concessionaire and financiers will routinely overshadow formal law and break down basic rule-of-law characteristics around the clarity, predictability and fairness of the law, with long-lasting implications for indigenous peoples. In the face of such a powerful legal framework enmeshed in a behemoth political economy of economic development, can the law regulate for the recognition and, crucially, the implementation of indigenous peoples' rights to land in a clear, predictable and fair manner, and if so, how? That is the challenge.

Development projects challenge traditional international legal thinking which has struggled to move beyond the organising logic of the nation state and the provision of remedy through a purely judicial paradigm. They fully display novel and highly specialised assemblages of bits of territory, authority and rights for a particular purpose, that cut across traditional binaries of global/local, public/private and formal/informal. Aspects of these projects expose complex interdependencies and struggles between rights and obligations, unity and fragmentation, power and the law, wealth and poverty[1] and also vulnerability and strength. Development projects can constitute sites of routinely concentrated capital and power in which 'expulsions'[2] of people from land will become the norm. This book offers a complementary legal response and series of illustrations around the legal dynamics that facilitate dispossession in the context of a development project.

More specifically, I illustrate how the legal, policy and regulatory financial instruments that support a development project and are born

[1] Drawing on S Sassen, 'Neither Global nor National: Novel Assemblages of Territory, Authority and Rights' (2008) 1(1–2) *Ethics and Global Politics* 61–79.
[2] S Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Harvard University Press 2014).

out of rules of private contract, security and property can, without corrective actions, steadily and with algorithmic repetitiveness create benefits for their holders (as they are designed to do) but at the same time work to 'trickle out' issues of rights implementation, at the expense of communities. These benefits accrue, for example, in the form of hierarchy and priority against all competing claims which brings the quality of universality to these assets. High degrees of ring fencing, insulation and banker–client confidentiality will shield discretionary and unchecked decision-making. Creditors can also negotiate specific advantages of preferred creditor status for currency convertibility during times of domestic financial crises. My argument is not for the wholesale dismantling of these rules of contract, corporate law and property in a 'baby bathwater' mentality, but that the effect they have in the context of development projects and the implementation of indigenous peoples' rights to land requires exposure, critical discussion and reconfiguration in line with the suggestions in the final chapter.

Equally important aspects for understanding the bleak role of the law (both private and public, as I argue in Chapter 3) in these projects is the hidden institutional behaviours, incentives and culture generated through the idiosyncratic settings in which legal documentation is drafted and deals are done. As I demonstrate throughout this book, these frequently overlooked private legal rules – transactional terms and related behaviours around implementation practice – have a crucial role to play in driving inequality and expulsion. Behind them stands an international legal framework that is structurally unable to cope with these assets, legal codes and assemblages. Consequently these private legal rules and behaviours ought to be considered as important normative legal sources when examining the impact of large development projects on precarity, accountability and a broad range of social and economic outcomes.

Even though none of my experiences took place inside a shiny courtroom and many of the conflicts surrounding development projects are settled through informal mechanisms, cross-border development projects pose a current legal problem for land-connected communities and rights implementation and provide insights into the role of law in creating and policing these structures. I write this study from the lens of a private law practitioner experienced in operations in which sovereign entities take a more peripheral seat. There is a name for these types of operation in the financing and development finance community, that of non-sovereign operations. To this end, this is not a study about World

Bank operations which lend directly to states, but those of the World Bank's sister organisation, the International Finance Corporation (IFC), and other similar development finance organisations. Whilst comprised of states, they have an entirely separate legal personality and enjoy a legal mandate for investing in private operations for the purposes of private sector development and in some cases, poverty alleviation, in developing countries. Those development finance institutions are important players in the globalised legal order of development. Due to their state composition, they act as a comforting catalyst for commercial banks who together will blend and extend substantial amounts of debt or in some cases equity, to finance infrastructure or natural resource development in a country in which the state is considered weak in terms of having the legal and financial capacity to conduct development. In this context, development finance institutions (DFIs) will push the investment forward and, during this process, directly lend to the project through unique debt structures that protect commercial banks and apply social safeguarding standards to the loan mechanics. These mechanisms, as well as the unique state-backed, private constitution of development finance institutions, provide a signal to the financial markets that a project is bankable and safe for investment. They empower and legitimise a DFI's corporate client to enter into a range of debt and project contracts. Typically confidential, those commercial contracts can have severe impacts on the recognition and implementation of the rights to land of communities claiming indigenous status.

My frame of analysis as a practitioner and researcher interested in interfaces between development, law, economics, politics and issues of vulnerability enlarges the potential interest of this book. With increasing concerns on vulnerability studies from a multidisciplinary perspective along with the quest from legal and development practitioners to finding new insights and discourse into vulnerability and inclusivity issues, with specific reference to the role of law as an addressable mechanism, this book should appeal to multiple audiences. These include scholars interested in fields of study that sit at the intersection of law, economy, institutions and vulnerability, and also practitioners including in-house lawyers, government advisors, law firms and programming officers within development agencies interested in the role of law (understood in the widest sense) for addressing issues of vulnerability and rights implementation in contexts of sustainable development, natural resource management, infrastructure development and business and human rights.

ACKNOWLEDGEMENTS

This book is the product of many years of work and study in the worlds of research and practice with a much earlier and different version having formed a doctoral thesis. The idea of writing about transnational development projects was planted in my mind as far back as 2009 when working in a law firm. It took years of further work experience and research to hone this work into its current form. Writing a book can be a taxing endeavour and I questioned this journey, especially after the passing of my mother in 2017. Fortunately, I have found an outlet in painting and input from some kind and generous people. First, heartfelt thanks to Dragana Spencer and Mehmet Ugur for supervising the thesis and being such approachable people. During the initial stages, I benefitted greatly from the support of Sarah Greer and Bill Davies. I also thank Sarah Keenan for commenting on early drafts and Ronen Shamir for the encouraging chats over tea and for reading my work. I extend my appreciation to Ilias Bantekas for his unwavering belief in this project. Many people have given up their time to answer my questions and to share their thoughts with me over the years. Hearty thanks to Anne Maryse de Soyza, Iris Krebber at the Department for International Development, Michael Meegan at Yamatji Marlpa Aboriginal Corporation, Lucy Claridge at Amnesty International, Clive Baldwin at Human Rights Watch and interlocutors at the European Bank for Reconstruction and Development. I would like to show my appreciation to Battsengel Lkhamdoorov for sharing his experiences, Oyunaa Baljir for translating our conversations and Byambajav Dalaibuyan at the Centre for Social Responsibility in Mining in Australia. I am grateful to my interlocutors at Rio Tinto – Kate Wilson, Shannara Sewell, Holly Dodd and Michelle Aeschlimann and to Malin Hillström and San Martin Orlando at Statkraft. I take this opportunity to thank all of them warmly. Thanks to Peer Zumbansen for input into the book proposal process. I am grateful to Tom Randall for taking publication and production forward and to the four anonymous reviewers who provided feedback

on the book proposal. Enormous thanks to Sue Farran who read the entire book and provided helpful comments during the final push, to Celine Tan who helped me arrive at the book's main title and to Giedre Jokubauskaite for organising a wonderful workshop funded by the University of Glasgow and attended by a number of financier interlocutors.

I have been lucky enough to receive financial support throughout this project. First and foremost, thank you to the School of Law at the University of Greenwich for the full doctoral scholarship. I also thank the Transnational Law Institute at Kings College for funding my attendance at international conferences. I am grateful for the opportunities provided in my time coordinating the inter-disciplinary project 'Integrating Normative and Functional Approaches to the Rule of Law and Human Rights' between Erasmus School of Law and the International Institute of Social Studies of Erasmus University Rotterdam. In this regard, a special thanks to Sanne Taekema for welcoming me to the Netherlands and for providing me with the time and freedom in which to write this book, collaborate and find my feet – I have realised a dream in completing this. Finally, I thank Joachim for being Joachim.