

CONTENTS

	<i>Preface: The Bigger Picture</i>	page xi
	<i>Acknowledgements</i>	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

CONTENTS

ix

- 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	
	<i>Index</i>	205	