Privatising Development: Project Finance Law and Human Rights

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I. Introduction

On 4 June 2003, ten of the largest and most influential investment banks formalised their commitment to the environment and to human rights by adopting the Equator Principles. In doing so, the banks committed themselves to financing only 'socially responsible'[2] projects in emerging markets. Specifically, the Principles apply to infrastructure projects costing over 50 million dollars, underwritten by the signatory banks, which have now grown to 25 in number. Based upon guidelines developed by the International Finance Corporation and the World Bank in the context of publicly financed infrastructure projects, the Equator Principles apply specifically to privatised projects. In a nod to this lineage, at the press conference announcing the Principles, bank executives sat shoulder-to-shoulder with Peter Woicke, the Executive Vice President of the International Finance Corporation and the Managing Director of the World Bank.[3] Privatised projects are commonly known as global project finance.[4] In making this commitment, it appeared that the investment banks were taking a moral high road, committing themselves to a form of enlightened global capitalism. While this is no doubt part of the story, at the time,

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[1] This introduction draws from and further develops Likosky (1998; 2001; 2002a; 2000b; 2003a; 2003b; and 2004). It has been completed with the support of the Arts and Humanities Research Board. This book has benefited from work on privatising human rights. *See* Voiculescu (2003).

[2] The Equator Principles (2003) Preamble.

[3] Nelthorpe (2003).

[4] On project finance law *see* Ambinder, Silva, and Dewar (2000); Bjerre (1999); Castro (1999); Clifford Chance (1991); Coles (2001); Hoffman (1998); Loke (1998); Nassar (2000); Pédamon (2001); Sozz (1996); Symposium (2002); Vinter (1996); and Yzaguirre (1998). On project finance law, disputes processing, and arbitration *see* Banani (2003); Dugué (2001); and Kantor (2001).

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it was also evident to onlookers that the adoption of the Principles resulted from, at least in part, successful campaigns by non-governmental organisations (NGOs) and community groups. These actors had targeted the investment banks involved in global project finance.

A shift is underway, initiated in many countries during the 1980s, away from the development approach and towards the global project finance approach to infrastructure projects. Under the development approach, the state put up the bulk of the capital to finance infrastructure projects with the World Bank providing supplementary financing. Also, states established public corporations charged with building and operating infrastructures. In contrast, under the global project finance approach, neither the state nor the World Bank finance or carry out infrastructure projects. Instead, we are told, private companies seek funding for projects through international capital markets and then build and operate projects to recoup sunk costs and to garner a profit. Despite the large number of projects undertaken under the global project finance approach, little comparative law work has been done examining how these processes actually operate in practice in various national settings and across sectors of the economy.

This book is designed to provide a systematic and comparative examination of transnational privatisation processes with a specific focus on global project finance from an interdisciplinary perspective with pieces by lawyers and social scientists. It also includes chapters by practitioners, who have played a prominent role in the social processes under study. Although contributors differ in their disciplinary backgrounds, experiences, and often political perspectives, they all view privatisation as an ongoing process rather than as a legislative *fait accompli*. Thus, attention is paid to how it functions in practice. Privatisation processes are examined in such far reaching areas as natural gas pipelines, the banking and financial infrastructure, forestry, prisons, and social services. Attention is paid to the actors and institutions which makeup privatisation processes such as the World Bank, the Multilateral Investment Guarantee Agency and export credit agencies, the United Nations Commission on International Trade Law, credit ratings agencies, international banks, transnational corporations, NGOs, community groups, and administrative agencies. The role of the state in privatisation processes is scrutinised. Contributors question whether the state has disappeared completely or whether the state has been reconfigured institutionally beyond recognition. Privatisations can redraw the political landscape, favouring some while displacing others. These issues are explored through international organisation frameworks and internal policies, legislative guides, contracts, and public-private partnerships. Throughout all of the chapters, focus is on the conjuncture of privatisation and globalisation.

II. Shift to Privatisation

The shift to privatisation was initiated in the United Kingdom under the leadership of Margaret Thatcher. The Unites States followed suit as then-President Ronald Reagan began the privatisation of U.S. infrastructures and social services. By the mid-1990s most countries had started to privatise their infrastructures,[5] and the legal techniques for effectuating privatisation were transferring back and forth between fully industrialised and developing countries. Privatisations have not only occurred in multiple countries, but they have also taken place in many infrastructure sectors.

Privatisations are thus a global phenomenon. They occur in Africa, Asia, Europe and also North and South America. The disintegration of the Soviet Union in the late 1980s added further momentum to this phenomenon. The expansion of the European Union too often involves the spread of Western European infrastructure companies into formerly communist accession countries. So, not only is the privatisation phenomenon international, it is also transnational.

Governments did not arrive at decisions to privatise in isolation from one another. International organisations have been instrumental in disseminating privatisation techniques. Often, organisations work closely with European and U.S. companies. These companies are themselves frequently the product of privatisations and seeking to sell their newly controlled goods on foreign markets. The International Monetary Fund and World Bank often condition aid to developing countries on the initiation of privatisation plans. Countries wishing to accede to the European Union must comply with privatisation requirements. Bilateral efforts also have driven privatisation. Through foreign aid programmes by national governments, legal experts are dispatched to various locales to help along privatisation. International organisations such as the United Nations Industrial Development Organisation[6] also regularly issue reports and provide technical assistance to developing countries seeking ways of privatising. Aid has taken a myriad of forms, including legal academics drafting commercial codes, NGOs translating western codes into various languages, and international organisations and foreign aid offices instituting training programmes for legal professionals.[7]

Further, when infrastructure companies privatised in fully industrialised countries, they often sought opportunities in developing countries. These opportunities were made possible by the privatisation of infrastructure sectors in developing

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5 *See* e.g. Ysguirre (1998); Andrade and Castro (1999); and Crothers (1995).

6 On the United Nations Industrial Development Organisation *see* Lambert (1993).

7 *See* e.g. Carothers (1999); Chua (1998); Faundez (1997); Likosky (2002a); Rose (1998); Tamanaha (1995); Twining (1993; and 2000).

countries. In other words, as developing countries deregulated their infrastructures, they not only created opportunities for domestic private companies. They also allowed foreign infrastructure companies to participate in their economies. The form of this participation often varied from partnering with local companies to fully owned foreign ventures.

Along these lines, it is important to recognise that the privatisation of infrastructures does not simply mean the transfer of ownership of public assets into private hands.[8] Instead, privatisation is a term, which includes under its umbrella a vast array of legal devices. Many of these devices do not involve full transfer of ownership and control. Typically, a full transfer of ownership does not occur and instead what is involved is a transfer of control.[9] This transfer might take the form of subcontracting, management contracts, the lease of state owned enterprises, concessions, build-operate-transfer (BOT) contracts, etc.[10] Thus, privatisation may proceed through a range of legal mechanisms, each with its own mix of ownership and control and ultimate resting point.

To give a sense of how privatisation processes in practice may run counter to public representations, it is useful to examine one of the most popular legal techniques for effectuating privatisation; the BOT arrangement.[11] BOT contracts are employed throughout the developing world and also in Europe and the U.S. For instance, East Asian infrastructure projects have been primarily carried out through this legal technique. The Channel Tunnel connecting the UK and France was also a BOT contract.[12] Under this contractual arrangement, the government grants a right to a private company to build and operate a defined project. The right runs long enough to recoup the sunk costs of building the project and also to collect an agreed upon profit. With cost recouped and profit garnered, control over the public sector good transfers to the government. Roads are often constructed under this mechanism. Here a private company would build a road, recoup costs and capture profit by charging tolls for road use and then transfer control of the road to the government. So, an understanding of the move towards global project finance requires examining a broad array of privatisation techniques in multiple infrastructure sectors in a myriad of countries.

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[8] *See* e.g. Brown (1993). For a treatment focusing on the nuances of privatisation *see* Veljanovski (1987).

[9] Swann (1988) pp. 2-5.

[10] Guislain (1997) p. 6.

[11] On BOT contracts *see* the Chapter in this volume by Don Wallace. Also *see* Levy (1996); and United Nations Industrial Development Organisation (1996).

[12] For a law and anthropology study of the Channel Tunnel *see* Darian-Smith (1999).

III. Global Project Finance and Human Rights

What this shift away from publicly financed and carried out projects and towards privatised ones will mean for the protection of human rights is uncertain. Within the development paradigm, NGOs and community groups directed their strategies at states and the World Bank. On an argumentative level and as a matter of policy, the development discourse was transformed with the idea of a more people-centred and environmentally friendly sustainable development approach resulting. With the initiation of global project finance, the constellation of actors involved in specific projects changes and the discourse of development is supplanted by the discourse of the market. The shift in the roster and role of participants and also the transformation of the justifying discourse raises questions regarding the form of the interface between NGOs and project planners.

Although many countries are only recently shifting away from the development approach and towards the global project finance approach, several countries have been pursuing projects under the latter approach since the 1980s. Projects have been initiated and some even completed in such diverse infrastructure sectors as airports, dams, mining, power, roads, and telecommunications. We see a common mode of argumentation, with the market discourse driving the shift across sectors. Quite often, a small set of development banks, government export credit agencies,[13] investment banks, international law firms, and insurance firms are involved in far-ranging projects. At the same time, great variety exists in sectors of the economy and in companies, NGOs, governments, etc. participating in specific projects. So, some precedent exists for understanding how human rights will be handled.

It is in this context that the Equator Principles should be understood. The Principles represent an attempt to shift and adapt environmental and human rights principles from the development context into the global project finance context. They are notable in avoiding reinventing the wheel for the privatisation context. The Principles are based upon ones developed by the International Finance Corporation and the World Bank. It is also important to recognise that the principles in the public and private context share a common authorship. The Principles themselves take directly from material produced by staff members of the World Bank Group. Further, it was NGOs and community groups that had successfully campaigned for the principles in the development context in the first place.

At the same time, it is important to recognise that, in the development context, the World Bank Group has a well-developed apparatus for carrying-out its guidelines. Under the Equator approach, banks will carryout the Principles in a bank-specific way. Not only will each bank devise its own approach to enforcing the Principles, but also these approaches will not be subject formally to external scrutiny. For this

[13] On export credit agencies *see* Short (2001).

reason, the international law firm of Sullivan & Cromwell LLP issued the following statement on the Equator Principles:

> The Equator Principles represent *an incremental step* towards the adoption of the [International Finance Corporation's] environmental and social policies and procedures as a market standard for emerging market project finance, even where financing is expected to come primarily from private sector sources of capital.[14]

The international law firm of Norton Rose viewed the implications of the Equator Principles more dramatically, titling its briefing on the issue 'Equator Principles: new environmental and social standards shake up project finance sector'.[15] Whether the Equator Principles are indeed an incremental step or instead a watershed is far from certain. Only time will tell whether investment banks apply the Principles in the same way that the World Bank Group institutions did. And, it is also not certain if NGOs and community groups will pursue further campaigns to have the Equator Principles expanded in scope and robustly applied in practice, although recent activity suggests that this will be the case.[16] The answer to these questions will represent a new chapter in development diplomacy.

This book makes an academic contribution to this emerging development diplomacy. In doing so, it is also to be understood within a broader academic environment in which the relationship between law and globalisation is under scrutiny.[17] It is unique within this field in its focus on global project finance which itself stands at the juncture of privatisation and globalisation.[18] In doing so, trans-Atlantic contributors from varying political, national, and disciplinary backgrounds examine the move towards privatisation and its significance for such things as the democracy, the environment, and human rights. All of the pieces examine some element of privatisation processes with most looking specifically at global project finance.

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[14] Sullivan & Cromwell LLP (2003) (*emphasis added*). For the opinion of another international law firm *see* Linklaters (2003).

[15] Norton Rose (2003).

[16] The Equator Principles (2004).

[17] *See* e.g. Darian-Smith (1999); Darian-Smith and Fitzpatrick (1999); Dezalay and Garth (2002a; 2002b); and 1996); Falk (2002); Friedman (1996); Gessner (1998); Hendley (2000); Jensen and Sousa Santos (2000); Likosky (2002a); Moore (2001); Riles (2000); Sousa Santos (1994); Silbey (1997); Shapiro (1993); Snyder (2002); Teubner (1996); Trubek, Dezalay, Buchanan, and Davis (1994); and Twining (2000).

[18] Although Likosky (2002) includes essays on this topic *see* Flood (2002) and Rose-Ackerman (2002).

IV. Scope of Collection

Traditionally, the relationship among global project finance, law, and human rights has been discussed in the context of the use of litigation to hold transnational infrastructure corporations accountable for human rights violations. Typically, these discussions concern the use of the Alien Tort Claims Act in the U.S. Importantly, this collection represents a substantial departure from this academic trend.[19] Rather than concern themselves with litigation, contributors to the volume explore the relationship among projects, law, and human rights through discussions of soft law and institutional reforms. At the same time, before presenting the approaches which make up the collection, it is useful to spend some time on the litigation approach.

In 1997, Harold Koh noted the emergence of a growing body of 'transnational public law litigation' designed 'to vindicate public rights and values through judicial remedies.'[20] One type of transnational public law litigation involves claims pursued against transnational corporations alleging human rights abuses arising in the context of infrastructure projects. These suits are often brought in U.S. courts under the Alien Tort Claims Act, targeting U.S. companies for alleged abuses perpetrated abroad.[21] They are generally brought against oil companies. Other cases using different statutes have arisen in the courts of developing countries.[22]

In a *Foreign Affairs* article published in 2000, Anne-Marie Slaughter and David Bosco argue that the use of the Alien Tort Claims Act is a form of 'Plaintiff's Diplomacy'—'a new trend towards lawsuits that shape foreign policy.'[23] Such lawsuits fall into a number of categories. The most relevant for our purposes, however, are the '[s]uits against corporations for violations of international law.'[24] Essentially, these cases are brought against U.S. corporations in U.S. federal courts for their role in alleged human rights violations abroad. According to Slaughter and Bosco, '[b]y targeting major corporations and business concerns, private plaintiffs have thus become a diplomatic force in their own right, forcing governments to pay attention

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[19] But *see* Likosky (2002a; 2000b; and 2003a) and Marcks (2001) (developing concepts of 'human rights risk').

[20] Koh (1991) p. 2347; *see also* Koh (1988).

[21] *See* Burley (1989); Collingsworth (2003); Coye-Huhn (2003); Dhooge (2003); Forcese (2001); Herz (2000); Hagen and Michael (2004); Ramsey (2001); Shaw (2002); and Slaughter and Bosco (2000).

[22] *See* Fernandes and Saldanha (2000).

[23] Slaughter and Bosco (2000) p. 103; *see also* Compa and Diamond (1996).

[24] Slaughter and Bosco (2000) p. 103.

at the highest levels.'[25] The subject matter of these cases varies, but abuses occurring in the context of infrastructure projects are an important source of litigation.

Many of these cases are brought under the Alien Tort Claims Act.[26] Passed in 1789, the statute went relatively unused until the 1980s.[27] It has recently been the subject of Supreme Court attention with its principles being reaffirmed, while the bar to its use being raised.[28] With regard to infrastructure projects, cases have been brought against various oil companies. For instance, a group in Burma has had success in an action against Unocal and Total for their alleged roles in the squelching of protests by the government.[29] Similar cases are being pursued against Chevron[30] and Shell[31] for their alleged roles in violent government actions in Nigeria[32] and against Exxon for its activities in Indonesia.[33]

While transnational public law litigation or plaintiff's diplomacy represents the use of law to have human rights taken into account by privatised infrastructure projects in primarily the oil sector, this collection represents efforts to have human rights internalised into the project design and execution themselves in other ways and in a variety of infrastructure sectors. These may take the form of the creation of institutions, frameworks, risk insurance, banking regulation, transactions, public-private partnerships, etc. This new approach towards the relationship among law, global project finance, and human rights is one thing that sets this volume apart.[34] Further, although the volume focuses primarily on law, it is interdisciplinary. To explore these issues, the volume is divided into three sections: frameworks, privatisation and project finance, and human rights and democracy.

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[25] Slaughter and Bosco (2000) p. 107.

[26] Alien Tort Claims Act, 28 U.S.C. § 1350 (2001).

[27] S*ee* Burley (1989) p. 17.

[28] Sosa v. Alvarez-Machain, No. 03-339 (29 June 2004).

[29] John Doe I v. Unocal, Nos 00-56603, 00-57197, Nos 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. Cal. 18 September 20002). For a discussion of the Unocal cases *see* Haberstroh (2004); Harvard Law Review (2003); Peterson (1998); Kieserman (1999); and Tyz (2003).

[30] Bowoto v. Chevron Corp., Case No. C99-2506 (N.D. Cal.).

[31] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000). The case against Shell is ongoing. For a discussion of this case *see* Skolnik (2002) and Kieserman (1999).

[32] For a similar case *see* Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998) (discussing the Amazon oil spills).

[33] Free (2003).

[34] Although *see* Likosky (1998; 2001; 2002a; 2003a; and 2003b). On attempts to remodel international institutions to make them more responsive to globalisation demands *see* Falk and Strauss (1999; 2000; and 2001).

A. Part One. Frameworks

The first two chapters and the comment that follows discuss the field writ large. They focus on transnational issues. All are concerned with the mix of roles and responsibilities of transnational corporations, public institutions, and NGOs.

In 'Beyond Naming and Shaming: Towards a Human Rights Unit for Infrastructure Projects', Michael B. Likosky argues for the creation of a Human Rights Unit within the United Nations charged with overseeing the handling of human rights issues by privatised international infrastructure projects. To provide an idea of how such a Unit would operate in practice, he focuses on a case study, the Camisea Project in Peru, which is not only the largest natural gas pipeline in the southern continent, but also a pipeline that has faced serious human rights issues since its inception almost twenty-five years ago.

Also discussing an incursion of human rights issues into the field of international development, Lan Cao, in 'An Evaluation of the World Bank's New Comprehensive Development Framework', looks at the new and expanded role of NGOs in the World Bank's Comprehensive Development Framework. In doing so, Cao analyses the various critiques of the Framework that have developed. To help understand the Framework and the expanded role for NGOs that it envisions, she discusses the changing role of NGOs in the international system writ large. This system is one of increasingly market-driven change. Thus it is in this context that NGOs must operate.

In an extended commentary on the two pieces, Michael M. Cernea draws on his own experience as a long-time sociologist for the World Bank. The Cernea comment takes issue with the relatively small amount of emphasis accorded to internal reformers within the World Bank. Importantly, he moves beyond casual comment. He describes in great detail how policies involving resettlement of displaced populations arose in the context of the World Bank and then circulated to other public and eventually to private organisations. Steeped in first-hand experience, this Comment will serve as an important resource for future research in the field.

B. Part Two. Privatisation and Project Finance

The next four chapters turn specifically to privatisation and issues raised by global project finance law. In doing so, they trace the history of privatisation processes, discuss how processes function in practice, examine institutions involved in these processes, advocate change, and describe in rich detail pressing current affairs. The first two chapters deal explicitly with global project finance and the final two chapters look at the financial infrastructure involved in privatisation processes.

Kenneth W. Hansen in 'PRI and the rise (and Fall?) of Private Investment in Public Infrastructure' charts the transition of infrastructure projects away from the hands of the public and into the private sector starting in the 1980s. This movement

started in the fully industrialised world and has spread to the rest of the world. It was in this latter batch of countries that political risk insurance was most needed to face a host of political and economic uncertainties. Hansen provides a thorough discussion of the public and private markets for this cover. In the future, due to increased problems with government reliability, public insurers, according to Hansen, will need to fill gaps, with their participation becoming more and more indispensable.

Continuing to reflect upon the implications of the shift to privatised infrastructure projects, Don Wallace in 'Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?', looks at the general trend towards the privatisation of infrastructures in many countries, in multiple sectors, and in varied forms. In discussing some of the difficult dilemmas of global project finance, Wallace details some of the experiences of the United Nations Commission on International Trade Law. In doing so, he advocates the adopting of legislation by governments to handle some of the issues raised. Key to the progress of global project finance is the further development of a globalisation subject to rational analysis, negotiation, and management.

In 'Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisations and Credit Ratings Agencies', John Flood turns the subject to privatisation processes generally and their relationship to the financial infrastructure. Specifically, he examines the role of credit ratings agencies in securitisations. Flood's account makes much of the recession of the state from the global economy and the ascendancy of contract as the legal *lingua franca* of the economic order. Here Flood provides vivid account of one device of the global economy, securitisation, providing examples as well as stories of abuse. He stresses how little is known about the elite practices of those institutions, like credit ratings agencies, that make-up the market.

In 'Privatisation in Modern Banking Regulation: Selective Supervisory and Enforcement Dimensions', J.J. Norton and H.M. Shams also look at the privatisation of the banking and financial infrastructure. Their concern is with evolving systems of private governance, banking regulation and supervision, and the emergence of public private partnerships in the sector. The changing relationship between states and private commercial actors is stressed. In doing so, they look at the international dimension and explore whether new approaches towards regulating elite banks—both public and private—represent a 'wholesome event in the evolvement of a "global financial system".'

C. Part Three. Human Rights and Democracy

In the final part of the book, the relationship among privatisation, democracy, and human rights are explored. The first chapter looks at this relationship in the context

of global project finance, while the latter two chapters look at forestry and then prisons and social services for the poor, respectively.

In 'Project Finance, Securitisation, and Consensuality', Carl Bjerre argues that global project finance transactions should be scrutinised for their impact on third parties. Global project finance is compared with securitisation. In exploring the impact of project finance on third parties, Bjerre makes use of the insights of Amartya Sen's 'capabilities approach' to development. In doing so, Bjerre, rooting his analysis in doctrine, explores the consensuality of project finance transactions. His chapter demonstrates how human rights may impact upon global project finance in an extra-judicial legal arena.

In 'From Global Forest Governance to Privatised Social Forestry: Company Community Partnerships in the Ecuadorian Choco', Laura Rival explores the recent shift in global forestry towards the devolution of forests into the hands of private owners and the emergence of company-community partnerships. Rival does so through an enthnographically-based case study, examining an Ecuadorian partnership with a wood-processing group. She details the role played by NGOs in partnership with business and also the relationship between business and local communities. An argument is made for expanding this partnership to include state organisations and an investment bank; albeit with a new role for the state which is clearly articulated.

Adding to Bjerre's and Rival's focus on extra-judicial means of promoting human rights, in 'Globalisation, Democracy and the Need for a New Administrative Law', Alfred C. Aman, Jr. highlights how administrative law has been overhauled as a result of privatisation and globalisation processes and might be made more responsive to democratic concerns. To illustrate this point, Aman examines the privatisation of prisons and social services for the poor. He stresses the range of privatisation techniques and the different forms of regulation to which they are subject and also the importance of globalisation in driving privatisation. One of the main concerns of Aman's chapter is the detrimental effect of globalisation and privatisation on democracy. Reforming administrative law may ameliorate this effect, according to Aman.

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