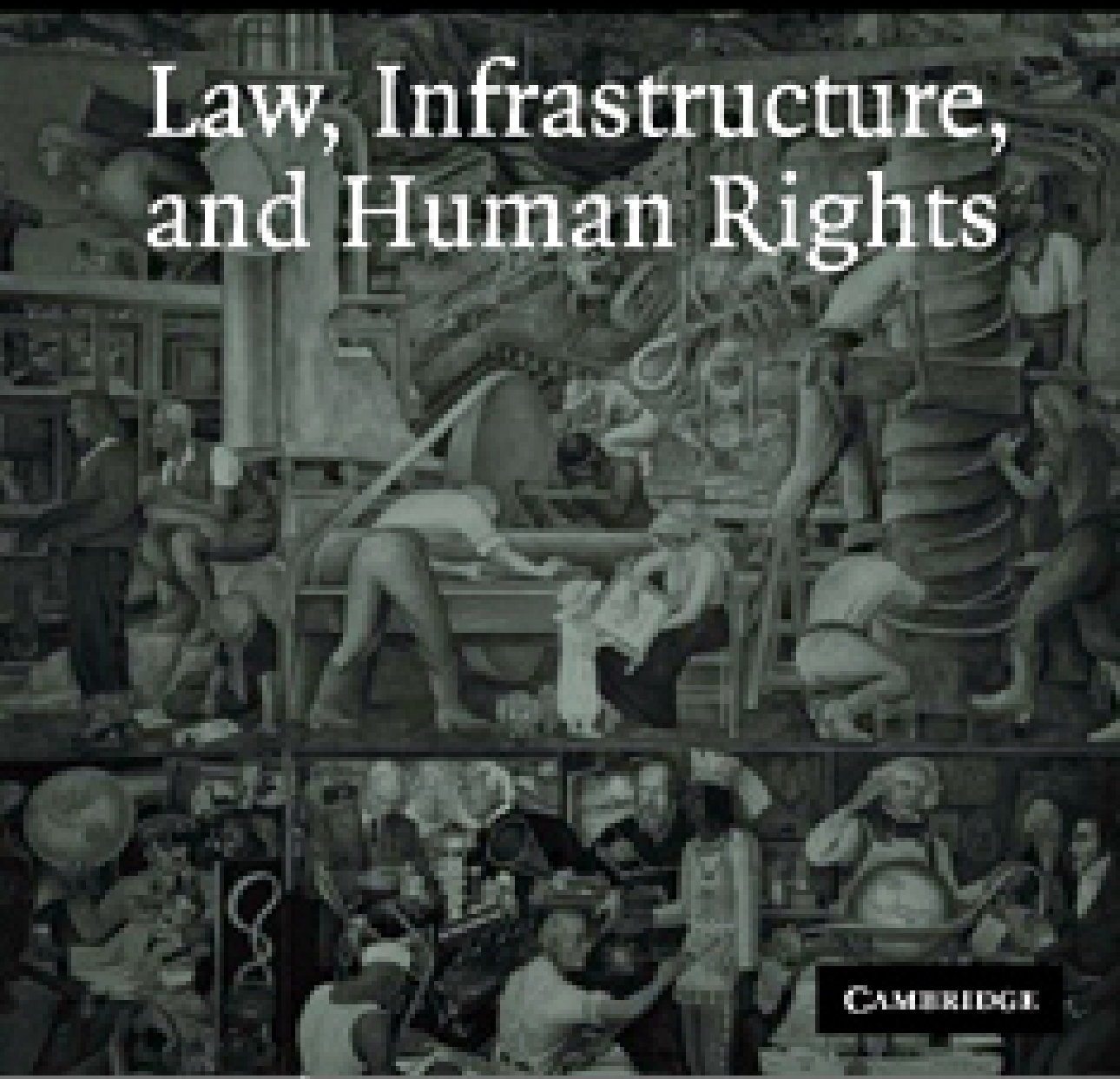
§Law in Context

MICHAEL B. LIKOSKY

Law, Infrastructure, and Human Rights



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Transnational public-private partnerships

I Introduction

As Chapter 1 indicated, this book looks at human rights issues arising in the context of privatized infrastructure projects as opposed to public ones. This chapter demonstrates how even privatized projects include a substantial public element. Nonetheless, a sea change has occurred since the late 1970s away from predominantly public and toward private projects. At the same time, in recognition of the still substantial role of governments in even these privatized projects, this chapter refers to privatized infrastructures as public-private partnerships (PPPs).[1] This indicates a mix of public and private actors playing a substantial role in specific projects.[2] Further, many of the infrastructure projects discussed in this book include a foreign element. Thus, our concern is primarily with transnational PPPs.

If privatized projects can include a substantial public element, then what does it mean for a project to be privatized? Is it enough that a private investment bank is involved in extending a loan for the project to be built? Does it matter if the private loan is advanced to a state government rather than to a private company? Is it necessary for a private company to be involved in the building or operating of a project? What is the significance of whether the project is privately financed or instead privately constructed or operated? What if a state government or intergovernmental organization underwrites the participation of a private company in a project? What level of private participation either in financing, construction, or operation is required to classify a project as privatized?

1 This work builds on Don Wallace's categorization of the field of privatized infrastructure projects as PPPs. D Wallace, Jr. "Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 131, 132.

2 Our concern is with PPPs in the infrastructure sector. PPPs have also been used in other areas, *see e.g.* N Beermann "Legal Mechanisms of Public-Private Partnerships: Promoting Economic Development or Benefiting Corporate Welfare" (1999–2000) 23 Seattle University Law Review 175 (stadiums, squares, garages and development projects); S S Kennedy "When is Private Public – State Action in the Era of Privatization and Public-Private Partnerships" (2000–2001) 11 George Mason University Civil Rights Law Journal 203 (charity and social services); A Miller "Public-Private Partnerships Concept: New Ventures for the 80s" (1983–1984) 3 Public Law Forum 69 (housing); J C Pasaba and A Barnes "Public-Private Partnerships and Long-Term Care: Time for a Re-Examination" (1996–1997) 26 Stetson Law Review 529.

For the purposes of this book, a privatized project includes substantial private participation in either financing or in construction or operation. For example, a privatized project might be financed by a private international investment bank and carried out by a state-owned enterprise. Likewise, a government might finance a private company's participation in a project. In practice, most privatized projects include a mix of public and private financiers. Furthermore, a consortium of public and private companies may construct a project. For these reasons, privatized projects are referred to as PPPs.

This chapter elaborates the PPP concept. It also employs the concept of "compound corporation" to understand the corporate form by which privatized projects are carried out. A compound corporation materially mixes public and private law elements to achieve a specific aim. Then, the chapter turns to a discussion of an historical precursor of the present-day PPPs. The third section focuses on the participation of private companies in nineteenth- and early twentieth-century railroads internationally. As a preview of the concerns that animate the case studies in the second part of the book, the proto-human rights dimensions of these railroad projects receive attention. Moving forward into the latter part of the twentieth century, the following section turns to the recent shift away from public projects and toward privatized ones. The United Kingdom initiated this shift in the late 1970s and it gathered steam during the 1980s and 1990s before showing signs of slowing internationally with the new millennium.

II What is a PPP?

In public arenas, privatization is generally presented as the wholesale transfer of public goods into private hands. Meredith M. Brown introduces an International Bar Association book on the topic by defining privatization as "the transfer of ownership of enterprises from the state to the private sector."[3] At times, this is the case. Public infrastructure goods might be sold at auction or even given away. However, although the term "privatization" itself suggests a transfer of ownership or control passing from public hands into private ones, the transfer is rarely complete or permanent.[4] Instead, privatization creates new partnerships between public and private actors. Each partner lends its own capital to a specific project and subsequently wields a

3 M M Brown "Privatisation: A Foretaste of the Book" in M M Brown and G Ridley, eds, *Privatisation: Current Issues* (Graham and Trotman London 1994) xv. On privatization *see also* M Freedland "Government by Contract and Public Law [1994] Public Law 86; M Freedland "Public Law and Private Finance – Placing the Private Finance Initiative in a Public Law Frame" [1998] Public Law 288; P Guislain, *Privatisations* (World Bank Washington, DC 1997); I Harden, *The Contracting State* (Open University Press Buckingham 1992); C McCrudden, ed, *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press Oxford 1999); A Paliwala "Privatisation in Developing Countries: The Governance Issue" 2001(1) Law, Social Justice and Global Development; CG Veljanovski *Selling the State: Privatisation in Britain* (Weidenfeld & Nicolson London 1987).

4 D Swann, *The Retreat of the State: Deregulation and Privatisation in the UK and US* (Harvester Wheatsheaf London 1988) 2–5.

certain amount of control over the enterprise. For example, a government might provide regulatory capital through a facilitative administrative law regime, whereas a private company might arrange the financing or contribute technological know-how or construction skills. Both would have a vested legal interest in the project. Mark Freedland argues that in the European context we see the establishing of a third sector, a

> [p]ublic-service sector, which we hope to distinguish from, on the one hand, the state sector and, on the other hand, the wholly private sector. . . . For the purposes of our argument, then, we offer the following working definition of the third, public-service sector. It is the sector of the economy in which services or activities, recognized as public in the sense that the State is seen as ultimately responsible for the provision of them, are nevertheless not provided by the State itself but by institutions which are, on the one hand, too independent of the State to be regarded as part of the State, but are, on the other hand, too closely and distinctively associated with the goals, activities, and responsibilities of the State to be thought of as simply part of the private sector of the political economy.[5]

It is important to emphasize that governments and companies are joining together in an entrepreneurial fashion to produce and regulate infrastructure projects.

Importantly, the majority of infrastructure projects discussed in this book are either planned or in the process of being built, so-called greenfield projects. However, the Iraq case study (Chapter 4) presents rehabilitation projects. These projects are also construction jobs aiming to bring an already built project back online. In contrast, "brownfield" projects are ones that are already built and in the operating stage. Chapter 5 (Antiterrorism) does look in part at the terrorist targeting of brownfield projects. It also looks at greenfield projects in Islamic countries pursued in response to terrorist threats. So, the bulk of infrastructure projects presented in Part II are greenfield projects and thus concerns over financing, constructing, and operating projects receive attention.

PPPs involve substantial private participation in each of these three project stages. Private participation correlates with the material involvement of at least one government in most projects. Like the private participant, a government might be involved in any of the three stages. The case studies in Part II reflect that in diverse ways PPPs are financed and carried out by government-company partnerships.

Financing takes a number of forms including government loans or direct financing, third-party financing, multilateral or bilateral loans or grants, capital market financing, or securitization.[6] Many projects in this book are funded through project

5 M Freedland "Law, Public Services and Citizenship – New Domains, New Regimes?" in M Freedland and S Sciarra, eds, *Public Services and Citizenship in European Law: Public and Labour Law Perspectives* (Clarendon Press Oxford 2998) 1, 2–3.

6 S L Hoffman, *Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Kluwer Law International Leiden 2001) 28.

finance techniques.[7] Although project finance receives the bulk of the attention by legal scholars of privatization, Carl S. Bjerre reminds us: it is "only a subset of project-oriented transactions."[8] This mode of financing refers to a situation in which an investment bank advances a loan for a project that is to be paid off incrementally through user charges.[9] For example, in the case of a road, the bank that issued the loan is repaid as travelers pay their tolls at the toll both. The loan itself is typically a nonrecourse loan, meaning that it is not secured by the assets of the project company. Increasingly, loans are advanced on a limited recourse basis.[10] The rationale for this trend is that projects face increased political risk and thus financiers demand more security from governments and companies.[11] Project finance is used in infrastructures described in Chapters 5 (Antiterrorism), 6 (Camisea), 7 (EU enlargement), and 8 (Antipoverty). Several case studies involve bilateral government financing (Chapter 4 – Iraq, Chapter 8), supranational loans (Chapter 7 – EU), and intergovernmental organization loans (Chapters 6 and 8). The aim in choosing these case studies is to present a relatively representative sampling of what is a diverse practice field with respect to financing.

7 On project finance *see id.* L P Ambinder, N de Silva and J Dewar "The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market" (2001) 24 Fordham International Law Journal 1029; Clifford Chance, *Project Finance* (IFR Publishers Limited London 1991); I R Coles "The Julietta Gold Mining Project: Lessons for Project Finance in Emerging Markets" (2001) 24 Fordham International Law Journal 1052; F Fabozzi and P K Nevitt, *Project Finance* (Euromoney London 1995); C Pedamon "How Is Convergence Best Achieved in International Project Finance?" (2001) 24 Fordham International Law Journal 1272; M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005); A F H Loke "Risk Management and Credit Support in Project Finance" [1998] Singapore Journal of International and Comparative Law 37; N Nassar "Project Finance, Public Utilities, and Public Concerns: A Practitioner's Perspective" (2000) 23 Fordham International Law Journal 60; C J Sozz "Project Finance and Facilitating Telecommunications Infrastructure in Newly-Industrializing Countries" (1996) 12 Santa Clara Computer and High Technology Law Journal 435; G Vinter, *Project Finance: A Legal Guide* (Sweet & Maxwell Limited London 1996); M R Ysaguirre "Project Finance and Privatization: The Bolivian Example" (1998) 20 Houston Journal of International Law 597. On project finance law, dispute processing, and arbitration *see* D D Banani "International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction" (2003) 26 Boston College International and Comparative Law Review 355; C Dugue "Dispute Resolution in International Project Finance Transactions" (2001) 4 Fordham International Law Journal 1064; M Kantor "International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?" [2001] Fordham International Law Journal 1122.

8 C S Bjerre "International Project Finance Transactions: Selected Issues under Revised Article 9" (1999) 73 American Bankruptcy Law Journal 261, 263.

9 Scott Hoffman provides the following definition of project finance:

> The term "project finance" is generally used to refer to a nonrecourse financing structure in which debt, equity, and credit enhancement are combined for the construction and operation, or the refinancing, of a particular facility in a capital intensive industry, in which lenders base credit appraisals on the project revenues from the operation of the facility, rather than the general assets or the credit of the sponsor of the facility, and rely on the assets of the facility, including any revenue-producing contracts and other cash flow generated by the facility, as collateral for the debt. S L Hoffman, *Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Kluwer Law International Leiden 2001) 4–5.

10 *Id.* 8.

11 *Id.* 27.

Importantly, the mode of financing of an infrastructure project does not necessitate the involvement of a particular mix of public or private companies in the construction and operating stages. A tendency exists in the literature to presume that project finance necessitates the involvement of private companies at these latter stages. Although this is often the case, a state corporation also could be the project company.[12]

PPPs in the infrastructure sector may be built and operated by a range of public and private companies. They may be domestic, foreign, or transnational. Often a consortium of companies is involved in building a project. Also, projects may involve large numbers of subcontractors.[13] Part II presents projects with far-ranging public-private configurations in the constructing and operating stages. Each chapter relates infrastructure projects that are built by a transnational consortium of public and private actors. In the Iraq chapter (Chapter 4), the mix of domestic and foreign companies involved in the subcontracting work receives attention.

Over the life of a project, public and private actors may hold exclusively, share or transfer infrastructure assets. This fluctuation in the public and private configuration of a project varies according to the particular legal scheme used to carryout a project. A wide range of schemes exists under the umbrella of the PPP concept. Don Wallace correctly tells us that this is "a field resonant with acronyms".[14] Projects proceed through an array of schemes, including the BOT, BOO, BOOT, BTO, BLT, and ROT.[15] Each involves a different mix of public and private control over a defined period of time. Furthermore, at the level beneath the concessionary contract, further legal arrangements are sometimes in place. These, too, distribute power between public and private participants. They include subcontracting schemes, management contracts, and arrangements involving state-owned enterprises such as dissolution or leasing.[16]

A brief explanation of the BOT or build-operate-transfer scheme provides some sense of how ownership and control evolves over time in the context of specific projects.[17] The BOT scheme is a popular one and the United Nations International

12 S E Rauner "Project Finance: A Risk Spreading Approach to the Commercial Financing of Economic Development" (1983) 24 Harvard Journal of International Law 145.

13 On the importance of subcontracting in transnational commercial affairs *see* A C Cutler, V Haufler and T Porter "Private Authority in International Affairs" in A C Cutler, V. Haufler and T Porter, eds, *Private Authority and International Affairs* (State University of New York Press Albany, New York 1999) 3, 11.

14 D Wallace, Jr. "Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 131, 132.

15 D A Levy "BOT and Public Procurement: A Conceptual Framework" (1996–1997) 7 Indiana International and Comparative Law Review 95, 102.

16 P Guislain, *Privatisations* (World Bank Washington, DC 1997) 6.

17 On BOTs *see* D A Levy; S M Levy, *Build, Operate, Transfer: Paving the Way for Tomorrow's Infrastructure* (Wiley New York 1996); M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005); M B Likosky "Editor's Introduction: Global Project Finance Law and Human Rights" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) xi; M B Likosky "Mitigating Human Risks Risk in International Infrastructure Projects" (2003) 10(2) Indiana Journal of Global Legal Studies 65; D Wallace "Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?"

Development Organization (UNIDO) has actively promoted its use.[18] In fact, UNIDO issued a how-to-book for project planners.[19] BOT projects range from toll roads in East Asia to natural gas pipelines in Latin America to the Channel Tunnel connecting France and the United Kingdom.[20]

As its name suggests, this scheme has three distinct stages. First, the government signs a concessionary contract with a project company to "build" a project. During this time, the project is under private control. The private company then "operates" the project for a period long enough to recoup costs and then to capture an agreed-on profit. After this profit is realized, then control over the project "transfers" away from private hands and into public ones.

Although this rough outline indicates the arch of control over a typical BOT project, it also bears reminding that, even during the periods of ostensible private control, the government plays a role in projects. David A. Levy tells us how the BOT scheme "represents a long-term interrelationship of the government and private sector."[21] The UNIDO book goes into detail about the crucial role that governments play at every stage of a BOT project.[22] Furthermore, what is also important here is that although the term "privatization" suggests a transfer of ownership and control into private hands, a common privatization scheme like the BOT one will only transfer control over a project to the private sector for a fixed period of time before the project ultimately reaches its resting point with control over it residing in the public.

Importantly, the use of the term PPP to refer to privatized projects with material involvement of governments and companies should not mask the fact that the term "PPP" is also a legal term of art. It may be set out in government legislation.

For example, on December 30, 2004, the Brazilian government passed a PPP law. It defines a PPP as a "concession contract, in the sponsored or administrative forms."[23] It must involve a payment of money from the public to the private sector.[24] Through a sponsored concession, the government might pay both user charges and also a direct payment to the private company involved.[25] In an administrative

in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* 131.

18 On UNIDO *see* Y Lambert, *The United Nations Industrial Development Organization: UNIDO and Problems of International Economic Cooperation* (Praeger London 1993).

19 United Nations Industrial Development Organization, *UNIDO BOT Guidelines* (United Nations Development Organization Geneva 1996).

20 For an anthropological study of the Channel Tunnel *see* E Darian-Smith, *Bridging Divides: The Channel Tunnel and English Legal Identity in the New Europe* (University of California Press Berkeley 1999). BOT projects have been used in state-directed economies like China and Vietnam. X Zhang "Private Money in Public Projects" (7/10/03) 46(28) Beijing Review 32; "Holding Companies to Fuel Second City Infrastructure" The Vietnam Investment Review (8/20/01).

21 D A Levy "BOT and Public Procurement: A Conceptual Framework" (1996–1997) 7 Indiana International and Comparative Law Review 95.

22 United Nations Industrial Development Organization, *UNIDO BOT Guidelines* (United Nations Industrial Development Organization Geneva 1996) 41.

23 Article 2.

24 Article 2, Section 3.

25 Article 2, Section 1.

concession, services are provided to the Public Administration.[26] As well, to qualify as a PPP for the purposes of the law, the contract must not be for less than twenty million Brazilian *reais* and must be more than five years in duration but less than thirty-five.[27] The law permits extensions.[28] The law also involves a public service element, making sure that in the contracting stage attention is paid to the "socioeconomic benefits" of the project.[29] Furthermore, as a legal term of art, the definition of a PPP varies from one political jurisdiction to another.

The infrastructure projects introduced in the second part of the book are often transnational. Projects involve foreign actors either in financing or construction and operation. For example, Chapter 4 looks at infrastructure projects in Iraq that are financed by the U.S. government. They are carried out by an international set of contractors and subcontractors, both public and private. Likewise, Chapter 6 presents the Camisea project, a natural gas pipeline running through the Peruvian rain forest. This project is also transnational. It is financed through intergovernmental organization loans and also loans from major private investment banks. Two international consortia made up of private companies are carrying out the project. Generally, PPPs may be transnational in wide-ranging ways, involving different roles of home and host state governments and transnational companies.

Within PPPs, the interests of governments and companies are intertwined.[30] Governments are important partners to private companies. They are essential for ensuring that a project is tendered. Private financiers often condition their loans on host state government guarantees and may also require cofinancing from the export credit agencies of the home states of transnational corporations. Government insurance programs might be a prerequisite for project viability. Furthermore, at times, government and private sector workers interact on a daily basis.

Companies are so dependent on the government and also benefit so much from proactive support that they may be said to be compound corporations. Such companies are juridical persons whose existence may only be explained by material reference to both public and private law.[31] In traditional jurisprudence, public and

26 Article 2, Section 2.
27 Article 2, Section 4.
28 Chapter II: "Public-Private Partnership Contracts," Article 5.
29 Article 4.
30 On the relationship between governments and companies in the context of the U.S. welfare state *see* C Reich "The New Property" (1964) 73 Yale Law Journal 733, 764. *See also* M B Likosky "Response to George" in M Gibney, ed, *Globalizing Rights: The Oxford Amnesty Lectures 1999* (Oxford University Press Oxford 2003) 34.
31 This section draws from M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 53–80 (see references cited therein); M B Likosky "Compound Corporations: The Public Law Foundations of *Lex Mercatoria*" (2003) 4 Non-State Actors and International Law 251 (2003) (critiquing Gunther Teubner's idea of a "global law without a state."). On the role of governments in economic globalization *see also* U Baxi, *The Future of Human Rights* (Oxford University Press India 2002). For a sophisticated treatment of how inter-firm cooperation is leading to new forms of private authority that also takes into account the "interconnectedness of state practices and interfirm institutions" *see* A C Cutler, V Haufler and T Porter "The Contours and

private law are presented as hived off categories. However, in the context of specific PPPs, companies might combine public and private law powers. Freedland argues that "so much of the activity of the political economy now occurs in a zone which is truly intermediate between its public and private sectors";[32] accordingly, privatization occurs "between the realms of public and private law."[33] Commentators often remark that the division between public and private law is analytically imprecise. [34] The analytical shortcomings of the traditional model result in part from how public and private laws are combined in practice by strategic actors.[35] Doreen McBarnet makes the point that although "legal academics tend to specialise" in public or private law, "as distinct concerns, the reality is that at the level of legal practice, public and private law are intertwined."[36] In the context of PPPs, companies exploit the two branches simultaneously to accomplish specific goals. As companies pull on each branch of law to extend their powers beyond the legal remit of their incorporation, the result of the mixture has an alchemical property and, thus, the chemical metaphor.

The fact that corporations mix public and private law is not itself a new insight. Commentators have long complained that private companies, for example, have taken on too many political powers.[37] This complaint relates to the size of companies. Or, instead, private companies, such as defense manufacturers, might become an instrumentality of the state when they rely on governments for their commercial clout.[38] In each case, the concern is that private companies are too intermingled with governments and are thus acting as political bodies exceeding their private law remit.

Significance of Private Authority in International Affairs" in A C Cutler, V Haufler and T Porter, eds, *Private Authority and International Affairs* (State University of New York Press Albany, New York 1999) 333, 335. Claire Cutler speaks of a new mercatocracy:

> As a complex mix of public and private authority, the mercatocracy [transnational merchants, private international lawyers and other professionals and their associations, government officials, and representatives of international organizations] blurs the distinction between public and private commercial actors, activities, and law. A C Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press Cambridge 2003) 5.

32 M Freedland "Law, Public Services, and Citizenship – New Domains, New Regimes?" in M Freedland and S Sciarra, eds, *Public Services and Citizenship in European Union Law: Public and Labour Law Perspectives* (Clarendon Press Oxford 1998) 1, 6.

33 *Id.* 3.

34 *See e.g.* J Austin "Lecture XLIV: Law, Public and Private" in J Austin, *Lectures on Jurisprudence: or, The Philosophy of Positive Law* (4th edition Gaunt Holmes Beach Florida 1998); H Kelsen, *General Theory of Law and State* (Russell & Russell New York 1961).

35 Further compounding the division of public and private laws is the argument made by some that private law is itself at its base public. R L Hale "Force and the State: A Comparison of the 'Political' and 'Economic' Compulsion" (1935) 35 Columbia Law Review 149; R Pound "Liberty of Contract" (1909) 18 Yale Law Journal 454.

36 D McBarnet "Transnational Transactions: Legal Work, Cross-border Commerce and Global Regulation" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 98, 99.

37 A A Berle and G C Means, *The Modern Corporation and Private Property* (Revised edition Harcourt, Brace and World New York 1968); G Myrdal, *Asian Drama: An Inquiry into the Poverty of Nations* (Twentieth Century Fund New York 1968) 864.

38 On the relationship between the U.S. Department of Defense and private companies *see* M D Reagan, *The Managed Economy* (Oxford University Press Oxford 1967) 191.

Conversely, the government through its incorporation of public corporations has been criticized for taking on duties, which should, some argue, be reserved for the private sector. Here governments are acting as *de facto* private companies. However, in keeping with the compound corporation concept, although these state corporations often mimic private corporations, they benefit from a strong executive that paves the way for them. This support may come in the form of privileging companies in tenders or takeovers. A primary criticism of this species of corporation has thus been their inefficiency resulting from market-distorting state action. The prescription is then to do away with them because of this tendency to mix corporate activity with the state.

Regardless of whether we are speaking about private corporations acting too public or public corporations acting too private, commentators generally have a problem with the mixing of public and private law duties by corporations. It is argued here, however, that the economy is itself mixed.[39] PPPs are used to carry out commercial activity. The mixing of public and private within a single corporate entity has been a social phenomenon for some time and will continue to be so in the foreseeable future. Over time, PPPs have been the norm in the infrastructure sector and compound companies have been the chosen vehicle for carrying them forward.

Although the mixing of public and private law elements in a single corporate enterprise is a hallmark of PPPs, mixing should not be beyond reproach. What is worrisome is when mixing is obscured from public view. For example, private infrastructure companies may project the image that they are going at it alone when in fact they sometimes benefit from a public law boost. As a matter of policy, if a government promotes certain corporate groups, then the government should be accountable for the actions of such groups. Mixing of public and private law takes many forms and thus attention must be paid to who controls specific corporations and how.

To ensure the accountability of compound infrastructure companies, attention must be paid to how such companies strategically combine public and private law powers to advance their interests. For example, a private company that is closely intermingled with the government might benefit from the government in terms of subsidies or tax advantages. It may even be that the government has accorded it favorable treatment in the tendering stage of a project. Or, a transnational company might receive government support from its home state through an export credit agency that facilitates its business activities abroad either through a direct loan or through political risk insurance. Here a company benefits directly from an association with the government.

However, if the compound company is asked to fulfill public duties as a result of its subsidy, it may disclaim public responsibility. This might happen, for example, when a company is asked to abide by affirmative action programs in its host state. In response to such a public demand, a company might argue that to internalize

39 On the mixed economy *see* E S Mason "Introduction" in E S Mason, ed, *The Corporation in Modern Society* (Harvard Universiy Press Cambridge 1943) 1.

such behavior into its corporate behavior would be to violate its mandate as a wealth-maximizing enterprise of private law origin. So, our hypothetical company would benefit from executive discretion in the form of financial aid for its enterprise, while employing private law-based arguments to throw off public responsibilities.[40]

Compound companies have existed in different times and places, including during colonial times as chartered companies and following that as transnational corporations. They also were found during the welfare state period as public corporations[41] and in African and Asian countries following national independence as development corporations.[42] Companies carrying forward PPPs can be nominally public or private companies, domestic, foreign, or transnational.

For example, Chapter 4 looks at compound companies charged with rebuilding Iraqi infrastructures. These companies are heavily dependent for financing on the government and also are intermingled with the U.S. Army Corps of Engineers. They rely on the U.S. government to defend their commercial assets and also to carryout their day-to-day activities. Similarly, Chapter 5 shows how in response to terrorist threats on infrastructure projects, the private owners of these projects have become increasingly dependent on public intelligence and also on government financial subsidies through insurance plans. In Chapter 6, the activities of transnational compounds in Peru receive attention. There, the very ability of companies to operate depends on government grants. Furthermore, the day-to-day operations of companies depends on successful mitigation of human rights risks by state actors. Chapter 7 explains how the European Union provides a public law boost to private infrastructure companies seeking to build infrastructures into newly independent states. Finally, Chapter 8 describes the serious debate happening at the international, bilateral, national, and subnational levels about what types of compounding are best suited to delivering infrastructure services to the urban poor.

Despite this underlying convergence of interests and mutual dependence, commentators devote a disproportionate amount of time to theoretical models that presume government-industry antagonism. To remark that partnership rather than conflict underlies the government/company relationship is not to say that tensions do not exist in particular projects or that conflict can not at times eclipse partnership. At the same time, when commentators treat the government exclusively as an adversary, the essential facilitative function of government is regrettably ignored.

40 Morris R. Cohen made a similar point about U.S. companies during the *Lochner* period:

> the same group that protests against a child labor law, or against any minimum wage law intended to insure a minimum standard of decent living is constantly urging the government to protect industry by tariffs. Clearly the theory of laissez faire, of complete non-interference of the government in business, is not really held consistently by those who so frequently invoke it. M R Cohen, *Law and the Social Order: Essays in Legal Philosophy* (Harcourt, Brace and Co. New York 1933) 75.

41 On public enterprises *see* Y Ghai, ed, *Law in the Political Economy of Public Enterprise: African Perspectives* (International Legal Centre New York 1971).

42 For a detailed discussion of the types of compound corporations *see* M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 61–80.

Over the life of an infrastructure project, the relationship between governments and companies can transform. An initially amicable relationship can turn sour. Such is the case when a government seeks to expropriate foreign assets or else to renegotiate the basic concessionary contract.[43]

If the relationship between governments and companies turns hostile, the government partner may seek to expropriate assets without adequately compensating the company.[44] In response, the company might bring a claim in an arbitration tribunal.[45] Typically, the concession contract stipulates that disputes will be heard by an arbitration tribunal, which will apply contractually determined laws. The fact that a government attempts to expropriate without adequate compensation does not mean that it will succeed. Arbitration tribunals have, according to Dinesh D. Banani, adopted a "disciplinary" orientation toward damaging state action.[46]

In addition, contractual renegotiation by companies is an increasing reality. The impetus for renegotiation varies. Chapter 7 presents a renegotiation that was spurred by commuters' unwillingness to pay high tolls on a PPP road. Some lawyers believe that renegotiations can be foreclosed by careful contract negotiations. The focus here is on the "difficulties in devising effective contractual commitments against ex post opportunism by government."[47] Others argue that the problem of renegotiation is overstated. Instead, it is important to adopt a longitudinal perspective.[48] Here, partners rearrange their relationships over time as a result of changing political circumstances. Similarly, the role of turbulent political events in shaping transnational PPPs was evident also in nineteenth- and early twentieth-century railroad projects.

III Historical PPPs: nineteenth- and early–twentieth-century railroads

PPPs have a long lineage from the Panama Canal to U.S. oil exploration in the 1930s.[49] They also include the projects that are the focus of this section,

43 On expropriation *see* A A Akinsanya, *The Expropriation of Multinational Property in the Third World* (Praeger New York 1980); M Bogdan, *Expropriation in Private International Law* (Studentlitteratur Lund 1975); G S Challies, *The Law of Expropriation* (Wilson and Lafleur Montreal 1954); N Girvan, *Corporate Nationalism in the Third World* (Monthly Review Press London 1976); P Muchlinski, *Multinational Enterprises and the Law* (Blackwell Publishers Oxford 1995) 493–533; M Schnitzler, *Expropriation and Control Rights: A Dynamic Model of Foreign Direct Investment* (Centre for Economic Policy Research London 1998).

44 R J Daniels and M J Trebilcock "Private Provision of Public Infrastructure: An Organizational Analysis of the Next Frontier" (1996) 46 University of Toronto Law Journal 375, 412–419.

45 Muchlinski, 534–572. On the evolution of arbitration tribunals *see* Y Dezalay and B G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press Chicago 1996).

46 D D Banani "International Arbitration and Project Finance in Developing Countries: Blurring the Public/Private Distinction" (2003) 26 Boston College International and Comparative Law Review 357.

47 R J Daniels and M J Trebilcock "Private Provision of Public Infrastructure: An Organizational Analysis of the Next Privatization Frontier" (1996) 46 University of Toronto Law Journal 375, 378.

48 This argument is developed by Tom Heller and his team at Stanford University Law School.

49 B Esty, *Modern Project Finance: A Casebook* (John Wiley and Sons, Inc. New York 2004) 26–27.

nineteenth- and early–twentieth-century railroads. At the same time, not all of these railroads were PPPs. State-owned railroads were common in Georgia, Illinois, Indiana, Michigan, Pennsylvania, Tennessee, Virginia,[50] and Alaska.[51] Although "[t]he depression of the 1830s and early 1840s dealt a blow to the American tradition of state enterprises but did not obliterate it altogether."[52] Nonetheless, internationally the bulk of nineteenth and early- twentieth century railroads were PPPs.

This section looks at the financing and construction of these early railroads. Paralleling our discussion of present-day PPPs, attention is paid to the mix of public and private actors in each stage of a project and also the transnational character of projects. Furthermore, this section focuses on early human rights-type claims that arose in the context of the spread of railways.

A Financing

Railroads in the nineteenth- and early-twentieth-century were often financed through a mix of domestic and foreign capital, public and private. Private investors underwrote railways globally. For example, private investors financed at least two-thirds of American projects. Also, the majority of investments in projects internationally was foreign. The Prussian railways were foreign-financed.[53] The French and English invested in Mexican projects.[54] U.S., British, French, and German investors helped finance Canadian railways.[55] Dolores Greenberg speaks of the need to understand U.S. involvement by "the intertwining economic and political ties which bound the New York-London-Canadian business elite."[56] The foreign investors were heavily dependent upon the Canadian government, as Greenberg argues:

> For all the Dominion's largesse in the forms of cash subsidies, land grants, and interest guarantees, the Yankees found themselves as readily vulnerable to external variables. Forced by shifts in government policy and investor response to revise continually their calendar of profit expectations, the Americans supplied considerably more capital than they intended. All in all, their experience in foreign direct investment paralleled that of at home.[57]

50 C A Dunlavy, *Politics and Industrialization: Early Railroads in the United States and Prussia* (Princeton University Press Princeton 1994) 50–51.
51 A H Brooks "The Development of Alaska by Government Railroads" (July 1959) 28(3) The Quarterly Journal of Economics 544.
52 Dunlavy 51.
53 Dunlavy.
54 D M Pletcher "General William S. Rosencrans and the Mexican Transcontinental Railroad Project" (March 1952) 38(4) The Mississippi Valley Historical Review 657, 658.
55 D Greenberg, *Financiers and Railroads, 1869–1889: A Study of Morton, Bliss & Company* (University of Delaware Press East Brunswick, New Jersey 1980) 193–214. At one point, "bankers in Paris and Germany were brought in to mollify the French in the Dominion Parliament." *Id.* 198.
56 *Id.* 194.
57 *Id.* 194–195.

The firm of Morton, Bliss & Company "proved crucial to completing a Canadian transcontinental."[58] Furthermore, in certain contexts, a large portion of overall private investment from one country to another was in the railway sector. Here, British and American investment in South American railways accounted for over one-half of each country's overall investment into the region.[59] This subsection focuses mainly on the role of foreign investors in U.S. railways.

The Dutch, French, Germans, and British were all involved in financing American railways,[60] although with time American investors took on a leading role.[61] George H. Douglas explains the early dominance of foreign investors:

> The reason for this influx of capital from abroad may not be so obvious today. For a long time, American capital resources were scarce. What is today the New York Stock Exchange started under a buttonwood tree on Wall Street in 1791. A few years later these individuals moved to a coffeehouse, and only in 1817 to a rented second-floor office. By this time, the capital markets in major European countries were long established. Accordingly, when it was necessary to raise large amounts of capital for the building of railroads, American builders had to turn to Europe for funding.[62]

British financiers played a particularly influential role in American railroads. Between fifteen and twenty-five percent of all American railways were capitalized by the British.[63] The percentage of overall British investment into America that was directed at railroads is striking. On the eve of World War I, railway investments amounted to $3 of the $4 billion that the British invested. The London Stock Exchange set aside a special section for firms with an American railway speciality.[64]

At times, foreign investors attempted to influence the corporate policy of the projects that they financed. For example, when the Rothschilds invested money in the Austrian railways, they contemporaneously put money into a Viennese locomotive factory.[65] Displaying a more nationalistic bent, British investors sometimes tied their money to the inclusion of British firms in the construction stage. Furthermore, British investment often correlated with the use of British-made goods, so much

58 *Id.* 193.

59 D R Adler, *British Investment in American Railways 1834–1898* (The University of Virginia Press Charlottesville 1970); J Coatsworth, "Railroads, Landholding, and Agrarian Protest in the Early Porfiriato" (February 1974) 54(1) The Hispanic American Historical Review 48.

60 L H Jenks "Capital Movement and Transportation: Britain and American Railway Development" (Autumn 1951) 11(4) The Journal of Economic History 375, 376; A J Veenendaal, *Slow Train to Paradise: How Dutch Investment Helped Build American Railways* (Stanford University Press Stanford 1996) (this book looks at Dutch involvement from 1855–1914).

61 Jenks 381.

62 G H Douglas "Slow Train to Paradise: How Dutch Investment Helped Build American Railroads By Augustus J. Veenendaal Jr (Stanford: Stanford University Press, 1996. xiv, 35 pp. $45.00, ISBN 0-8047-2517-9)" (March 1997) 83(4) The Journal of American History 1405.

63 Jenks 375.

64 *Id.* 376.

65 P Keefer "Protection Against a Capricious State: French Investment and Spanish Railroads, 1845–1875" (March 1996) 56(1) The Journal of Economic History 170, 189.

so that from 1847 to 1880 financial investments were a "sharp stimulus for home exports."[66] In fact during this period, thirty to fifty percent of the total output from U.K. rail production went to the American railways in which U.K. capital was in large measure financing.[67] From 1849 to 1852 in fact, "the United States market was of paramount importance to the British ironmasters."[68] Also, with regard to the U.S. western railroads, financiers played a role in "determining the timing and magnitude of . . . construction."[69] Dorothy R. Adler argues: "Export of rails from Great Britain to the United States was a significant phase of the development of American railways and closely tied to the export of capital."[70] She provides the following example: "In November 1853 Samuel G. Ward estimated that half of the European investments of £70 million in American railway bonds and state bonds to aid railways represented securities obtained in return for purchases of British rails."[71]

At the same time, with regard to the connection between foreign railway investment and general corporate policy in America, commentators disagree about the existence and degree of influence. For one, British investment was often portfolio-based and thus did not involve investors sitting on the board of directors of American firms.[72] Given the significant British investment in American railways, Leland H. Jenks finds their small degree of influence surprising, which he argues is unprecedented, and noteworthy:

> The striking thing about all this purchase of railway securities is the small amount of British entrepreneurship, or business leadership, or control that was involved. Substantially all the British and, for that matter, other foreign investment in American railways was a supply of capital to private American companies, American promoters, American operators, and managers. Elsewhere the British have invested heavily in railways under operation of governments, as in Australia. But there is no comparable case, so far as I know, in the annals of foreign investment, of a class of entrepreneurs of one country making so continuous and successful an appeal to investors of another for a supply of capital on the unsupported credit of the prospects of companies which they, not the investors, were to control.[73]

66 R B Du Boff "British Investment in American Railways, 1834–1898" (September 1971) 31(3) The Journal of Economic History 695 (review of *British Investment in American Railways, 1834–1898.* By Dorothy R. Adler. Edited by Muriel E. Hidy. Charlottesville: The University of Virginia Press, 1970. Pp. xiv, 253. $11.50).

67 *Id.*

68 D R Adler, *British Investment in American Railways 1834–1898* (The University of Virginia Press Charlottesville 1970) 32.

69 H N Scheiber "The Role of the Railroads in United States Economic Growth: Discussion" (December 1963) 23(4) The Journal of Economic History 525, 527.

70 Adler 25.

71 *Id.* 25.

72 R B Du Boff "British Investment in American Railways, 1834–1898" (September 1971) 31(3) The Journal of Economic History 695.

73 L H Jenks "Capital Movement and Transportation: Britain and American Railway Development" (Autumn 1951) 11(4) The Journal of Economic History 375, 378.

Nonetheless, although not always tied directly to financial investment, British companies did involve themselves in American railway construction; for instance, the supply of iron and steel rail before 1890.[74]

B Construction and operation

At their base, railways were PPPs, often transnational ones. Relationships among governments, investors, and construction companies were both sociolegally constituted and embedded. For example, in their international railway investments, both the Rothschilds and the Péreires "built up a web of repeated interactions with country leaders, cemented with ongoing personal loans, in France, England, the German states, and Austria."[75] In Massachusetts, the government provided a range of types of assistance to one railway line:

> the state sponsored costly engineering studies, provided capital for the Western when private funds were lacking, granted extensive privileges to both lines, conducted investigations to determine the need for public regulatory action, and influenced corporate policy directly by placing state representatives on boards of directors.[76]

John H. Coatsworth concludes: "What was striking about the state's role was not its passivity but its direction."[77] The intermingling of public and private actors went beyond the financing stage, spreading to most facets of a project.

One way that governments involved themselves in railway projects was by guaranteeing interest payments. The role of governments in ensuring that investors are regularly paid when projects fall below anticipated use is still central to modern day PPPs. For example, in the nineteenth century, the Argentine government guaranteed the interest of private railways.[78] Many of these projects were foreign, with sixty-six

74 *Id.* 381.

75 P Keefer "Protection Against a Capricious State: French Investment and Spanish Railroads, 1845–1875" (March 1996) 56(1) The Journal of Economic History 170, 173.

76 J H Coatsworth, review author, "The State, the Investor, and the Railroad: The Boston & Albany" (June 1970) 57(1) The Journal of American History 140, 142. Stephen Salsbury does not see the role of the state as tremendously significant. S Salsbury, *The State, the Investor, and the Railroad* (Harvard University Press Cambridge 1957) 298. Although the book's author differs from the reviewer about the relative importance of government rule, he does acknowledge that "railroads required the power of eminent domain, which was the gift of the state alone." *Id.* 297. Salsbury also recognizes that, in the context of the Western Railroad, the government was "essential since the road was constructed during a period of national crisis when private capital was not abundant." *Id.* 33. In fact, there "the state may have advanced the Western's construction by as much as five years." *Id.* Nonetheless, although Salsbury acknowledges that "laissez faire was a myth, at least as far as the building of canals and railroads is concerned", he also argues that "states did not follow well thought out plans for the guidance and stimulation of economic development." He argues: "Assistance for a few key projects and scattered speeches of local politicians to influence works on a specific measure are not evidence of a theory of government aid." *Id.* 34.

77 Coatsworth 142.

78 J S Duncan "British Railways in Argentina" (December 1937) 52(4) Political Science Quarterly 559, 560.

percent of rails owned and constructed by the British.[79] Similarly, France provided "guaranteed interest rates to shareholders" which were tied to "imposed constraints on private enterprises."[80] In America, the government issued land grants, albeit sometimes for a fixed term.[81] Returning to Argentinian practice, its government at times donated land or granted tax exemptions. It went so far as to offer a form of political risk insurance. In one case, an American entrepreneur backed by British investment capital was to be "reimbursed for any damage to property resulting from civil war."[82] Also, in another effort to mitigate against political risk, project transactions were carried out in British sterling.[83]

Many railroads in nineteenth-century Mexico were also transnational PPPs. American, British, and Mexican companies constructed the railways.[84] At one point, the French were involved as a result of their invasion in the 1860s.[85] Then the French entered into a concession with a Mexican national who would later be "excoriated" "for disobeying a law in January 25, 1862, which forbade Mexicans to aid invaders."[86] This sale progressed into a congressional investigation that ultimately determined the concession was both "unwise and unconstitutional," because it ceded too much control away from the government and covered the entire cost of construction.[87] So, the amicableness of Mexican transnational PPPs depended largely on the political context out of which the agreements were forged.

As well, the corporations that pursued projects in different countries mixed public and private laws. In our terminology, they were compound corporations. At times, private companies partnered with public ones. At other times, companies were themselves mixed. Some countries used public companies for certain projects and private ones for others, as was the case in Algeria and Morocco.[88]

Although it was the close ties between governments and private actors that made railway construction possible and the prospects of profits palpable, over the life of specific projects relations between these parties at times turned hostile. For example, in Spain the government expropriated projects. This meant seizing Belgian

79 *Id.* 559.
80 A Mitchell "Private Enterprise or Public Service? The Eastern Railway Company and the French State in the Nineteenth Century" (March 1997) 69(1) The Journal of Modern History 18, 20.
81 D M Ellis, R C Overton, R E Riegel, H O Brayer, C M Destler, S Pargellis, F A Shannon and E C Kirkland "Comments on The Railroad Land Grant Legend in American History Texts" (March 1946) 32(4) The Mississippi Valley Historical Review 557.
82 J S Duncan "British Railways in Argentina" (December 1937) 52(4) Political Science Quarterly 559, 561–562.
83 *Id.*
84 D M Pletcher "The Building of the Mexican Railway" (February 1950) 30(1) The Hispanic American Historical Review 26, 30.
85 *Id.* 42.
86 *Id.* 43.
87 *Id.* 49.
88 B E Thomas "The Railways of French North Africa" (April 1953) 29(2) Economic Geography 95, 77, and 100.

investment property.[89] In France, the government nationalized private railroads.[90] Control over the Chinese railroads generally moved from private to public hands. Foreign companies largely financed and built the early railroads. Involvement was multinational with investment from Belgians, the British, the French, Germans, Japanese, and Russians. This foreign participation lasted until the Republic was formed. Then, plans were laid to shift control over to the government. They went into effect in 1927. After this, foreign companies played a progressively smaller role in the railroad sector.[91] Conversely, the movement of property from public to private hands occurred elsewhere.

For example, Russian projects passed from both private to public as well as public to private hands. A rail linking Warsaw and Vienna started off as a private project in 1839. The company however went bankrupt and as a result the government took over in 1842. By contrast, the line linking St. Petersburg and Moscow started off public and then became private. In 1878, the majority of Russian railway projects were private. In 1882, the government purchased a number of bankrupted lines. However, private involvement continued to be the norm until the end of the century. With the new century, the public increasingly involved itself until the government held nearly two-thirds of Russian rail projects. And, in 1917, the government nationalized the remaining third.[92]

The Japanese railroads of the nineteenth century also demonstrate how many railroads were transnational PPPs in which the mix of public and private and also foreign and domestic evolved over time. Initially, British and American companies lobbied the Japanese government to build its railroads. For example, the Tokugawa government granted permission to an American diplomat to build one line. However, when the new Meiji government took power, staunchly opposing foreign participation in the railways, it revoked the permission.[93] Nonetheless, the Japanese were not experienced in railway construction and had to rely ultimately on foreign technical assistance, particularly from the British.[94]

Initially, as railroads moved into private hands from 1881 to 1900, the Japan Railway Company, a private corporation, carried out most of the work.[95] Although the railways were nominally under the control of private companies, in line with the PPP approach, the government agreed to subsidize the rails, "mak[ing] up the

89 P Keefer "Protection Against a Capricious State: French Investment and Spanish Railroads, 1845–1875" (March 1996) 56(1) The Journal of Economic History 170.

90 A Mitchell "Private Enterprise or Public Service? The Eastern Railway Company and the French State in the Nineteenth Century" (March 1997) 69(1) The Journal of Modern History 18, 20.

91 C Kia-Ngau, *China's Struggle for Railroad Development* (The John Day Company New York 1943) 23–86.

92 E Ames "A Century of Russian Railroad Construction: 1837–1936" (December 1947) 6(3/4) American Slavic and East European Review 57.

93 N Iki "The Pattern of Railway Development in Japan" (February 1955) 14(2) The Far Eastern Quarterly 217, 219.

94 *Id.* 221.

95 *Id.* 222.

difference whenever profits fell below 8 per cent."[96] Also, the government financially supported the extension of railway lines into nonprofitable remote areas. Inouye Masaru, the head of the Railroad Bureau, made the case that profitability should not be the only criteria for judging railroads, which also should:

> promote transportation and communication and facilitate everything from national defense to the promotion of industry. They are indispensable for achieving enlightenment. Accordingly, the amount of direct profits gained from investment is not the only criterion for judging the value of railroads.[97]

Ultimately, the government challenged the private control over its railways, nationalizing them in 1906.

As well, in the Japanese case, we begin to see how social movements affected the development of railways. In the late nineteenth century "internal disturbances culminating in the Satsuma Rebellion of 1877"[98] upset railway plans. However, with the suppression of the Rebellion, plans resumed.[99] The relationship between railways and social movements occupied planners throughout the nineteenth and early twentieth century internationally.

C Social movements

During the nineteenth- and early-twentieth-century, conflict arose between the planners of railroad PPPs and community-based groups. Railroads could be a "risky and dangerous business."[100] At times, this resulted from the fact that, as Edward P. Ripley explains in the context of the U.S. railroads before the 1880s, railroads were largely "a private institution, operated by its owners purely for private gain with but very ill defined duties toward the public."[101] In nineteenth-century Mexico, as railroads "increase[d] agrarian exports", John Coatsworth has asked: "But what effect on agrarian conditions?"[102] In response to the deleterious effects of projects on segments of the host population, oftentimes community groups opposed railways and let their stance be known either nonviolently or violently. For example, U.S. railways at times displaced power from certain towns when lines bypassed them. In

96 *Id.* 223.
97 Quoted in *Id.* 225.
98 *Id.* 221–222.
99 *Id.*
100 G H Douglas "Slow Train to Paradise: How Dutch Investment Helped Build American Railroads By Augustus J. Veenendaal Jr (Stanford: Stanford University Press, 1996. xiv, 35 pp. $45.00, ISBN 0-8047-2517-9)" (March 1997) 83(4) The Journal of American History 1405. *See also* A J Veenendaal, *Slow Train to Paradise: How Dutch Investment Helped Build American Railways* (Stanford University Press Stanford 1996) 110–129 (this book looks at Dutch involvement from 1855–1914).
101 E P Ripley, "Discussion on Papers by Whitney and Knapp on Corporations and Railways" (May 1905) 6(2) Publications of the American Economic Association, 3rd Series. Papers and Proceedings of the Seventeenth Annual Meeting. Part II 31.
102 J Coatsworth "Railroads, Landholding, and Agrarian Protest in the Early Porfiriato" (February 1974) 54(1) The Hispanic American Historical Review 48.

Iowa, many farmers opposed projects as a result.[103] It was true that even landholders could be adversely affected.[104] Similar conflicts turned violent in Mexico. Further, Stephen Salsbury tells us how in Massachussetts, "[t]he General Court deliberately avoided setting safety standards for the Western Railroad, even after a series of disastrous wrecks had shaken the public confidence in the line's management."[105]

The railway lines laid through Mexico were intensely controversial in their treatment of indigenous populations. Coatsworth argues that planners caused the "wholesale alienation" of indigenous groups.[106] Rail projects led to protests and rebellions. In total, fifty-five recorded incidents occurred from 1877 to 1884.[107] These incidents took many forms ranging from violent uprising to attempts at land reoccupation to peaceful petition signing and to agitations connected to legal proceedings. At times, protestors used "terrorist tactics in the form of assassination and kidnapping."[108] Federal and state troops were called in to squelch protests.[109]

Protests in Mexico arose in response to land acquisition for railroads. Villagers brought four court cases, each resulting in victory and the return of land.[110] The mode of acquiring land proved too controversial. Companies acquired land in a two-step process. First, indigenous community land was appropriated through reform laws. This moved land away from being held as community property, converting it to individual parcels. In turn, rail companies purchased land at a low cost from individuals. Coatsworth characterizes this process as "artful combinations of legal sale and illegal acquisition."[111] Acquisition was not only tied to court cases, but also it resulted in protest and war.[112]

103 J L Larson, *Bonds of Enterprise: John Murray Forbes and Western Development in America's Railway Age* (Harvard University Press Boston 1984). John L. Larson makes an impassioned case for revisiting the progressive nature of the railroads in relation to these farmers:

> Popular faith in the doctrine of economic progress had carried a revolution in trade and commerce for nearly two generations in America, yet at the bottom of the postwar regulation question lay a nagging fear in the popular mind that this progress was illusory. Rhetoricians like E. L. Godkin might easily attribute the whole progress of the nation to the blessings of organized capital and railroads, but most Iowa farmers had worked too hard to believe that. They piled up harvests, yet they watched friends and neighbors brought to despair. They borrowed money and reinvested earnings in more land and equipment just to keep even with falling prices. Good harvests and profitable years understandably slipped from memory when crop failures – or worse, record yields – ruined farm incomes and jeopardied mortgaged homesteads. Aggregates meant little as each man approached reality in person; the popular mind in the Gilded Age was formed out of hundreds of private views. *Id.* 163.

104 J Coatsworth "Railroads, Landholding, and Agrarian Protest in the Early Porfiriato" (February 1974) 54(1) The Hispanic American Historical Review 48, 49.

105 S Salsbury, *The State, the Investor, and the Railroad* (Harvard University Press Cambridge 1957) 298.

106 Coatsworth 49.

107 *Id.* 51.

108 *Id.* 64.

109 *Id.*

110 *Id.* 59.

111 *Id.* 50. For A similar use of law in the context of United States–Native American relations *see* R Strickland "Genocide-at-Law; An Historic and Contemporary View of the Native American Experience" (1985–1986) 34 Kansas Law Review 713, 720.

112 *Id.* 59.

Thus, as with present-day infrastructure projects, nineteenth- and early–twentieth-century railroads were PPPs. Often they were transnational. They mixed public and private, domestic and foreign at the financing, construction, and operation stages. Furthermore, projects were often controversial and resulted in social campaigners targeting them.

IV Forward to the recent shift toward privatization

Today, in almost every corner of the world, infrastructure projects are once again in private, not public, hands. At the same time, as Kenneth W. Hansen reminds us: "it was widely considered 'normal' worldwide well into the 1980s for the development and operation of core infrastructures to be an activity, as well as a responsibility, of the public sector."[113] There were, of course, some exceptions.[114] Nonetheless, Wallace rightly explains how, from after World War II and up to the recent shift toward privatization, the political environment was one of "nationalizations, anti-colonialism, anticapitalism, and socialism."[115] This period of public control over infrastructures had "supplanted" an "earlier history" of private participation in infrastructures.[116]

Under the leadership of Margaret Thatcher, in the late 1970s the United Kingdom touched off the recent international move toward privatized projects.[117] Ronald Reagan's United States soon followed suit. Since then, gathering steam in the 1980s and 1990s, privatization has spread throughout the world with legal techniques for carrying out privatization transferring back and forth between fully industrialized and developing countries.[118] Now countries in Africa, Asia, Europe, and also North and South America pursue privatizations. The disintegration of the Soviet Union

113 K W Hansen "PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 105.

114 For example, some utilities in the U.S. were private during this period *see e.g.* "Publicly and Privately-Owned Utilities" (1951) 12 Ohio State Law Journal 166; "Financing of Privately-Owned Utilities" (1951) 12 Ohio State Law Journal 195; F A Iser "Termination of Service by Privately-Owned Public Utilities: The Tests for State Action" (1976) 12 Urban Law Annual 155; C M Kneier "Competitive Operation of Municipally and Privately Owned Utilities" (1948–1949) 47 Michigan Law Review 639; M H Lauten "Constitutional Law – State Action – Termination of Electrical Service by Privately Owned Utility Does Not Constitute State Action for Purposes of the Fourteenth Amendment" (1975) 24 Emory Law Journal 511; G L Mayes "Constitutional Restrictions on Termination of Services by Privately Owned Public Utilities" (1974) 39 Missouri Law Review 205.

115 D Wallace, Jr "UNICTRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects" (2000) 8 Tulane Journal of International and Comparative Law 283, 284.

116 *Id.*

117 For an important treatment of law and privatization in the United Kingdom that focuses on utilities and financial services *see* C McCrudden, ed, *Regulation and Deregulation: Policy and Practice in the Utilities and Financial Services Industries* (Clarendon Press Oxford 1999).

118 M Andrade and M A de Castro "The Privatization and Project Finance Adventure: Acquiring a Colombian Public Utility Company" (Spring 1999) 19 Northwestern Journal of International Law and Business 425; J D Crothers "Project Finance in Central and Eastern Europe from a Lender's Perspective: Lessons Learned in Poland and Romania" (1995) 41 McGill Law Journal 285; M R Ysaguirre "Project Finance and Privatization: The Bolivian Example" (1998) 20 Houston Journal of International Law 597.

added new fuel to the engine of privatization. At the same time, the recent global economic slowdown has stemmed the rapid pace of privatization with governments reclaiming some control over projects.[119]

Not only has the spread of privatization been an international phenomenon, but it has also touched almost every sector of the economy in country after country. In the United States, privatizations started with independent power projects in the 1980s and moved from there.[120] Globally, sectors such as power, water, transportation, and telecommunications have privatized.

Given the diverse set of countries pursuing privatization and also the many sectors of the economy involved, it is inevitable that the processes by which privatizations are carried out vary markedly according to country and sector.[121] For example, a country transitioning away from a planned economy and toward a market-based one will privatize differently than a long-standing private-sector oriented economy. In a transitioning planned economy, the government might retain an overarching plan for the economy within which the privatization program is subsumed. Importantly, some plans in developing countries have been supported by fully industrialized market-based economies in part because of the policy-making predictability that they engender.[122]

At the same time, despite the diversity of privatization processes, certain legal techniques for effectuating privatization have transferred back and forth between countries without a problem. For example, the BOT scheme has been used all over the world and in multiple sectors of the economy. The circulation of techniques results in part from active promotion of them by certain governments, intergovernmental organizations, and law firms.

The international movement promoting privatized projects is not simply a story of a change in "preferences"[123] among domestic politicians and commercial elites

119 K Hansen "PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 105.

120 B Esty, *Modern Project Finance: A Casebook* (John Wiley and Sons, Inc. New Jersey 2004) 27.

121 On diversity within regions *see* "Current Issues in Multinational Financing: Remarks" (1995) 89 American Society of International Law Proceedings 19, 29 (remarks by J W Fernandez). William Twining's point about the relationship between globalization and legal theory is relevant here:

> In considering the implications of globalization for legal theory, it will be necessary to be concerned with a wide range of questions at different levels of generality. "Thick description" of local particulars set in broad geographical contexts will be as important as ever in the development of a healthy discipline of law in a more integrated world." W Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press Oxford 1997) 179.

122 For a discussion of this phenomenon *see* G Myrdal, *Asian Drama: An Inquiry into the Poverty of Nations* (Twentieth Century Fund New York 1968); M B Likosky, *The Silicon Empire* (Ashgate Aldershot 2005) 41–44 (and literature cited therein).

123 Y Dezalay and B Garth "Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960–2000" in M B Likosky, ed, *Transnational Legal Processes : Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 197; Y Dezalay and B G Garth, *The Internationalization of Palace Wars* (The University of Chicago Press Chicago 2002); Y Dezalay and B G Garth "Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy" in Y Dezalay and B G Garth, eds,

within the countries involved. Yves Dezalay and Bryant G. Garth argue that "the content and the scope of rules produced to govern the state and the economy cannot be separated from the circumstances of their creation and production."[124] They make the point that:

> A related temptation is to take as given the ideals of science produced in the north to create these cosmopolitan communities and ask only about how those in the south came to share those "preferences" – for example, asking how southern economists converted to U.S. approaches to economic transformation; the construction of the preferences of the elites in the United States is ignored or simply taken for granted. This silence, which relates again to the tendency of the exporters not to question their own universals, is particularly important in the world of international strategies, since international strategies are typically played out in a space where orders and categories are blurred.[125]

The traditional story of the spread of privatization speaks about changes in governments' approach to financing and construction of infrastructure projects.[126] With regard to financing, in the 1970s and 1980s governments found themselves facing increased debt crisis. Scott L. Hoffman tells us:

> Until the early 1970s, much of the financing of infrastructure development in developing countries came from government sources, such as the host country government, multilateral institutions and export-financing agencies. More recently, however, constraints on public funding have emerged. These constraints include reductions in developing country financial aid funding. Also, host country governments lack the financial creditworthiness to support financially, through direct funding or credit support, the volume of infrastructure projects required to develop their economies.[127]

So, governments found it increasingly difficult to finance projects. Here, private international investment banks stepped in. This shift away from public and toward private financing worked in tandem with a move away from the public construction of projects. Here, the conventional story talks of how state-owned enterprises became progressively inefficient and poorly run. As a result, many were either transferred into private hands or else dismantled and replaced by private companies.

Although this conventional story includes indisputable facts, the shift to privatization was also strategically constructed and contested. It was not always clear

Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy (The University of Michigan Press Michigan 2002) 306, 313.

124 Y Dezalay and B G Garth "Legimating the New Legal Orthodoxy" in Y Dezalay and B G Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* 306, 307.

125 Y Dezalay and B G Garth, *The Internationalization of Palace Wars* (The University of Chicago Press Chicago 2002) 8.

126 K W Hansen "PRI and the Rise (and Fall?) of Private Investment in Public Infrastructure" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 105, 106.

127 S L Hoffman, *Law and Business of International Project Finance: A Resource for Governments, Sponsors, Lenders, Lawyers, and Project Participants* (Kluwer Law International Leiden 2001) 25.

or self-evident that projects would progress toward privatization in the exact way that they did. For example, even when financing shifted toward the dominance of international investment banks, projects at times continued to be publicly carried out. Here private banks lent money directly to public corporations through project finance techniques. So, it was possible to have off-balance sheet financing without private participation in the construction stage of projects.[128]

Not only were such seemingly anomalous phenomena present, but also privatization did not arise organically from the bottom up. Governments and intergovernmental organizations actively promoted privatization.[129] William Twining tells us:

> Globalisation does not minimise the importance of the local, but it does mandate setting the study of local issues and phenomena in broad geographical and historical contexts. . . . In terms of space these levels include the global, international, transnational, regional, inter-communal, municipal (or nation-state), sub-state and non-state local. In respect of time, they have complex histories of change, inertia, imposition, diffusion, interaction, and so on.[130]

International organizations like the Betton Woods institutions and also United Nations organizations played a substantial role in transitioning countries toward privatization.

For example, the World Bank Group underwent a shift, reorienting its activities away from underwriting public projects and toward actively promoting privatized ones. The World Bank Group had been actively involved in underwriting public projects. During the 1980s and 1990s it reoriented toward encouraging privatized projects. Although the World Bank still does directly finance projects, at both the policy and organizational levels, it is an active promoter of privatization. At the policy level, the World Bank produced the New Comprehensive Development Framework, which focuses its energy on encouraging an environment in developing countries conducive to private-sector led growth.[131] On the organizational level, the World

128 S E Rauner "Project Finance: A Risk Spreading Approach to the Commercial Financing of Economic Development" (1983) 24 Harvard Journal of International Law 145.

129 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 44–51.

130 W Twining, *Globalisation and Legal Theory* (Butterworths London 2000) 253. On the importance of general jurisprudence for understanding globalization *see* B Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press Oxford 2001) 120–130; W Twining "A Post-Westphalian Conception of Law" (2003) 37 Law and Society Review 199; W Twining "Reviving General Jursiprudence" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 3; W Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press Oxford 1997) 149–179. Tamanaha defines general jurisprudence as "the study of law *as such*. It is based on the belief that 'Law is [a] social institution found in all societies and exhibiting a core of similar features.'" Tamanaha xiii.

131 L Cao "An Evaluation of the World Bank's New Comprehensive Development Framework" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 27; M 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 B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* 65.

Bank created the Multilateral Investment Guarantee Agency (MIGA) in 1988. MIGA makes projects that the private sector judges too politically risky become commercially viable and attractive. It does so by providing political risk insurance for international privatized projects in developing countries and transition societies.[132] Importantly, at the same time, through the International Finance Corporation, the World Bank Group has been involved in promoting privatized projects as far back as 1956.[133] As well, often one of the International Monetary Fund's conditionalities is the adoption of privatization.

Also, promoting privatized projects, the United Nations Commission on International Trade Law (UNCITRAL) produced a legislative guide[134] and a model law.[135] The United States and China advocated for the idea of the legislative guide, *Legislative Guide on Privately Financed Infrastructure Projects*.[136] Its explicit purpose is to "assist in the establishment of a legal framework favorable to private investment in public infrastructure."[137] Although the UNCITRAL document promotes privatization, it does not paint in broad-brush strokes. Instead, it grapples with the primary concerns voiced by privatization critics.[138] At the same time, the overarching aim is to adapt privatization models that are "suitable" to "national" and "local" contexts.[139]

As well, it is important to recognize that powerful governments have promoted privatization abroad on a bilateral basis. As Boaventura de Sousa Santos points

132 Convention Establishing the Multilateral Investment Guarantee Agency (MIGA), 11 October 1985 [1989] UKTS 47.

133 On the International Finance Corporation *see* C M Mates "Infrastructure Financing in Mexico: The Role of the International Finance Corporation" (Spring 2004) 12 United States-Mexico Law Journal 29.

134 On the Guide *see* D Wallace, Jr "UNICTRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects" (2000) 8 Tulane Journal of International and Comparative Law 283; D Wallace, Jr "Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 131.

135 United Nations Commission on International Trade Law, *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (United Nations New York 2004). On UNCITRAL generally *see* A C Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press Cambridge 2003) 212–225.

136 D Wallace, Jr "UNICTRAL Draft Legislative Guide on Privately Financed Infrastructure: Achievement and Prospects" (2000) 8 Tulane Journal of International and Comparative Law 283, 285.

137 "UNCITRAL Consolidated Legislative Recommendations for the Draft Chapters of a Legislative Guide on Privately Financed Infrastructure Projects" General Assembly A/CN.9/471/Add.9 (December 2, 1999) United Nations Commission on International Trade Law 33rd Session New York 12 June – 7 July 2000 Privately Financed Infrastructure Projects. (from Foreword) text available in (Spring 2000) 8 Tulane Journal of International and Comparative Law 305.

138 D Wallace, Jr "Private Capital and Infrastructure: Tragic? Useful and Pleasant? Inevitable?" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 131. Wallace was "involved in the production of this work both as an 'expert' and government delegate." *Id.* 136.

139 United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects* (United Nations New York 2001) "Introduction and background information on privately financed infrastructure projects" 4.

out: "the external strength of the state is of crucial importance in understanding some forms of legal globalization."[140] It also calls into question what Twining terms "'black box theories' that treat nation states or societies or legal systems as discrete, impervious entities that can be studied in isolation either internally or externally."[141] Governments have subsidized the overseas involvement of their corporate infrastructure nationals. They have done so through their export credit agencies, which are government banks devoted to encouraging their corporate nationals to go overseas. In the area of infrastructure, this might take the form of direct loans or else the providing of political risk insurance. For example, the United States provides support through its Overseas Private Investment Corporation (OPIC) and the Export-Import Bank.[142] Furthermore, governments often furnish legal assistance to developing countries, encouraging the adopting of laws conducive to foreign investment in the infrastructure sector.[143]

140 B d S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition Butterworths London 2002) 189.

141 W Twining, *Globalisation and Legal Theory* (Butterworths London 2000) 51. On Twining's view toward "black box theories" *see also* W Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press Oxford 1997) 150.

142 C D Toy "U.S. Government Project Finance and Political Risk Insurance Support for American Investment in Central and Eastern Europe and the NIS" (1994) 88 American Society of International Law Proceedings 181. Also on OPIC *see* M B Perry "Model for Efficient Foreign Aid: The Case for the Political Risk Insurance Activities of the Overseas Private Investment Corporation" (1995–1996) 36 Virginia Journal of International Law 511; S Franklin and G T West "Overseas Private Investment Corporation Amendments Act of 1978: A Reaffirmation of the Development Role of Investment Insurance" (1979) 14 Texas International Law Journal 1.

143 For example, legal academics have been involved in the shift toward privatization through the drafting of commercial codes, NGOs have translated western codes into various languages, and also international organizations and foreign aid offices have instituted training programs for legal professionals. *See e.g.* T Carothers, *Aiding Democracy Abroad: The Learning Curve* (Carnegie Endowment for International Peace Washington, DC 1999); A L Chua "Markets, Democracy, and Ethnicity: Toward a New Paradigm of Law and Development" (1998) 108 Yale Law Journal 1; Y Dezalay and B G Garth, *The Internationalization of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (University of Chicago Press Chicago 2002); Y Dezalay and B G Garth,eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press Michigan 2002); J Faundez, ed, *Good Government and Law: Legal and Institutional Reform in Developing Countries* (St. Martin's Press, Incorporated New York 1997); M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002); C Rose "The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study" (1998) 32 Law and Society Review 93; S S Silbey "'Let Them Eat Cake': Globalization, Postmodern Colonialism, and the Possibilities of Justice" (1997) 31(2) Law and Society Review 207; D M Trubek "Law and Development: Then and Now" American Society of International Law, Proceedings of the 90th Annual Meeting (1996); W Twining "Constitutions, Constitutionalism and Constitution-Mongering" in I P Stotzky, ed, *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Boulder 1993) 383.

At the same time, for the most part, legal academics did not participate in the early stages of privatization. Carol V. Rose explains: "As scholars backed away from the LDM [law and development movement], the actual practice of legal assistance often was left to technocrats who were less bothered by the messy complexities and imperialist implications of their work." Rose 135.

In sum, a shift has occurred since the late 1970s away from public projects and toward PPPs. It has been actively promoted at the national and international levels. What results are transnational partnerships mixing public and private, domestic, foreign, and international parties and laws.

V Conclusion

The particular mixes of state and non-state actors involved in transnational PPPs are diverse. Thus, when it comes to human rights, nongovernmental organizations and community groups find themselves targeting varied public-private actor configurations. At the same time, common templates of actors also exist across projects. The next chapter turns to the human rights dimensions of transnational PPPs, adopting a human rights risk-based approach.