

§Law in Context

MICHAEL B. LIKOSKY



Law, Infrastructure,  
and Human Rights

CAMBRIDGE

CAMBRIDGE

[www.cambridge.org/9780521859622](http://www.cambridge.org/9780521859622)

---

# Human rights risks

## I Introduction

The [previous chapter](#) looked at the shift away from public and toward privatized international infrastructure projects. Privatized projects are carried out through transnational public-private partnerships (PPPs), involving a mix of public and private actors, domestic, foreign, and international. This chapter turns to the relationship between this shift toward PPPs, on the one hand, and human rights, on the other. Did human rights strategists play a role in driving this shift away from public and toward privatized projects? Are human rights handled differently by PPPs than by public projects? What types of strategies do nongovernmental organizations (NGOs) and community groups pursue to have human rights respected by PPPs? Do transnational corporations (TNCs) and governments respond to human rights advocates with strategies of their own? Do they at times initiate human rights strategies unprovoked?

By way of example, dam projects traditionally have been publicly financed and carried out. However, they are increasingly undertaken as transnational PPPs. With this shift to privatization, human rights express themselves in new and legally innovative ways in the context of specific projects. We see this in the case of the Kotopanjang Dam in the Indonesian provinces of Riau and Western Sumatra. When this dam flooded the Tanjung Pau village, community members did not seek redress from Indonesian public corporations, as might have been done during the heyday of state-financed and carried-out projects. Instead, the human rights strategies pursued reflected a changed landscape. The Japanese Tokyo Electric Power Service Corporation, a private TNC, was in charge of constructing the Kotopanjang Dam. Two foreign public institutions, the Japan Bank of International Cooperation and the Japan International Cooperation Agency, provided financing. Thus, in response to alleged human rights wrongs, villagers pursued legal action against these Japanese public and private organizations. The suit was filed in the Tokyo District Court on behalf of 3,861 Indonesians.<sup>1</sup>

1 A Suutari “Sumatran Villagers Sue Japan Over ODA Dam” (8/14/03) Japan Times; “Thousands of Indonesians Sue Tokyo over Dam” (9/6/02) Morning Star 3.

The Kotopanjang Dam litigation is a part of the new generation of human rights legal strategies targeting transnational PPPs which this chapter takes as its subject. Strategies are wide ranging, singling out state and nonstate actors. They target actors in different countries and sectors of the economy. Strategies elicit counterstrategies, be they amicable, hostile, or indifferent. The interaction between strategies and counterstrategies is itself dynamic.

Human rights express themselves in myriad ways in the context of specific PPPs. As we saw in Chapter 1, legal strategies most often unfold on the terrain of soft law, rather than in the courts. For example, contract provisions may incorporate human rights principles in loan agreements, supply contracts, or in government concessionary contracts that stipulate “take or pay” arrangements. Accordingly, a number of questions must be asked about these legal strategies.<sup>2</sup>

When a contractual clause promises to deliver human rights, what does this mean in practice? Do contracts include a default provision for failure to deliver human rights? If a project goes belly-up as a result of human rights problems, what priorities will be given to different creditors? If the state expropriates a project as a result of human rights demands, will the private company be fairly compensated? Who will monitor the carrying out of the contractual provisions? If human rights are infringed on, then who possesses a human rights claim against companies under the terms of the contract?

Who has standing to bring a suit? Is it project-affected peoples, states, or other private companies? If it is only a company or government, will either initiate a suit in the name of human rights? Will NGOs and community groups need to apply pressure? Are states under an obligation to advance a claim as guardians of the human rights of their citizenry?

What courts are available to bring a claim? Are foreign and domestic national courts an option? Does the contract stipulate that disputes will be entertained instead in an arbitration tribunal? What is the choice of law governing human rights claims? Will a successful claim spur the renegotiation of contracts? If a claim is successfully brought against a construction company, how will this affect project financiers’ ability to recoup sunk costs and to turn a profit?

Will states abide by agreements in concessionary contracts to have such disputes governed by arbitration clauses? Will political risk insurance taken out by companies either with their home state government, an intergovernmental organization, or else private insurer cover liabilities? Will human rights be classifiable under the insurance policies as covered political risks? Does the fact that human rights are so subject to changing definition based on regime change, political trends, ease of enforcement, global opinions, evolving international consensus, and so on compound things? How important are the terms of particular insurance policies or the insurer? Do the insurance policies require companies to mount successfully

2 I am thankful to one of the anonymous readers for help in formulating some at these questions.

a claim in an arbitration tribunal before making a payout? Or do the insurers agree to pay without an arbitration tribunal or national court judgement? Will the insurer itself bring the claim against the government, exercising its subrogation rights?

How should societies balance the short-term costs of a project with the long-term benefits?<sup>3</sup> Is it inevitable that the construction of some large-scale projects will impinge on the human rights of project-affected communities that might be displaced? Should this social cost be paid by these communities or instead redistributed by the state or companies through higher user charges for the project once it is built? Will certain consumers subsidize the human rights of other consumers through cross-subsidizing by infrastructure companies and governments? Or will governments pay the user charges of its poor citizens? Here, citizens pay for projects differentially through their tax contributions.

If one country legally guarantees that its TNCs will respect a higher level of human rights than others, does this mean that the home government is putting its corporate nationals at a competitive disadvantage? For example, does the higher human rights standards guaranteed by the U.S. Export-Import Bank for projects that it funds result in lost contracts for U.S. businesses? Are there anticompetitive forces at play when human rights demands are legally guaranteed by some but not others? Is internationally uniform regulation the answer? Should demands that run counter to market freedoms be put aside? Can human rights and the market be squared? Are human rights at times in the long- or short-term interest of market actors? Are they inefficient at some times but not at others? Does it depend whether the company is a brand-name one with a retail arm or instead a little-known small subcontractor?

Who should ultimately be responsible for ensuring that a project respects human rights? Should it be the local government, foreign governments, international organizations, or corporations? Traditionally, human rights have been considered the responsibility of the local government. However, cases are increasingly being brought against foreign companies in their home state courts. Non-litigation-based movements also target an array of actors. Should the division of responsibility for human rights among project planners be carefully and clearly drawn? Or, should the body of human rights claims evolve over time with any project planner being fair game? Is the local government unable to ensure human rights on its own? Does this depend on the regime in power? If the regime does not respect human rights, should foreign companies and states simply stay away? If not, when they do participate, should they bring the promise to have human rights recognized with them, contractualizing human rights within the investor-state agreements, that is public

3 For a critical discussion of the debate over the trade-off between development and human rights see B d S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition Butterworths London 2002) 289–301.

regulation by another name? Should “Third World” projects deliver “First World” human rights? Do foreign companies have a responsibility to abide by international standards or the standards of their own home state? Should it matter that these companies sometimes receive a public law boost from their home state government? What is the extra-territorial reach of human rights?

This book begins to answer these and related questions by reference to a diverse set of case studies in Part II. Each case raises human rights issues in unique and politically contested ways. Although high-profile cases of human rights abuses have been reported in the context of projects, important success stories of projects also exist. For example, investment banks and infrastructure companies with brand-name recognition have at times shown remarkable respect for human rights. Often this has been the culmination of community group campaigns; however, it also reflects the decision making of companies and also accords with a market-based logic, that is, consumers will avoid the products of companies associated with human rights violations. Among other things, the book looks at how such company policies have come about and then how they are implemented.

As we saw in Chapter 2, a PPP is an umbrella concept, bringing together a wide range of projects in different countries and in various sectors of the economy. Although commonalities exist across infrastructure projects, human rights invariably express themselves in complex and project-specific ways. This chapter introduces the concept of “human rights risk” to understand the ongoing “defense and attack”<sup>4</sup> between project planners and insurgents that occurs on the terrain of a privatized infrastructure project. A human rights risk here is not a quantification of the risk that human rights will be violated by a project. Instead, a human rights risk is something that is strategically constructed by project opponents. Telling us that “risks are always political,” Mary Douglas reminds us: “Risk analysis that tries to exclude moral ideas and politics from its calculations is putting professional integrity before sense.”<sup>5</sup> The aim here then is not to displace traditional risk analysis but instead to provide a sociolegal supplement. Often, in response to a successful human rights risk strategy, project planners pursue countermeasures designed to reduce the risk that a human rights campaign will obstruct their plans.

To explore the human rights implications of the shift toward PPPs, this chapter first elaborates the human rights risk concept. Next, it employs this concept to revisit the shift initiated in the late 1970s toward PPPs set out in the [previous chapter](#), arguing that it was in part itself driven by human rights strategists. Then, several examples of human rights risk strategies are presented. Finally, the chapter relates three specific projects in which human rights risk strategies figure prominently.

4 M McDougal “International Law, Power and Policy: A Contemporary Conception” (1954) 82 *Recueil Des Cours* 1, 176.

5 M Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge London 1992) 44.

## II Human rights risk: the concept

Although many countries only recently shifted away from the public approach and toward the PPP approach, several have been pursuing projects under the latter approach since the 1970s and 1980s. Projects have been initiated and some even completed in such diverse infrastructure sectors as airports, dams, 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 investment banks, international lawyers, and insurance firms have been involved in infrastructure projects under both approaches and across sectors. At the same time, great variety exists across sectors in the companies, NGOs, governments, and other participants in specific projects. It is now possible to begin to ask whether “social impacts on the citizens of the host country are factored into the evaluation of potential” PPP projects.<sup>6</sup>

To analyze the implications of the shift for the realization of human rights, this chapter presents the concept of a “human rights risk.”<sup>7</sup> This risk is simply the possibility that a human rights problem will adversely affect the interests of those persons undertaking a project. Human rights risks are strategically constructed. Although strategists may draw on normative theories, human rights gain their meaning from social practice.<sup>8</sup> Along these lines, Upendra Baxi argues: “In the absence of commitment to evolve, expand, and entrench such structures, substantive human rights standards only constitute, in the famous Holmesian epigram, the ‘brooding omnipresence in the sky.’”<sup>9</sup> Project planners here include a range of actors, for example, international banks, transnational law firms, TNCs, and a segment of elites in fully industrialized and developing countries. Of course, the specific membership of each class of actors varies widely with respect to specific projects.

Human rights risk mitigation strategies are in turn employed by this group of project planners in the context of infrastructure projects. Planners are also strategic actors. Their mitigation strategies are often defensive tactics, responding to human rights strategies by NGOs and community groups. For example, if an NGO

6 L L Broome “Framing the Inquiry: The Social Impact of Project Finance – A Comment on Bjerre” (2002) 12 *Duke Journal of Comparative and International Law* 439, 441–442.

7 For a different and useful theory of human rights risk developed in parallel see E Marcks “Avoiding Liability for Human Rights Violations in Project Finance” (2001) 22 *Energy Law Journal* 301. For a discussion of “social risk” in the context of privatized projects see E J Woodhouse “Guerra del Agua and the Cochabamba Concession: Social Risk and Foreign Direct Investment in Public Infrastructure” (2003) 39 *Stanford Journal of International Law* 295. On risk generally see K J Arrow, *Essays in the Theory of Risk-Bearing* (North-Holland Publishing Company Amsterdam 1976); A Giddens “The Director’s Lectures: Runaway World: the Reith Lectures revisited: Lecture 2” (11/17/99); F H Knight, *Risk, Uncertainty and Profit* (Harper and Row Publishers New York 1921).

8 Felix S. Cohen refers to this as “the human meaning of law.” F S Cohen “The Problems of a Functional Jurisprudence” (June 1997) 1 *Modern Law Review* 5, 6.

9 U Baxi “What Happens Next Is Up to You: Human Rights at Risk in Dams and Development” (2001) 16 *American University International Law Review* 1507, 1517.

successfully mounts a campaign claiming that a project does not include indigenous communities in its decision making, project planners might respond by including members of these communities, as we will see in Chapter 6. This inclusion is a human rights risk mitigation strategy. It is designed to reduce the risk that NGO and community group human rights strategies will disrupt projects. Whether this counterstrategy in the end successfully mitigates the human rights risk often depends on the follow-up by the NGO and the local communities. For example, human rights groups might in turn argue that the project planners are not including indigenous groups to a degree that is acceptable. The dynamic strategic interaction between human rights advocates and project planners is the subject of this chapter and the book.

Also, in presenting human rights risk mitigation strategies as something designed to reduce the threat that human rights risks will disrupt projects, this is not to say that project planners do not themselves often adhere to human rights principles. Governments and corporations are complex organizations with members who advance human rights interests for their own ethical or strategic reasons. These members may work hard to institutionalize their personal beliefs in the context of a specific project. Oftentimes, these members work closely with members of certain NGOs in a spirit of partnership.<sup>10</sup>

Furthermore, NGOs and community groups are themselves diverse. Some actively promote human rights, whereas others pursue different agendas. In addition, the rationale for pursuing specific human rights strategies may be ambiguous or hidden by activists. Furthermore, certain NGOs participate in infrastructure projects, whereas others criticize from the outside.

Following the anthropologist Mary Douglas, risk is seen as something that is strategically constructed. Douglas and Aaron Wildavsky ask: “How, then, do people decide which risks to take and which to ignore?”<sup>11</sup> For example, NGOs and community groups might pursue specific strategies designed to bring certain human rights problems with a project to the attention of project planners. If successful, the result of these strategies would mean that project planners have to deal with the risk that a human rights problem will threaten or derail a project. Thus, this book is not just concerned with whether a project has adverse human rights impact but also with how such an impact is brought to the attention of project planners and then, in turn, how project planners respond. Its subject matter is also the ensuing back-and-forth between planners, on the one hand, and NGOs and community groups, on the other. Of course, the back-and-forth is often complex and contradictory. At times, different governments, companies, NGOs, community groups, and international

10 See e.g. 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* (Martinus Nijhoff Leiden 2005) 65.

11 M Douglas and A Wildavsky, *Risk and Culture: An Essay on the Selection of Technological and Environmental Dangers* (University of California Press London 1982).

organizations may disagree among themselves. Although the concern is primarily with how the dangers of a project are politicized,<sup>12</sup> at the same time, the realization of human rights is also a concern of this book. Importantly, a focus on risk strategies should not obscure “the reality of dangers.”<sup>13</sup>

Importantly, the concept of “human rights risk” is not an attempt to quantify economically the cost of making a project respect human rights, although project planners might do this. Oftentimes the negotiations between planners and NGOs are over the public perception of how a project manages human rights. It is argued here that in order for a normative-based human rights law to be successfully translated into practice, one must understand how human rights strategies are mounted and responded to. Human rights principles have little meaning if they do not produce concrete results. They are not just abstract principles in a “heaven of legal concepts,”<sup>14</sup> but instead the result of “a struggle, a struggle of nations, of the state power, of classes of individuals.”<sup>15</sup>

Traditionally, human rights law has been viewed as comprised of rights that may be exercised against governments. However, in the context of privatized international infrastructure projects, human rights are understood as actionable also against private companies. As we saw in Chapter 1, victims of alleged human rights violations bring claims against companies through transnational private law litigation. This is a growing area of law. At the same time, the vast majority of claims advance through non-litigation-based legal means. For example, human rights strategists often aim to achieve social change through the revision of contracts between financiers and project companies or else between contractor and subcontractor. Strategies target both governments and companies.

Human rights strategists generally make two types of claims. First, in the positive sense, strategists demand that projects deliver on their public good promises. Here human rights are used to advance goals involving the distribution of resources. For example, strategists argue that poor communities should have access to water supplies even if they cannot afford to pay market rate for them. Second, in the negative sense, strategists mount human rights strategies with the aim of ensuring that projects do not impinge on the human rights of project-affected communities in the construction stage wherein the human rights of certain communities are sacrificed in the short term “for an uncertain future.”<sup>16</sup> The textbook example here is the displacement of communities as a result of a large-scale infrastructure

12 M Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge London 1992) 29.

13 *Id.* Importantly, certain groups bear greater risk than others. U Beck, *World Risk Society* (Polity Press Maiden 1999); M M Cernea and C McDowell, eds, *Risks and Reconstruction: Experiences of Resettlers and Refugees* (World Bank Washington, DC 2000); M Douglas, *Risk and Blame: Essays in Cultural Theory* (Routledge London 1992); M Douglas and A Wildavsky, *Risk and Culture* (University of California Press Berkeley 1982); N Luhmann, *Risk: A Sociological Theory* (A de Gruyter New York 1993).

14 R von Jhering “Heaven of Legal Concepts” in M R Cohen and F S Cohen, eds, *Readings in Jurisprudence and Legal Philosophy* (Prentice Hall New York 1953) 678.

15 R von Jhering, *The Struggle for Law* (Callaghan and Company Chicago 1879) 15.

16 L Henkin, *The Age of Rights* (Columbia University Press New York 1990) 192.



project.<sup>17</sup> Louis Henkin identifies this dual nature of human rights: “it is the duty of society to respect the immunity or to provide the benefits” that come with human rights.<sup>18</sup>

How project planners respond to a human rights risk amounts to their human rights risk mitigation strategy. In other words, how do planners seek to minimize the impact of a human rights problem on their plans? Do they address the underlying human rights problem itself, making a project more respectful of human rights? Do they discredit the NGO or community group campaign? Do they negotiate with one NGO but not with another? Do they assuage the concerns of the NGOs and community groups by adopting guidelines? Do they adopt binding or nonbinding measures? Do they establish commissions to review human rights practices of specific projects?

In adopting a strategic orientation toward our understanding of human rights, this book does not concern itself primarily with the formal adapting of normative-based human rights rules from a public to a PPP context. Nonetheless, this is the subject of Chapter 6, which looks at the adapting of the World Bank Group human rights guidelines from public to privatized projects. At the same time, the human rights risk approach is informed by a vision of human rights in which rights to infrastructure, like other human rights, “are a *floor*, necessary to make other values . . . flourish.”<sup>19</sup> The Universal Declaration of Human Rights states: “the peoples of the United Nations have in the Charter . . . determined to promote social progress and better standards of life.”<sup>20</sup> Similarly, in the Four Freedoms Address, then U.S. President Franklin D. Roosevelt states that individuals have a right to “a wider and constantly rising standard of living.”<sup>21</sup> This, according to Roosevelt, involves “freedom from want, which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world.”<sup>22</sup> Infrastructure projects are a precondition to economic development and thus necessary for rising standards of living.<sup>23</sup> This book argues that an accurate understanding of the real-world meaning of these human rights principles depends on a close examination of how human rights

17 M M Cernea “The ‘Ripple Effect’ in Social Policy and its Political Content” in M B Likosky, ed, *Privatizing Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65.

18 L Henkin, *The Age of Rights* (Columbia University Press New York 1990) 3. Related, Isaiah Berlin distinguished between positive and negative liberties. I Berlin “Two Concepts of Liberty” in M J Sandel, ed, *Liberalism and Its Critics* (Blackwell Oxford 1984).

19 L Henkin, *The Age of Rights* (Columbia University Press New York 1990) 186.

20 “PREAMBLE” Universal Declaration of Human Rights, General Assembly Resolution 217A, U.N. Doc. A/810 (1948) 71.

21 F D Roosevelt “Address of the President of the United States” 87 Congressional Record 44, 46.

22 *Id.*

23 For a discussion of infrastructure projects as a precondition to high technology-based economic development see M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 129–159; M B Likosky “Infrastructure for Commerce” (2001) 22(1) Northwestern Journal of International Law and Business 1.

strategies are mounted and counterstrategies executed.<sup>24</sup> This is particularly true in a world of global legal pluralism,<sup>25</sup> wherein human rights obligations may be promised in one site but strategically subverted in another.

This book looks at the role of strategic actors in not only realizing human rights at the micro level, but also at the macro level in driving the shift from the public approach to the PPP approach in the first place. There, strategic actors mounted a human rights risk strategy designed to make public projects respect human rights. In response, it is argued here, project planners privatized projects. The *next section* relates this story.

### III Human rights risk: from public to private

As we saw in Chapter 2, the shift away from public and toward privatized projects has been orchestrated by a group of government and corporate actors. A number of reasons have been put forward for this shift, notably the inefficiency of state corporations, government deficits, and the organizational advantages of profit-based companies. Importantly, although governments have disbanded or sold public corporations, public officials and institutions have not exited the scene with privatization.<sup>26</sup> Instead, privatization involves new transnational public-private partnerships. Governments and their corporate partners often span multiple jurisdictions and are adept at coordinating multiple legal sites, drawing together public and private laws, domestic, foreign, and international. For example, a single project might be carried out by a foreign company with financing arranged through a multinational set of investment banks. Both the home state of the corporation and the host state might provide subsidies or insurance. If public institutions are still involved in privatized projects, then why has the locus of responsibility for human rights shifted away from states and toward private companies?

Although the reasons for the shift toward privatized projects are multiple and do involve efficiency considerations, human rights strategies also played a role in driving the shift. The conventional narrative draws attention to the importance of the exit of governments from the infrastructure business for efficiency reasons. However, even though governments did exit in their capacity as owners of public

24 For a collection that looks at how human rights operate in practice edited by an anthropologist see R Wilson, ed, *Human Rights: Culture and Context* (Pluto Press London 1997).

25 F G Snyder "Governing Globalisation" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 65.

26 This position contrasts with the position put forward by Gunther Teubner that the global economic legal order exists outside of and often in opposition to the state. G Teubner "'Global Bukowina': Legal Pluralism in the World Society" in G Teubner, ed, *Global Law Without a State* (Dartmouth Aldershot 1997) 3. For a critical discussion of Teubner's thesis see M B Likosky "Compound Corporations: The Public Law Foundations of *Lex Mercatoria*" (2003) 4 Non-State Actors and International Law 251. Francis Snyder argues that Teubner's thesis should be amended to recognize the role of states in transnational commerce. Snyder 71.

corporations, they remained involved through development corporations, public regulatory action, export credit agencies, international organizations, and so on. Projects themselves would not go forward in the private context without government support. For example, many international investment banks require government guarantees before they will advance capital to a private infrastructure company. Furthermore, if one looks at projects carried out under the public approach and then under the privatized approach, one sees a common set of international banks and law firms involved in projects under each approach. If governments remain involved during both period as well as other main project planners, then has the emperor simply changed his tailor? Have human rights strategists played a role in this change?

Before exploring these questions, it is important to stress that, although human rights did play a role in effectuating the shift, economic imperatives also drove it. The so-called Third World debt crisis left many countries without the available cash or credit necessary to finance large-scale infrastructure projects. Also, the public corporations charged with delivering infrastructures proved inefficient. Furthermore, in some infrastructure sectors, rapid technological change also militated toward the relaxing of restrictions on the participation of foreign private infrastructure companies, which possessed technological know-how. At the same time, with regard to human rights, a parallel story unfolded.

It is suggested here that we have the same emperor wearing different clothes, and it is possible to offer some explanations for what has driven the change in attire if we focus on the human rights risk approach. If, for the purposes of our discussion, we leave to one side the relatively recently independent states of the former Soviet Union and focus on the developing countries, we see a common set of actors engaging in human rights risk mitigation strategies involved across periods.

First, as hinted at earlier, international banks and law firms recur in projects across periods. Whereas during the development period these banks lent money to states, now they lend money to private corporations. There are a small number of such banks, most based in New York and London. The bankers rely on an equally small set of international law firms to legalize their infrastructure agreements across periods.<sup>27</sup>

Second, we have a common community of TNCs involved. Whereas during the development period these corporations partnered with state public corporations,<sup>28</sup> today they typically join forces with local private companies. It is not surprising

27 J Flood "Capital Markets, Globalisation and Global Elites" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 114. On transnational legal practice see R Abel "Transnational Legal Practice" (1994) 44 Case Western Reserve Law Review 737; L M Friedman "One World: Notes on the Emerging Legal Order" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* 23, 28.

28 On public corporations see e.g. Y Ghai, ed, *Law in the Political Economy of Public Enterprise: African Perspectives* (International Legal Centre New York 1971); Y Ghai, *The Legislature and Public Enterprises* (Ljubljana Yugoslavia 1981); Y Ghai "Law and Public Enterprise in Developing Countries"

to find the same firms involved, as, for most infrastructure sectors, technological know-how resides in the headquarters of a small number of firms. These firms share nationalities, with many being from the United States, the United Kingdom, France, Germany, Japan, Belgium, or Italy.

That said, the clothes look very different. What accounts, then, for the change? A number of explanations exist in the literature. Generally, the argument is made that development states and their public corporations were inefficient and corrupt. They ran up huge debts undertaking projects from the 1950s to the 1980s.<sup>29</sup> They could no longer afford to finance infrastructure projects, so the entrance of the market-based approach represented a fortuitous circumstance. This argument is persuasive in many respects. At the same time, it is suggested here that this shift also was a golden parachute. In part, it was the success of human rights groups that drove the shift toward neoliberalism. The market-based approach is, in certain respects, a counterinsurgency – a human rights risk mitigation strategy.

We must ask how the group of persons undertaking an infrastructure project approaches human rights under the public frame and then under the PPP frame. Under the public frame, human rights were initially managed by the state. We see this in the development discourse, which focuses on the state as the guarantor of human rights of its subjects. This position is traceable to decolonization, in which the remedy for colonialism was a universally held human right by previously colonized people. This right manifested itself in the creation of sovereign states.<sup>30</sup> Thus, the state was the chosen mode of managing human rights risks during the public phase. From the perspective of the small dominant transnational group driving the infrastructure sector, this meant that claims of inequitable infrastructure policies were subsumed under nation-building discourse. If the state was involved, it was assumed that it was good for the human rights of all.

However, much of this changed in the 1980s, as the international human rights movement succeeded in uncoupling human rights from the state. Human rights became something that could even be exercised against states. In the infrastructure field, this meant that groups began to hold the state accountable for human rights abuses perpetrated in the course of carrying out infrastructure projects. Paradoxically, as these groups succeeded in their antistate campaigns, they became embedded in the state. Human rights activists and organizations in country after country began to populate state institutions. As Jonathan A. Fox and L. David Brown conclude from a series of case studies, funded by the MacArthur Foundation, on

---

in V V Ramanadham, ed, *Public Enterprise and the Developing World* (Croom Helm London 1984) 59.

29 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. See also A O Krueger “Government Failures in Development” (1990) 4 *Journal of Economic Perspectives* 9.

30 M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 4–5.

how transnational coalitions target intergovernmental agencies in the infrastructure sector,<sup>31</sup> we saw the same thing happen at the international level. Nongovernmental organizations began to participate in lawmaking, to monitor compliance with international human rights laws, and to conduct human rights and environmental risk assessments for World Bank projects.

However, just as the domestic and international public institutions realize their public potential in the context of infrastructure projects, we see the recession of the state and the World Bank from the infrastructure business with the shift to the PPP approach. It was the success of human rights activists that in part drove the state and the World Bank out of the game. By disclaiming state institutions that were now populated by NGOs and community groups, project planners could avoid the “costs” of human rights and environmentalism. But the question remains: have they entirely left the game as promised?

Perhaps not. Let us assume for the moment – and this is a debatable point – that the parties to an infrastructure project seek to mitigate human rights risks at the least cost to themselves. And, as suggested earlier, let us define human rights risks as the probability that human rights problems will upset the plans of the project planners. Then we might argue that it was least costly, in the short term, to disclaim the state and World Bank as they became democratic. Democracy, human rights, and the environment were viewed as costly: thus, the shift to the market.

Now, the same group of parties involved in the projects all along remains. They just wear different institutional clothes. So the public corporations privatize; however, many of the same individuals may maintain control or influence over the private entity. The U.S., U.K., European, and Japanese governments stop offering direct aid to developing countries. In the past, when the United States, for example, gave money to Malaysia, it stipulated as a condition of that aid that the Malaysian government would involve a U.S. corporation in the particular infrastructure project receiving financial assistance. Today, generally we see a similar process, albeit in different institutional guises. Political risk insurance is provided by the U.S. Export-Import Bank, for example, when U.S. corporations are involved overseas. This insurance gives U.S. companies a public law boost. In the terminology put forth in Chapter 2, such TNCs are compound corporations.

The state has changed its institutional configuration; what persists, however, is the use of the state as an instrumentality by a small group of private persons. The state has become oligarchized.<sup>32</sup> The group running the infrastructure show

31 J A Fox and L D Brown, eds, *The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements* (MIT Press Cambridge 1998). For a follow-up article see L D Brown and J Fox “Transnational Civil Society Coalitions and the World Bank: Lessons from Project and Policy Influence Campaigns” (2000) 16(1) IDR Reports: A Continual Series of Occasional Papers, Institute for Development Research, Boston.

32 See M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005) 23–51; M B Likosky “Response to George” in M Gibney, ed, *Globalizing Rights: The 1999 Oxford Amnesty Lectures* (Oxford University Press Oxford 2002) 34.

has employed a macro-level human rights risk mitigation strategy, changing the institutional guises through which it operates in order to circumvent demands made by human rights groups.

This continuity is acceptable. We are told, however, that other elements of the state that are more publicly accountable lack the capacity to stay in the infrastructure game under the PPP approach. Human rights costs are then externalized onto those persons least able to bear the costs. Privatization is a subterfuge. At the same time, in response to this macro-level human rights risk mitigation strategy, human rights strategists have begun to adapt their human rights strategies from the public context into the privatization context. We next turn to catalogue some of these strategies and then to look briefly at how they play out in specific contexts. Part II of the book then looks in more detail at how this targeting of privatization by human rights strategists is happening in a number of countries and in the context of different infrastructure projects. Importantly, human rights strategists discussed in the second part of the book do not always lie outside of the state. For example, as we will see in the context of infrastructure reconstruction in Iraq and antiterrorist measures, the human rights reality of government participation in privatization is often complex, contradictory, and ambiguous.

## IV Human rights risk strategies

NGOs and community groups pursue a range of strategies aimed at having privatized projects respect human rights. These strategies include litigation, changes to contracts, conditions on international and bilateral loan agreements, guidelines, white papers, and so on. What the strategies look like in practice varies depending on the targeted party, the country, the type of infrastructure, the stage of the project, and so on. A successful strategy in one context may fall flat in another. Furthermore, strategies are used in conjunction with one another. In addition, project planners devise their own counterstrategies that are sensitive to many of the same diverse factors as the human rights strategies themselves are.

The relationship between privatized projects and human rights is complex and contradictory. Planners justify projects based on their ability to produce public goods, the essence of human rights in the positive sense. At the same time, the construction of infrastructure projects is typically associated with human rights abuses. A growing body of interdisciplinary literature examines attempts to realize human rights through legal means.

### A Human rights risk strategies

As we saw in Chapter 1, transnational litigation is one area in which human rights risk strategies and counter-strategies are important. This chapter looks at three other areas: (1) international NGO efforts to reduce corruption in the tendering process of projects; (2) the emergence of market-based strategies for realizing human rights,

such as codes of conduct and ethical investment movements; and (3) political risk insurance.<sup>33</sup>

It is not always clear whether these areas represent human rights risk strategies or mitigation strategies. Often it is a little of both. Sally Engle Merry tells us:

clearly, the law is neither purely a tool for imposing the rule of dominant groups nor a weapon for resistance, but a site of power, defined by its texts, its practices, and its practioners, available to those who are able to turn it for their purposes.<sup>34</sup>

For example, a corporate code of conduct could be seen as the culmination of an NGO strategy. On the other hand, it could equally be seen as a countermeasure pursued by companies. It is a paradoxical aspect of law that it can simultaneously embody both of these aspects. Here stands the overlap of human rights risk strategies and mitigation measures.

### 1 Anticorruption legislation

An important legal strategy designed to reduce human rights abuses in infrastructure projects targets corruption in the tendering processes of projects. The transnational NGO Transparency International has spearheaded this movement. Notable successes have been achieved in intergovernmental fora such as the Organization for Economic Cooperation and Development (OECD) and the International Chamber of Commerce. In addition, the U.S. Foreign Corrupt Practices Act has been an important development. According to Susan Rose-Ackerman, the anticorruption strategies have succeeded in establishing that parties to an infrastructure project are under a normative obligation to reduce corruption in the tendering process. This obligation resulted in a human rights risk mitigation strategy by project planners – the adoption of various legal codes, both state and nonstate.<sup>35</sup> Rose-Ackerman

33 Another important area is the ballooning of intergovernmental organization inspection panels and ombudsmen devoted to addressing human rights concerns arising in the context of international infrastructure projects. Most of this literature concerns itself with public rather than privatized projects. See D D Bradlow “International Organizations and Private Complaints: The Case of the World Bank Inspection Panel” (1993–1994) *Virginia Journal of International Law* 553; L B de Chazournes “Public Participation in Decision-Making: The World Bank Inspection Panel” (1999) 31 *Studies in Transnational Legal Policy* 84; K J Dunkerton “World Bank Inspection Panel and Its Affect on Lending Accountability to Citizens of Borrowing Nations” (1995) 5 *University of Baltimore Journal of Environmental Law* 226; E Hey “World Bank Inspection Panel: Towards the Recognition of a New Legally Relevant Relationship in International Law” (1997) 2 *Hofstra Law and Policy Symposium* 61; D Hunter “Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People” (2003) 4 *Chicago Journal of International Law* 201.

34 S E Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton University Press Princeton, New Jersey 2000) 265.

35 S Rose-Ackerman “Corruption and the Global Corporation: Ethical Obligations and Workable Strategies” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 148; S Rose-Ackerman, *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press New York 1999); S Rose-Ackerman, *Corruption: A Study in Political Economy* (Academic Press New York 1978).



argues that this corruption is not only morally bankrupt but also economically inefficient.<sup>36</sup>

Although this movement has convincingly established a normative obligation not to engage in corruption and produced notable legislative successes, further sociolegal work is necessary to understand how these codes are used in practice to stem human rights abuses. Questions include: What is the relationship between political corruption and human rights? Do anticorruption codes function differently according to the legal culture into which they are introduced?<sup>37</sup> Does the nature of corruption vary from one society to the next?<sup>38</sup> Do laws go unenforced?

## 2 Intergovernmental codes

Increasingly, NGOs are developing human rights strategies that bypass the state and target companies directly. These strategies aim to produce market-based mechanisms for reducing human rights risks, including corporate codes of conduct,<sup>39</sup> and ethical pension funds. Human rights groups often pursue these strategies through intergovernmental organizations such as the United Nations and the OECD. For example, model codes for companies have been pursued by the International Labour Organisation (ILO)<sup>40</sup> and by the United Nations Center on Transnational Corporations.<sup>41</sup> International investment banks that finance infrastructure projects adopted the Equator Principles, which will be discussed in detail in Chapter 6.<sup>42</sup> These

36 S Rose-Ackerman “Corruption and the Global Corporation: Ethical Obligations and Workable Strategies” 151.

37 See D Nelken, “Changing Legal Cultures” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* 41.

38 See W L Twining “Reviving General Jurisprudence” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* 3. Contra H H Koh “Opening Remarks: Transnational Legal Process Illuminated” in *Transnational Legal Processes* 327.

39 On human rights, transnational companies, and codes see M K Addo, ed, *Human Rights Standards and the Responsibility of Transnational Corporations* (Kluwer Law International London 1999); N Horn, *Legal Problems of Codes of Conduct for Multinational Enterprises* (Kluwer Deventer, The Netherlands 1980); P T Muchlinski “Attempts to Extend the Accountability of Transnational Corporations: The Role of UNCTAD” in M T Kamminga and S Zia-Zarifi, eds, *Liability of Multinational Corporations Under International Law* (Kluwer The Hague 2000) 97; P Muchlinski “Human Rights, Social Responsibility and the Regulation of International Business: The Development of International Standards by Intergovernmental Organisations” (2003) 3 Non-State Actors and International Law 123; P Muchlinski “International Business Regulation: An Ethical Discourse in the Making?” in T Campbell and S Miller, eds, *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organisations* (Kluwer Academic Publishers The Netherlands 2004) 81; P T Muchlinski, *Multinational Enterprises and the Law* (Blackwell Publishers Ltd Oxford 1995) 457–490.

40 Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (3d ed. 2001) (1977), at <http://www.ilo.org/public/english/employment/multi/download/english.pdf>.

41 United Nations Centre on Transnational Corporations, *Code of Conduct on Transnational Corporations* (1988) (efforts at finalizing the United Nations code were abandoned in 1992).

42 The United Nations Global Compact is another important non-state measure. On the U.N. Global Compact see B King “U.N. Global Compact: Responsibility for Human Rights, Labor Relations, and the Environment in Developing Nations” (2001) 34 *Cornell International Law Journal* 481; W H Meyer and B Stefanova “Human Rights, the U.N. Global Compact, and Global Governance”



Principles are market-based guidelines that set high human rights standards for projects. However, they lack enforcement mechanisms. In fact, these Principles and other codes like them rarely have enforcement mechanisms, leading commentators to praise the moral aspirations of codes but to question their efficacy.<sup>43</sup> At the same time, the absence of enforcement mechanisms does not necessarily preclude their successful implementation. For example, no study has systematically examined how projects adhering to the Equator Principles treat human rights.

For the purposes of this chapter, these guidelines and codes of conduct represent an important type of human rights risk mitigation strategy. International NGOs have succeeded in having human rights principles translated into guidelines and codes. Companies have responded with a human rights risk mitigation strategy, formulating and adopting these instruments. The relationship between what the nonstate actors had in mind in advancing human rights reforms and what the project planners are pursuing requires further examination. Although many question the efficacy of instruments, little is known about how they function in practice. Drafters recognize that they are not self-executing. Thus, participants employ these guidelines and codes as “instruments in a continuous process of defense and attack”<sup>44</sup> in ongoing negotiations over human rights. The specific role of these guidelines and codes in the ongoing negotiations requires further study. Also, instruments targeting the retail industry have capitalized on the importance of brand names. Although brand name is important to infrastructure companies such as Shell or Chevron, the bulk of the companies in the infrastructure sector do not have brand-name recognition.

### 3 Political risk insurance

With the privatization and internationalization of infrastructure projects, companies have found themselves operating in political contexts characterized by high levels of political risk. In many emerging markets, the willingness of international investment banks to underwrite projects depends on the project companies’ ability to secure political risk insurance.<sup>45</sup> Such insurance is provided by both public and private organizations.

---

(2001) 34 *Cornell International Law Journal* 501; J G Ruggie “Global-governance.net: Global Compact as Learning Network” (2001) 7 *Global Governance* 371; L A Tavis “Novartis and the U.N. Global Compact Initiative” (2003) 36 *Vanderbilt Journal of Transnational Law* 735; A M Taylor “U.N. and the Global Compact” (2000–2001) 17 *New York Law School Journal of Human Rights* 975.

43 See e.g., C McCrudden “Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?” (1999) 19 *Oxford Journal of Legal Studies* 167.

44 M McDougal “International Law, Power and Policy: A Contemporary Conception” (1954) 82 *Recueil Des Cours* 1, 176.

45 W F Megevick, Jr. “Project Financing Update 2004: Reworking and Building New Projects in Developing Markets: Loan and Security Documentation in International Infrastructure Projects from a Lender’s Perspective” (October 2004) 866 *Practicing Law Institute PLI Order No.* 5347 73.

These organizations are both national and international.<sup>46</sup> They include Lloyds of London, American International Group, BPL Global, the U.S. Export-Import Bank and Overseas Private Investment Corporation,<sup>47</sup> the World Bank's Multilateral Investment Guarantee Agency, as well as many other national export credit agencies.<sup>48</sup> The public political risk insurers have their roots in the post-World War II period. They facilitated investment in both Western Europe and also in Asia, Africa, and Latin America.<sup>49</sup> Many of the organizations are of more recent origins. For example, the Overseas Private Investment Corporation was established in 1971 and the Multilateral Investment Guarantee Agency was formed in 1988.<sup>50</sup> Major private insurers have been offering political risk insurance since the early 1970s.<sup>51</sup> The public insurers typically provide similar forms of coverage. However, national export credit agencies generally finance the activities of only their corporate nationals. In large-scale projects, involving companies from multiple jurisdiction, diverse export credit agencies work together to ensure that project financing is coordinated.

Realizing the essential role that export credit agencies play in ensuring that projects are financially viable, NGOs increasingly have targeted them. One NGO, the Export Credit Agency Watch, issued the Jakarta Declaration for Reform of Official Export Credit Investment Insurance Agencies in an attempt to subject agencies to formal rules.<sup>52</sup> Campaigns have elicited concessions from government agencies. For example, the U.S. Export-Import Bank now holds the projects that it finances to a higher international standard than other export credit agencies.

One high profile case has targeted the U.K.'s Export Credits Guarantee Department's role in the Ilisu Dam Project in relation to large-scale displacement of

46 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.

47 M Liu "Project Financing 2001; Building Infrastructure Projects in Developing Markets: Mitigating the Political Risk of Infrastructure Projects with OPIC Political Risk Insurance" (April 2001) 822 *Practising Law Institute Commercial Law and Practice Course Handbook Series PLI Order No. A0-0076 441*.

48 R Short "Essay: Export Credit Agencies, Project Finance and Commercial Risk: Whose Risk Is It, Anyway?" (April 2001) 24 *Fordham International Law Journal* 1371. These agencies will be discussed in greater detail in Chapter 5. For a discussion of these agencies in the project finance area see L L Broome "Framing the Inquiry: The Social Impact of Project Finance – A Comment on Bjerre" (2002) 12 *Duke Journal of Comparative and International Law* 439, 442–443. Rating agencies are also significant. For a discussion of these agencies in the context of securitization see J Flood "Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitisation and Credit Rating Agencies" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* 147. On the influence of the rating agencies see J Barratt "Financing Projects through the Capital Markets – A South East Asian Perspective" in F D Oditah *The Future for the Global Securities Market: Legal and Regulatory Aspects* (Clarendon Press Oxford 1996) 95.

49 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* 105, 109–110.

50 *Id.* 112–113.

51 *Id.* 114.

52 <http://www.eca-watch.org/goals/jakartadec.html>.

peoples.<sup>53</sup> Friends of the Earth, an NGO, wants guidelines developed by the World Commission on Dams to be applied to the private project. This dam mixes public and private financing, both domestic and international.<sup>54</sup> As with most organized activity targeting the insurance industry, the campaign is a work in progress.

## B Mitigating human rights risks in specific projects

The goal of this book is to explore how attempts to realize human rights through legal strategies operate in action. In the context of infrastructure projects undertaken in developing countries, the book focuses on how these strategies are initiated, why parties engage in them, whether the strategies produce their intended results, and what their impact is upon human rights. It adopts a dynamic perspective, examining the different actors who initiate these strategies, the interrelations among strategies, and the role that these strategies play as an infrastructure project unfolds over time. Thus, the power of human rights law is measured by evaluating how it functions in practice. This section looks briefly at several projects, including a public infrastructure project – the Narmada Dam in India; a PPP project – the North-South Expressway in Malaysia; and also a mixed state- and PPP-infrastructure project – the Mexican Puebla-Panama Plan.

A number of questions are asked of these projects and the ones in the next part of the book:

- How do different parties identify human rights problems? How do actors decide which problems to select for attention and which ones to ignore? What types of strategies do they devise to deal with these problems? When are the strategies directed at the state, foreign governments, international organizations, NGOs, TNCs, and so on? Are certain strategies more effective than others? If strategies do not produce their intended results, what effect do they have on the behavior of other actors? How do parties respond to strategies directed at them? Do they change their behavior? Do they initiate counterstrategies? Do parties coordinate strategies? How do various strategies interact with one another? How do actors use laws, official reports, protests, codes of conduct, and so on as tactics in ongoing struggles for control over an infrastructure project?
- Does a correlation exist between the parties involved in these strategies and respect for human rights? Does the involvement of certain actors, for example, interstate organizations, NGOs, specific host, or foreign governments have any bearing on the realization of human rights? If so, what accounts for these differences? Do projects that take human rights risks into account early on avoid problems at late stages of a project?
- Are projects funded by the state more respectful of human rights than PPPs? Does the role of the state in managing human rights problems differ under each approach?

53 L Boman “Image and Reality” (November 2001) Project Finance.

54 S Stern “International Project Finance: The Ilisu Dam Project in 2004 and the Development of Common Guidelines and Standards for Export Credit Agencies” (Spring 2004) 10(1) Journal of Structured and Project Finance 46.

Do TNCs take a more prominent role with regard to human rights under the latter approach? Are different human rights strategies initiated under each approach? Are certain strategies more effective under one approach than the other? Are strategies developed under the state-financed approach being adapted successfully to the privatized projects?

- Do strategies vary according to the country in which an infrastructure project is undertaken, the infrastructure sector, or the stage of the project? Do energy projects raise different human rights issues than roads, dams than airports, and oil pipelines than telecommunications lines? Are human rights problems different at the development, tendering, and construction stages of a project?

As public and private parties invest large amounts of energy and resources to manage human rights risks, the answers to these questions have important policy implications. If we can determine which strategies or combination of strategies produce the best results, energy and resources can be allocated more effectively. Thus, exploration of these issues may produce a fuller understanding of how human rights strategies operate in practice and, in doing so, contribute to the realization of human rights.

As indicated earlier, the infrastructure field is tremendously complex, involving heterogeneous actors and also multiple countries and sectors of the economy. For this reason, it will not be possible to arrive at ironclad rules regarding which human rights risk strategies are most effective in all circumstances. Rather, a methodology has been put forth for approaching the study of the relationship between infrastructure projects and human rights capable of application to past, present, and future projects. To give an additional idea of how these issues work in practice, three brief case studies will be presented here. The analysis will be limited with greater attention paid to how human rights strategies operate in the context of infrastructure projects in the next part of this book.

## 1 The public model: The Narmada Dam in India

In 1991, in response to highly effective community group and NGO campaigns, the World Bank established an Independent Review to examine whether it should continue financial support of the Sardar Sarovar Dams along the Narmada River.<sup>55</sup> These dams, initiated in 1987, together were the most ambitious dam project undertaken to date. Citing the project's failure to deal appropriately with environmental and human rights problems central to the undertaking, the World Bank withdrew support for the project.<sup>56</sup> It also helped establish the World Commission on Dams,

55 *Sardar Sarovar: The Report of the Independent Review (1992)*; see also Friends of the River Narmada, *The Sardar Sarovar Dam: An Introduction*, at <http://www.narmada.org/sardarsarovar.html>.

56 World Bank Operations Evaluation Department, *Learning from Narmada* <http://wbln0018.worldbank.org/oed/oeddoclib.nsf/3ff836dc39b23cef85256885007b956b/12a795722ea20f6e852567f5005d8933?opendocument> (5/1/95).

comprising leading governmental and nongovernmental actors, to assess the environmental impact of future projects.<sup>57</sup>

The withdrawal of World Bank support did not put an end to this paradigmatic example of the state-financed approach. Subsequently, public interest groups brought a case in the Indian federal courts to have the dam project aborted. The court responded by ordering the government to finish the dam speedily,<sup>58</sup> and protests did not subside.<sup>59</sup>

The Narmada dams have been well reported; however, future research along the lines suggested would explore the effects, direct and indirect, of the Independent Review for the project itself. No doubt, the Review has resulted in closer scrutiny of dams financed by the World Bank. The Bank, however, withdrew its funding from the Narmada dams in response to this review, and it is not altogether clear whether this withdrawal has ultimately been favorable for human rights groups. In fact, the World Bank's ongoing participation in the dams would perhaps have ensured the availability of a forum for bringing human rights claims. Importantly Upendra Baxi makes the point that the Commission's Report includes "a whole range of new rights, tactics, and strategies" for NGOs.<sup>60</sup>

## 2 The PPP model: The Malaysian North-South Expressway

In the late 1980s, the Malaysian government initiated the North-South Expressway, the most ambitious privately financed project undertaken in East Asia since decolonization. The Expressway would run the entire length of Peninsular Malaysia from Thailand to Singapore. Project planners employed a then innovative PPP approach, the build-operate-transfer (BOT) contract, under which a private company builds and operates a road. After costs are recouped and profits captured through toll charges, control over the project cedes to the government. The construction phase was completed well ahead of schedule and widely touted by experts and government officials as an unqualified success. The BOT contract has since become standard practice for PPP endeavors.

Although the government offered a rosy picture of the road, the project had faced a number of human rights problems during the tendering phase. At the time, a high-profile campaign was launched in parliament against the project by the opposition leader, Lim Kit Siang. The contract had been awarded to a well-connected and inexperienced entrepreneur with strong ties to the ruling party. In fact, his company, United Engineers, was a subsidiary company of the ruling party.

57 For more information on the World Commission on Dams, see its website, at <http://www.dams.org/>. For a reflection on the World Commission on Dams see U Baxi "What Happens Next Is Up to You: Human Rights at Risk in Dams and Development" (2001) 16 *American University International Law Review* 1507.

58 P Popham "Villagers Fight to Save Homes from Dam to Halt Dam" *Independent* 16 (10/19/00).

59 L Bavadam "Going Beyond the Narmada Valley" (11/11-11/24/00) *Frontline* <http://www.flonnet.com/fl1723/17230400.htm>.

60 U Baxi "What Happens Next Is Up to You: Human Rights at Risk in Dams and Development" (2001) 16 *American University International Law Review* 1507, 1509.

Lim Kit Siang brought a lawsuit against the government alleging that the tendering process constituted corruption by government officials.<sup>61</sup> Although the claim did not prevail in the courts, the government nonetheless retaliated by detaining Siang under the Internal Securities Act. A high court judge also was removed because of a judgment related to the project.<sup>62</sup>

Academics, officials, and the press portrayed the human rights dimensions of the North-South Expressway as a domestic squabble. References to protests, jailings, domestic litigation, and crony capitalism highlight the domestic character of the project. This presentation, however, underestimates the transnational character of the Expressway, which was itself a paradigmatic example of the PPP approach. For example, although the contract was awarded to a domestic company, the project was carried out through a complex scheme involving over two hundred foreign and domestic subcontractors. Also, the feasibility studies were financed and conducted by an international consortium of businesses, including Mitsui (Japan), Taylor Woodrow (United Kingdom), and Dragages (France).<sup>63</sup>

With time, a countrywide demonstration was orchestrated against increased tolls, highlighting the need to take a longitudinal perspective on plans.<sup>64</sup> The right to increase tolls was contractualized. At least one opposition leader has suggested that deprivatization would be desirable, with the government Employee Provident Fund taking over the project.<sup>65</sup> We must ask, however, whether this might be just another way of paying off foreign and domestic corporate nationals who are having difficulty turning a profit off of the road.

### 3 A mixed project: The Puebla-Panama Plan in Mexico

In March 2001, Mexican President Vincente Fox announced the Puebla-Panama Plan, designed to transform the long-neglected and poverty-stricken southern region of the country into a prosperous corridor. Through airports, railways, and ports, the plan would connect the southern states with Asia, Central America, Europe, and the United States. Not insignificantly, the announcement coincided in time with the march on the capital by the Zapatista National Liberation Army. Fox presented the Plan as a well-intentioned offer of reconciliation to the Zapatistas, who had taken up arms against the government in 1994 in part to protest a lack of federal infrastructure investment into Chiapas.<sup>66</sup>

61 M B Likosky "Infrastructure for Commerce" (2001) 22 *Northwestern Journal of International Law and Business* 1, 29.

62 On controversy surrounding the treatment of the judiciary in the country see T S Abas, *Sir John Foster Galaway Memorial Lecture: The Role of the Independent Judiciary* (Promarketing Publications Kuala Lumpur, Malaysia 1989).

63 Likosky 29.

64 L K Siang, Speech at DAP Public Forum on "Justice for All" at <http://www.malaysia.net/dap/sg1507.htm>.

65 *Id.*

66 For more information about the Plan, see generally the articles collected at the Global Exchange Plan Puebla Panama News Archive at <http://www.globalexchange.org/countries/mexico/ppp/archive/html>.

Rather than viewing the Plan as a well-intentioned offer, the Zapatistas argued that it represented a counterinsurgency measure, claiming that it would give indigenous peoples no more than “the crumbs left over from capitalist neoliberal development.”<sup>67</sup> They pointed out that the Plan would dispossess the southern indigenous communities of their lands without paying adequate compensation.<sup>68</sup>

According to conventional representations, the Plan’s relations with human rights are a predominately domestic affair. Thus, the Plan has overwhelmingly been presented as a domestic controversy between the Fox administration and the Zapatistas. Here the specter of global capitalism does no more than infuse the language of the contentious political discourse. This framing, however, neglects a number of key issues. The planning stages were funded by several international organizations:

The Inter-American Development Bank hosted a meeting of multilateral and bilateral agencies to explore support for an effort to promote integration and sustainable development in the so-called Meso-American region. Joining with the IDB on June 29th were delegates from the World Bank, the International Finance Corporation, the International Monetary Fund, the Central American Bank for Economic Integration, the Andean Development Corporation, the UN Development Programme, the UN Commission for Latin America and the Caribbean, the US Agency for International Development, and the Japan Bank for International Cooperation.<sup>69</sup>

Also, several months before announcing the Plan in parliament, Fox traveled through Asia and Europe to raise capital for the project.

Although the Plan is still in the early stages of planning, it is uncertain whether it will be undertaken through the state-financed or PPP approach. The answer to this question is confused by the fact that the Plan comprises numerous infrastructure projects. Thus, although Fox has indicated that several projects will be undertaken through the PPP approach, it is still possible that the state-financed approach will be employed in certain instances. Although this makes it difficult to identify clear-cut and narrowly tailored research questions, it does provide an opportunity to witness the unfolding of human rights risk mitigation strategies.

It is not yet clear whether the Zapatistas have allied themselves with specific international NGOs or foreign governments. The Zapatistas are internationally well-connected. The relationship among various legal regimes and the Plan is also already complex. Domestically, Fox has used legislation, notably the indigenous human rights bill, as an attempt to mitigate human rights risks engendered by the plan. The Zapatistas have put forth a different human rights risk assessment and

67 IPS, “Development or Destruction?” *Latinamerica Press* at <http://www.lapress.org/article.asp?lancode=1&artcode=2214> (5/14/01).

68 B Weinberg “Zapistas Present Mexico with and Issue of Peace” *Common Dreams NewsCenter* at <http://www.commondreams.org/views01/0314-02.htm> (3/14/02).

69 *Active Cooperation Among Multilateral Banks: A New Trend, International Financial Institutions Network (IFInet)* at <http://www.infoexport.gc.ca/ifinet/news/archives2001-e.htm> (8/13/01).

continue to utilize protests to argue that the Fox human rights mitigation strategy will not rectify the underlying human rights problems in Chiapas. Instead, they claim that the Fox mitigation strategy will aggravate human rights problems.<sup>70</sup>

## V Conclusion

This chapter focused on how human rights strategies are initiated, why parties engage in them, whether the strategies produce their intended results, and what their impact is on human rights. It adopted a dynamic perspective, examining the different actors who initiate these strategies, the interrelations among strategies, and also the role that these strategies play as an infrastructure project unfolds over time. Thus, the power of human rights law was measured by evaluating how it functions in practice.

Now that we have looked at how human rights risks arise in the context of PPPs generally, we will turn to a series of detailed case studies. As indicated at the beginning of this chapter, human rights risks arise in different ways in various infrastructure projects. It is necessary first to attend to this variation before exploring possible common issues raised.

<sup>70</sup> See generally Global Exchange Plan Puebla Panama News Archive at <http://www.globalexchange.org/countries/mexico/ppp/archive/html>.