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Mitigating Human Rights Risks Under State-Financed and Privatized Infrastructure Projects

MICHAEL B. LIKOSKY*

INTRODUCTION

Infrastructure projects undertaken in developing countries and transition societies are presently sites of intense human rights struggles. For instance, public outcry resulting from a well-orchestrated non-governmental campaign led the World Bank to withdraw support for a series of state-sponsored dam projects along the Narmada River in India. The Zapatistas have responded to President Vincente Fox's offer to build a land-based Panama Canal through the Chiapas region by claiming that it would give indigenous peoples no more than "the crumbs left over from capitalist neo-liberal development."¹ Suits have been filed in U.S. courts against Shell and Chevron² for their alleged collusion with the Nigerian government in squelching peaceful protests against the laying of oil pipelines in Nigeria. These suits are high-profile instances of what Harold Koh refers to as "transnational public law litigation" and Anne-Marie Slaughter and David Bosco term "plaintiff's diplomacy."³ Again and again, we see the battles over human rights being fought on the terrain of the state. The recent shift away from state sponsorship of projects and towards market-based approaches, however, threatens to change the nature of our narratives and the possibility of realizing a human rights-based development model.

According to conventional accounts, from the 1950s to roughly the 1990s, infrastructure projects in many countries were financed and carried out by

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1. IPS, *Development or Destruction?*, LATINAMERICA PRESS (May 14, 2001), at <http://www.la-press.org/article.asp?lancode=1&artcode=2214>.

2. See *Bowoto v. Chevron Corp.*, Case No. C99-2506 (N.D. Cal.); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

3. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 102 (2000).

states.⁴ When the state had insufficient capital or technological capacity, either the World Bank or private transnational corporations entered the project arena in an auxiliary capacity. As a result, when human rights problems arose in connection with infrastructure projects, non-governmental organizations (NGOs) and community groups targeted the state and, on occasion, the World Bank.⁵ Perhaps coincidentally, as these non-state initiated campaigns succeeded in holding states and the World Bank accountable for their roles in perpetrating human rights abuses, we were told that, due to mismanagement by and incapacity of the state and the World Bank, both parties were exiting the infrastructure business.⁶

A shift is underway, initiated in many countries during the 1980s, away from the development approach and towards the global project finance approach to infrastructure projects. Under the global project finance approach, neither the state nor the World Bank finance or carry out infrastructure projects. Instead, private companies seek funding for projects through international capital markets and then build and operate projects to recoup costs and to garner a profit.⁷ What this shift will mean for the protection of human rights is uncertain. Within the development paradigm, NGOs directed their strategies at states and the World Bank. On the level of argumentation, they successfully transformed the development discourse, promoting the idea of a more people-centered and environmentally friendly “sustainable development” approach. With the initiation of global project finance, the constellation of actors involved in specific projects changes and the discourse of development is supplanted by the discourse of the market. The shift in the roster and in the roles of participants, and the transformation of the justificatory discourse, raises questions regarding how NGOs will convince project planners to take human rights risks into account when undertaking infrastructure projects.

Although many countries have only recently shifted away from the development approach and towards the global project finance approach, several countries have been pursuing projects under the latter approach since the late 1980s. Projects have been initiated and some even completed in such diverse infrastruc-

4. Michael B. Likosky, *Editor's Introduction: Transnational Law in the Context of Power Disparities*, in *TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES* at xxiv (Michael B. Likosky ed., 2002) [hereinafter *TRANSNATIONAL LEGAL PROCESSES*].

5. *Id.*

6. *Id.*

7. *Id.*

ture sectors as airports, dams, mining, power, roads, and telecommunications. We see a common mode of argumentation, with the market discourse driving the shift across sectors. Quite often, a small set of investment banks, international lawyers, and insurance firms have been involved in infrastructure projects under both approaches. At the same time, great variety exists across sectors in the companies, NGOs, governments, and other participants in specific projects.

To analyze the implications of this shift for the realization of human rights, this article employs the concept of a “human rights risk.” A human rights risk is simply the possibility that a human rights problem will adversely affect the interests of those persons undertaking an infrastructure project. Given the fact that a common set of actors—e.g. international bankers, transnational law firms, transnational corporations, a segment of elites in fully industrialized and developing countries—is involved in projects across periods, we may say that this group constitutes “those persons undertaking an infrastructure project.” This article inquires how this group approaches human rights under the development frame and then under the global project finance frame. Part I examines the various strategies undertaken by NGOs and community groups to manage human rights risks in the context of infrastructure projects—transnational public law litigation, anti-corruption legislation, and market-based mechanisms. Part II then compares how these strategies are employed with reference to projects undertaken under the development and global project finance approaches, examining the Narmada dams in India, the North-South Expressway in Malaysia, and the recently proposed Puebla-Panama Plan in Mexico. In conclusion, several observations are made regarding the significance of the shift towards privatized infrastructure projects for the realization of human rights.

I. STRATEGIES FOR MITIGATING HUMAN RIGHTS RISKS

Infrastructure projects are presently sites of intense struggles over human rights. Planners justify projects based on their ability to produce public goods, but, 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 in the course of infrastructure projects in developing countries.

Increasingly, international law scholars are arguing that human rights law is sufficiently developed to measure rates of compliance.⁸ Responding to this call, international lawyers and international relations scholars have joined forces to explain whether, how, and why states obey international law.⁹ Benedict Kingsbury and Anne-Marie Slaughter identify sociolegal studies as a key resource in this effort.¹⁰ This call coincides with an increased attention in the last five years within sociolegal studies to how transnational legal processes function in practice.¹¹

This article adopts a sociolegal approach, drawing selectively from international law and international relations scholarship. Thus, it asks a specific set of

8. See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Richard A. Falk, *Re-Framing the Legal Agenda of World Order in the Course of a Turbulent Century*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 355; RICHARD A. FALK, *PREDATORY GLOBALIZATION* (1999); LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (1979); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998); Koh, *supra* note 3; Harold Hongju Koh, *Transnational Legal Process Illuminated*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 327 [hereinafter *Transnational Legal Process Illuminated*]; see also generally *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4.

9. See generally PETER R. BAEHR, *HUMAN RIGHTS: UNIVERSALITY IN PRACTICE* (1999); Falk, *supra* note 8; HENKIN, *supra* note 8; Kingsbury, *supra* note 8; Harold Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999); Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); *HUMAN RIGHTS AT THE MILLENNIUM: THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* (Burns H. Weston & Stephen P. Marks eds., 1999).

10. Kingsbury, *supra* note 8; Slaughter et al., *supra* note 9.

11. See generally EVE DARIAN-SMITH, *BRIDGING DIVIDES: THE CHANNEL TUNNEL AND ENGLISH LEGAL IDENTITY IN THE NEW EUROPE* (1999); *LAWS OF THE POSTCOLONIAL* (Eve Darian-Smith & Peter Fitzpatrick eds., 1999); YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); *EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW* (Volkmar Gessner & Alic Cem Budak eds., 1998); *FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN LEGAL CULTURES* (Volkmar Gessner ed., 1996); BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* (1995); Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. J. INT'L L. 65 (1996); Kathryn Hendley, *The Effectiveness of Legal Institutions in the Transition Economy in Post-Soviet Russia*, in *GOVERNANCE, DECENTRALIZATION AND REFORM IN CHINA, INDIA AND RUSSIA* (Jean-Jacques Dethier ed., 2000); Kathryn Hendley et al., *Do Repeat Players Behave Differently in Russia? Contractual and Litigation Behavior of Russian Enterprises*, 33 LAW & SOC'Y REV. 833 (1999); Likosky, *supra* note 4, at xvii; Sally Falk Moore, *An International Legal Regime and the Context of Conditionality*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 333; Sally Falk Moore, *Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999*, 7 J. ROYAL ANTHROPOLOGICAL INST. 95 (2001);

questions associated with the sociolegal approach. These questions include: Why do parties pursue law to achieve their goals? What legal strategies do they undertake? How do these legal strategies operate in practice? Do they achieve their intended results? What are the unintended effects of these strategies? In answering these questions, it will test many of the hypotheses developed by international law and international relations scholars. At the same time, the primary goal is to ascertain how human rights law functions in practice in the context of infrastructure projects in developing countries.

While no sociolegal study has been devoted explicitly to assessing strategies for mitigating the human rights risks associated with infrastructure projects, several international law and social science scholars have analyzed this relationship in the course of asking related questions. These studies focus on a number of areas: (1) suits filed in the courts to hold transnational corporations accountable for human rights abuses, (2) international non-governmental and intergovernmental efforts to reduce corruption in the tendering process of projects, and (3) the emergence of market-based strategies for realizing human rights, such as codes of conduct and ethical investment movements.

A. MITIGATING HUMAN RIGHTS RISKS THROUGH THE COURTS

In 1997, Harold Koh noted the emergence of a growing body of “transnational public law litigation” designed “to vindicate public rights and values

David Nelken, *The Globalization of Crime and Criminal Justice: Prospects and Problems*, in *LAW AND OPINION AT THE END OF THE TWENTIETH CENTURY* (M. Freeman ed., 1997); Annelise Riles, *The Virtual Sociality of Rights: The Case of “Women’s Rights are Human Rights”*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 420; Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 *LAW & SOC’Y REV.* 93 (1998); Susan S. Silbey, *Let Them Eat Cake: Globalization, Postmodern Colonialism, and the Possibilities of Justice*, 31 *LAW & SOC’Y REV.* 207 (1997); Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 *AMER. J. INT’L L.* 470 (1995) (book review); Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997); David M. Trubek et al., *Global Restructuring and the Law: Studies in the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407 (1994); Richard A. Wilson, *Human Rights, Culture and Context: An Introduction*, in *HUMAN RIGHTS, CULTURE AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES I* (Richard A. Wilson ed., 1997) [hereinafter *ANTHROPOLOGICAL PERSPECTIVES*]; Richard A. Wilson, *Representing Human Rights Violations: Social Contexts and Subjectivities*, in *ANTHROPOLOGICAL PERSPECTIVES*, *supra*, at 134.

through judicial remedies.”¹² One type of transnational public law litigation involves claims pursued against transnational corporations alleging human rights abuses arising in the context of infrastructure projects. These suits are often brought in U.S. courts under the Alien Tort Claims Act, targeting U.S. companies for alleged abuses perpetrated abroad.¹³ Other cases have arisen in the courts of developing countries.¹⁴

In a Foreign Affairs article published in 2000, Anne-Marie Slaughter and David Boscoe argue that the use of the Alien Tort Claims Act is a form of “Plaintiff’s Diplomacy”—“a new trend towards lawsuits that shape foreign policy.”¹⁵ Such lawsuits fall into a number of categories. The most relevant for our purposes, however, are the “[s]uits against corporations for violations of international law.”¹⁶ Essentially, these cases are brought against U.S. corporations in U.S. federal courts for their role in human rights violations abroad. According to Slaughter and Boscoe, “[b]y targeting major corporations and business concerns, private plaintiffs have thus become a

12. Koh, *supra* note 3, at 2347; *see also* Harold Hongju Koh, *The Palestine Liberation Organization Missionary Controversy*, 82 AM. SOC’Y INT’L L. PROC. 534 (1988). Transnational public law litigation, according to Koh, includes five characteristics:

- (1) a *transnational party structure*, in which states and nonstate entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international, private and public law are all alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants’ strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement.

Koh, *supra* note 3, at 2371.

13. *See* Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act*, 40 VA. J. INT’L L. 545 (2000), available at <http://www.earthrights.org/pubs/atca.shtml>; Slaughter & Boscoe, *supra* note 3.

14. *See* JAMIE CASSELLS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* (1993); *see also* Desmond Fernandes & Leo Saldanha, *Deep Politics, Liberalisation and Corruption: The Mangalore Power Company Controversy*, LAW, SOC. JUST. & GLOBAL DEV. J. (2000), at <http://elj.warwick.ac.uk/global/issue/2000-1/fernandes.html> (last visited Mar. 13, 2003); M. Galanter, *Law’s Elusive Problem: Learning from Bhopal*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 172.

15. Slaughter & Boscoe, *supra* note 3, at 103; *see also* HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond eds., 1996) [hereinafter HUMAN RIGHTS].

16. Slaughter & Boscoe, *supra* note 3, at 103.

diplomatic force in their own right, forcing governments to pay attention at the highest levels.”¹⁷ The subject matter of these cases varies, but abuses occurring in the context of infrastructure projects are an important source of litigation.

Many of these cases are brought under the Alien Tort Claims Act.¹⁸ Passed in 1789, the statute went relatively unused until the 1980s.¹⁹ With regard to infrastructure projects, cases have been brought against various oil companies. For instance, a group in Burma recently initiated an action against Unocal and Total for their alleged roles in the squelching of protests by the government.²⁰ Similar cases are being pursued against Chevron²¹ and Shell²² for their alleged roles in violent government actions in Nigeria.²³

Slaughter and Boscoe argue that this trend towards holding U.S. companies accountable for human rights abuses and environmental damage caused abroad leads to ambiguous results. On the positive side, the suits cause companies to pay greater attention to the impact of their actions.²⁴ According to Slaughter and Boscoe, however, the suits have three principal shortcomings. First, NGOs are not necessarily democratically accountable institutions and may allow decisions that should be made through the democratic process instead to be made by the courts. Second, not all countries value human rights and the environment equally, and thus to impose U.S. environmental and human rights standards on all countries is undemocratic. Third, threatened corporations may lobby their home state government to curtail the scope of allowable suits under the Alien Tort Claims Act.²⁵ For these reasons, Slaughter and Boscoe argue that the use of the Alien Tort Claims Act should be limited to cases involving egregious human rights abuses.²⁶

17. *Id.* at 107.

18. Alien Tort Claims Act, 28 U.S.C. § 1350 (2001).

19. *See* Burley, *supra* note 13.

20. *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001).

21. *Bowoto v. Chevron Corp.*, Case No. C99-2506 (N.D. Cal.).

22. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

23. For similar cases, see *Jota v. Texaco Inc.*, 157 F.3d 153 (2d Cir. 1998) (discussing the Amazon oil spills); *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000) (discussing the Bhopal disaster).

24. Slaughter & Bosco, *supra* note 3, at 110–11.

25. *Id.* Additionally, Catherine A. MacKinnon argues that these claims also discourage close relationships between the attorneys and affected communities. *See* Catherine A. MacKinnon, *Collective Harms Under the Alien Tort Statute: A Cautionary Note on Class Actions*, 6 ILSA J. INT'L & COMP. L. 567, 573 (2000).

26. Slaughter & Bosco, *supra* note 3, at 111; *see also* Herz, *supra* note 17, at 573 (giving examples of violations that might rise to an egregious level).

Whether these arguments are valid and their prescription desirable requires further study. We must ask about the extent to which the U.S. courts are being used in the infrastructure context. This requires inquiry into whether the courts are being used solely to settle disputes or instead to play a strategic role in ongoing human rights negotiations, as “bargaining chip[s] for use in other political fora.”²⁷ Second, we might inquire into what types of NGOs are bringing suits to test whether these organizations hinder or advance democratic interests.

The efficacy of transnational public law litigation has been tested in a recent sociological study, conducted by Marc Galanter, examining the claims process arising out of the massive leak of methyl isocyanate at the Union Carbide plant in Bhopal, India.²⁸ He argues that tort law proved inadequate to compensate victims of the disaster. In the Bhopal case, the Indian government brought a claim against Union Carbide on behalf of the victims of the disaster, seeking redress in the high-compensation U.S. federal courts. The U.S. judge ruled, however, that the Indian courts were a more appropriate venue for the case (on the basis of *forum non conveniens*).²⁹ As a result, the case was tried in the low-remedy Indian system, and the government secured a judgment against the company.³⁰ According to Galanter, while the Indian legal judgment looked good on its face, in practice, due to inadequate institutions, the tort regime failed to deliver on the promises of its judgment.³¹ Based on these findings, Galanter advocates transnational tort law reform.³² According to Galanter, the key to understanding the Bhopal disaster and its legal aftermath lies in approaching it from a transnational vantage.³³ As a possible solution, Galanter argues for the further development of a transnational private law catering to ordinary persons.³⁴ Whether Galanter’s points about India can be generalized to other contexts requires further study.

27. Koh, *supra* note 3, at 2349; *see also* Yves Dezalay & Bryant Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960–2000*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 197; C. Joppke, *Sovereignty and Citizenship in a World of Migration*, in *TRANSNATIONAL LEGAL PROCESSES*, *supra* note 4, at 259.

28. Galanter, *supra* note 14; *see, e.g.*, *Bano v. Union Carbide Corp.*, 2000 WL 1225789 (S.D.N.Y. 2000) (brought under the Alien Tort Claims Act); *see also* CASSELLS, *supra* note 14, at 150–51.

29. *See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 809 F.2d 195 (2d Cir. 1987).

30. Galanter, *supra* note 14, at 174; *Bhopal Charges Stay, Indian Court Rules*, CNN.COM, Aug. 28, 2002, at <http://www.cnn.com/2002/world/asiapcf/south/08/28/india.bhopal/>.

31. Galanter, *supra* note 14, at 172.

32. *Id.* at 173.

33. *Id.*

34. *Id.* at 182.

B. Mitigating Human Rights Risks Through Anti-Corruption Legislation

Another 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 inter-governmental fora such as the Organisation for Economic Cooperation and Development (OECD) and the International Chamber of Commerce. According to Susan-Rose Ackerman, the anti-corruption strategies have succeeded in establishing that parties to an infrastructure project are under a normative obligation to reduce corruption in the tendering process. This has resulted in the adoption of various legal codes, both state and non-state.³⁵ Rose-Ackerman argues that this corruption is not only morally bankrupt but also economically inefficient.³⁶ While 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: Do anti-corruption codes function differently according to the legal culture into which they are introduced?³⁷ Does the nature of corruption vary from one society to the next?³⁸ Do laws go unenforced?

C. Mitigating Human Rights Risks Through Inter-Governmental and Market-Based Codes

Increasingly, non-governmental organizations 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

35. Susan Rose-Ackerman, *Corruption and the Global Corporation: Ethical Obligations and Workable Strategies*, in TRANSNATIONAL LEGAL PROCESSES, *supra* note 4, at 148 [hereinafter *Corruption and the Global Corporation*]; SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999) [hereinafter CORRUPTION AND GOVERNMENT]; SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978) [hereinafter CORRUPTION].

36. *Corruption and the Global Corporation*, *supra* note 35, at 151.

37. See Donald Nelken, *Changing Legal Cultures*, in TRANSNATIONAL LEGAL PROCESSES, *supra* note 4, at 41.

38. See William L. Twining, *Reviving General Jurisprudence*, in TRANSNATIONAL LEGAL PROCESSES, *supra* note 4, at 3. *Contra Transnational Legal Process Illuminated*, *supra* note 8.

risks, including corporate codes of conduct and ethical pension funds.³⁹ Human rights groups often pursue these strategies through inter-governmental organizations such as the United Nations and the OECD. For instance, model codes for companies have been issued by the International Labor Organisation (ILO)⁴⁰ and by the General Assembly of the United Nations.⁴¹ However, these codes rarely have enforcement mechanisms, leading commentators to praise their moral aspirations but to question their efficacy.⁴²

In 1999 U.N. Secretary-General Kofi Annan announced the U.N. Global Compact, which seeks to internalize human rights goals into the transnational economy by focusing on (1) encouraging companies to adopt human rights promoting policies and not to involve themselves in human rights abuses, (2) upholding basic labor standards, and (3) promoting environmentally sustainable policies. The Compact advocates two paths to achieve these goals: empowering relevant U.N. multilateral institutions and utilizing voluntary codes of conduct.⁴³ Like codes initiated in various public and private fora, however, the U.N.

39. See generally HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS (Michael K. Addo ed., 1999); HUMAN RIGHTS, *supra* note 14; Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 3 (Norbert Horn ed., 1980) [hereinafter LEGAL PROBLEMS OF CODES OF CONDUCT]; LEGAL PROBLEMS OF CODES OF CONDUCT, *supra*; Bob Hepple, *A Race to the Top? International Investment Guidelines and Corporate Codes of Conduct*, 20 COMP. LAB. L. & POL'Y J. 347 (1999); Seymour J. Rubin, *Transnational Corporations and International Codes of Conduct: A Study of the Relationship Between International Legal Cooperation and Economic Development*, 10 AM. U. J. INT'L L. & POL'Y 1275 (1995); Meaghan Shaughnessy, *Human Rights and the Environment: The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, 10 COLO. J. INT'L L. & POL'Y 159 (2000); F.G. Snyder, *Governing Globalization*, in TRANSNATIONAL LEGAL PROCESSES, *supra* note 4, at 65; Thomas A. Troyer et al., *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127 (1985); Aurora Voiculescu, *Privatising Human Rights: Voluntary Codes of Conduct Between Standards, Guidelines, and the Global Compact*, paper presented at the Workshop on Law and Poverty IV: Moving Toward International Poverty Law?, May 3-4, 2001 (on file with author).

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. U.N. CENTRE ON TRANSNATIONAL CORPORATIONS, CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS (1988) (efforts at finalizing the U.N. code were abandoned in 1992).

42. See, e.g., Christopher McCrudden, *Human Rights Codes for Transnational Corporations: What Can the Sullivan and MacBride Principles Tell Us?*, 19 OXFORD J. LEGAL STUD. 167 (1999).

43. Voiculescu, *supra* note 39.

Compact lacks compliance mechanisms. Instead it relies on “mobilizing shame’ against member state violators.”⁴⁴

For the purposes of this article, these codes of conduct represent an important type of human rights risk mitigation strategy. International NGOs have succeeded in generating codes in various arenas. Still, while many question the efficacy of codes, little is known about how these codes function in practice. Drafters of the codes recognize that they are not self-executing. Thus, participants employ these codes as “instruments in a continuous process of defense and attack”⁴⁵ in ongoing negotiations over human rights. The specific role of these codes in the ongoing negotiations requires further study. Also, many of the codes have targeted the retail industry because of 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. Thus, it will also be necessary to test whether these strategies are being employed in a broader context and to evaluate their efficacy.

In sum, the international law and social science literature addressing human rights in the context of infrastructure projects has produced important findings and generated a number of hypotheses in need of testing. Various strategies—litigation, anti-corruption legislation, and market-based codes—have received attention. By adopting a sociolegal approach, this article will next analyze how these strategies function in practice in the context of specific infrastructure projects.

II. MITIGATING HUMAN RIGHTS RISKS IN SPECIFIC PROJECTS

The goal of this article 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 article 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 inter-relations 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 in the context

44. See Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533, 1541 (1998) (book review).

45. HAROLD DWIGHT LASSWELL & MYRES MCDUGAL, *LAW, SCIENCE AND POLICY* 176 (1953).

of a state-financed infrastructure project—the Narmada Dam in India—a global project finance project—the North-South Expressway in Malaysia, and also a mixed state- and global project finance infrastructure project—the Mexican Puebla-Panama Plan.

A number of questions are asked:

1. 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, non-governmental organizations, transnational corporations, and so forth? 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 counter-strategies? 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 forth as tactics in ongoing struggles for control over an infrastructure project?

2. Does a correlation exist between the parties involved in these strategies and respect for human rights? Does the involvement of certain actors, e.g. inter-state organizations, NGOs, specific host, or foreign governments, and so forth 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?

3. Are projects funded by the state more respectful of human rights than privately funded projects? Does the role of the state in managing human rights problems differ under each approach? Do transnational corporations 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?

4. Do strategies vary according to the country in which an infrastructure project is undertaken, the infrastructure sector, or the stage of the project? Do mines 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, or 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 at numerous points above, 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 is put forth for approaching the study of the relationship between infrastructure projects and human rights capable of application to past, present, and future projects.

A. Mitigating Human Rights Risks Under the State-Financed Model: The Narmada Dam in India

In 1991, in response to highly effective community group and non-governmental organization campaigns, the World Bank established an Independent Review to examine whether it should continue financial support of the Sardar Sarovar Dam Projects along the Narmada River.⁴⁶ This project, initiated in 1987, represented the most ambitious dam project ever undertaken. 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.⁴⁷ It also established the World Commission on Dams, comprising leading governmental and non-governmental actors, to assess the environmental impact of future projects.⁴⁸

46. 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/sardar-sarovar.html>.

47. World Bank Operations Evaluation Department, *Learning from Narmada*, May 1, 1995, at <http://wbln0018.worldbank.org/oed/oeddoelib.nsf/3ff836dc39b23cef85256885007b956b/12a795722ea20f6e852567f5005d8933?opendocument> (last visited Mar. 13, 2003).

48. For more information on the World Commission on Dams, see its website, at <http://www.dams.org/>.

The withdrawal of World Bank support did not put an end to this paradigmatic example of the state-financed approach. Recently, 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,⁴⁹ and protests have not subsided.⁵⁰

The Narmada dams have been well-reported, however, and 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 Dam 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.

B. Mitigating Human Rights Risks Under the Global Project Finance 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 an innovative global project finance 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.⁵¹ The BOT contract has since become standard practice for global project finance 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

49. Peter Popham, *Villagers Fight to Save Homes from Dam to Halt Dam*, INDEPENDENT, OCT. 19, 2000, at 16.

50. Lyla Bavadam, *Going Beyond the Narmada Valley*, FRONTLINE, NOV. 11–24, 2000, at <http://www.flonnet.com/fl1723/17230400.htm>.

51. Michael B. Likosky, *Infrastructure for Commerce*, 22 N.W. J. INT'L L. & BUS. 1, 29 (2001).

the opposition leader, Lim Kit Siang.⁵² 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.⁵³ Lim Kit Siang brought a lawsuit against the government alleging that the tendering process constituted corruption by government officials.⁵⁴ Although the suit did not prevail in the courts, the government nonetheless retaliated by jailing Siang under the Internal Securities Act.⁵⁵ A high court judge was also removed because of a judgment related to the project.⁵⁶

Academics, officials, and the press portrayed the human rights dimensions of the North-South Expressway as a domestic squabble.⁵⁷ 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 global project finance approach. For instance, although the contract was awarded to a domestic company, the project was carried out through a complex scheme involving over two hundred 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).⁵⁸

Recently, a country-wide demonstration was orchestrated against increased tolls, highlighting the need to take a longitudinal perspective on plans.⁵⁹ The right to increase tolls was contractualized. Some opposition leaders have suggested that de-privatization would be desirable, with the Employee Provident Fund taking over the project.⁶⁰ We must ask, however, whether this might be just another way of paying off foreign groups.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 28.

57. *Id.*

58. *Id.*

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

60. *Id.*

C. Mitigating Human Rights Risks Under a Mixed Project: The Puebla-Panama Plan in Mexico

In March 2001, President Vicente Fox announced the Puebla-Panama Plan (PPP), designed to transform the long-neglected and poverty-stricken southern region of the country into a prosperous corridor. Through airports, railways, and ports, the PPP 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 PPP 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.⁶¹

Rather than viewing the PPP as a well-intentioned offer, the Zapatistas argued that it represented a counter-insurgency measure. They pointed out that the PPP would dispossess the southern indigenous communities of their lands without paying adequate compensation.⁶²

According to conventional representations, the PPP's relations with human rights are a predominately domestic affair. Thus, although only recently announced, the PPP 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 Develop-

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

62. Bill Weinberg, *Zapistas Present Mexico with and Issue of Peace*, COMMON DREAMS NEWS-CENTER (Mar. 14, 2001), at <http://www.commondreams.org/views01/0314-02.htm>.

ment 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.⁶³

Several months prior to announcing the PPP in parliament, Fox traveled through Asia and Europe to raise capital for the project.

Although the PPP is still in the early stages of planning, it is uncertain whether it will be undertaken through the state-financed or global project finance approach. The answer to this question is confused by the fact that the PPP comprises numerous infrastructure projects. Thus, although Fox has indicated that several projects will be undertaken through the global project finance approach, it is still possible that the state-financed approach will be employed in certain instances. While 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. This will most likely occur, as the Zapatistas are internationally well-connected. The interconnection of various legal regimes and the PPP is also already complex. Domestically, Fox has used legislation, notably the indigenous human rights bill and the PPP, as attempts to mitigate human rights risks engendered by the PPP. The Zapatistas have put forth a different human rights risk assessment and 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.⁶⁴

CONCLUSION

It is not altogether clear whether NGOs are coordinating their efforts to deal with the global project finance approach with the same seamlessness as their counterparts, the market-approach crowd. In part, a lack of coordination results from the divergent human rights problems raised by various infrastruc-

63. *Active Cooperation Among Multilateral Banks: A New Trend*, International Financial Institutions Network (IFIInet) (Aug. 13, 2001), at <http://www.infoexport.gc.ca/ifinet/news/archives2001-e.htm>.

64. See generally Global Exchange Plan Puebla Panama News Archive, *supra* note 61.

ture sectors. For instance, while campaigns protesting the adverse human rights impact of dams tend to focus on mass displacements of peoples and persons, activists targeting the impact of mines focus on labor abuses. A countertrend of cross-sector and well-coordinated non-governmental group campaigns also exists, however. As Susan Rose-Ackerman has shown, organizations such as Transparency International and networks such as the Export Credit Agency Watch focus on cross-cutting issues like corruption in the project tendering processes and political risk insurance offered by OECD nation-states to human rights-disrespecting projects overseas.

At the same time, closer examination of both the development and project finance-based approaches raises questions regarding the veracity of the conventional narratives. For example, much is made of the exit of the state from the infrastructure business. However, we continue to see state involvement through development corporations, public regulatory action, export credit agencies, and so forth. Also, the specter of a small group of international banks and law firms haunts both periods. We must at least address whether the emperor has simply changed his tailor.

I would like to suggest that we have the same emperor wearing different clothes, and to offer some possible explanations for what has driven the change in attire. 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 involved across periods.

First, as hinted at earlier, we have a common set of international banks and law firms involved in these projects across periods. While 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 residing in New York and London. The bankers rely on an equally small set of international law firms to legalize their infrastructure agreements across periods.

Second, we have a common community of transnational corporations involved. While during the development period these corporations partnered with state public corporations, today they typically join forces with local private companies. It is not surprising to find the same firms involved, since, for most infrastructure sectors, technological know-how resides in the headquarters of a small number of firms. These firms share nationalities, with most being from the United States, the United Kingdom, France, Germany, or Japan.

That said, the clothes look very different. What accounts then for the change? A number of explanations exist in the literature. Generally, the argu-

ment is made that development states were inefficient and corrupt. They ran up huge debts undertaking projects from the 1950s to the 1980s. They could no longer afford to finance infrastructure projects, so the entrance of the market-based approach represented a fortuitous circumstance. I would instead argue that it was a golden parachute. I would like to suggest that it was the success of human rights groups that drove the shift towards neo-liberalism. The market-based approach is, in certain respects, a counter-insurgency.

As explained in the introduction, we must ask how the group of persons undertaking an infrastructure project approaches human rights under the development frame and then under the project finance frame.⁶⁵ Under the development 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. Thus, the state was the chosen mode of managing human rights risks during the development phase. From the perspective of the small transnational group running the infrastructure show, 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 anti-state 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 how transnational coalitions target inter-governmental agencies in the infrastructure sector,⁶⁶ we saw the same thing happen at the international level. Non-governmental organizations began to participate in law-making, monitor compliance with international human rights laws, and to

65. *See supra* Introduction.

66. *See generally* THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOs, AND GRASS-ROOTS MOVEMENTS (Jonathan A. Fox & L. David Brown eds., 1998).

conduct human rights and environmental risk assessments for World Bank projects, and so forth.

My argument is that it is just as the domestic and international public institutions realize their public potential that we see the recession of the state and the World Bank from the infrastructure business. So it is the success of human rights activists that drove the state and the World Bank out of the game. But the question remains: have they entirely left the game?

I would answer no. Let us assume for the moment—and I realize 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 I 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 clothes. So the public corporations privatize. The heads of the new private corporations are often the same group of persons that controlled the public corporations. Similarly, the U.S., U.K., European, and Japanese governments stop offering direct aid to developing countries. In the past, U.S. aid has sometimes been conditioned on an agreement by the receiving government to involve a U.S. corporation in the particular infrastructure project being funded. Today, we see a similar process, albeit in different institutional guises. Political risk insurance is provided by the U.S. Import Export Bank, for instance, when U.S. corporations are involved overseas. The state has changed its configuration; what persists, however, is the use of the state as an instrumentality for a small group of private persons.

This continuity is acceptable. We are told, however, that other elements of the state lack the capacity to stay in the infrastructure game under the global project finance approach. Human rights costs are then externalized onto those persons least able to bear the costs.

In a 1999 article in the *International Herald Tribune*, Richard A. Falk and Andrew Strauss pointed to a need to establish independent and democratically accountable extra-state institutions of global governance.⁶⁷ Following Falk and

67. Richard A. Falk & Andrew Strauss, *Globalization Needs a Dose of Democracy*, *INT'L HERALD TRIB.*, Oct. 5, 1999, at 8.

Strauss, I here propose the establishment of a Human Rights Risk Assessment Unit. The purpose of this Unit would be to coordinate the efforts of various community groups and international non-governmental organizations devoted to realizing human rights in the course of infrastructure projects. The Unit would not only produce information on the relationship between infrastructure projects and human rights generally, but would also aim to assess the effectiveness of strategies undertaken by various groups in different contexts. In doing so, the feasibility of transnational alliances across geographies, infrastructure sectors and issue areas would be explored. If we are lucky, infrastructure projects would increasingly be made to deliver on their promises to produce public goods, which are in their essence positive human rights.

