

§Law in Context

MICHAEL B. LIKOSKY



Law, Infrastructure,
and Human Rights

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I Introduction

During the life of a major international infrastructure project, large numbers of public and private actors may enter and exit the scene. This poses a challenge for human rights groups. If social change is the goal and the project is sprawling, then who should be targeted? This is further compounded by the shift away from public projects and toward privatized ones. As we saw in Chapter 3, when projects were public, investment in strategies targeting governments and the World Bank paid dividends. However, under the privatization approach, nongovernmental organizations (NGOs) and community groups are still experimenting with targets and strategies. At present, the aim of prominent NGOs is to identify major players with the power to impact on the human rights practices of projects and to convince them to legalize human rights commitments. Furthermore, the aim is to make sure that the major players not only legally commit to sound human rights practices, but also that they translate their public minded pronouncements into practice.

Major campaigns targeting private financiers and constructors of privatized infrastructure projects are underway. One of the most high profile campaigns targets the Camisea natural gas pipeline in Peru. It runs through the land of several indigenous communities in the Amazon rain forest and is the largest natural gas project in South America.¹ NGOs and community groups have mounted campaigns to prevent the project from going forward in its present form. Student protestors, Hollywood actors and actresses, and high-profile musicians have joined them. Campaigns target major players including natural gas companies and also public and private banks. These international players are part of the new network of state and nonstate actors that drive privatization.

Protests have elicited concessions and policy changes by the major players who underwrite and participate in the Camisea project. However, despite successes and mutual agreements between protesters and project planners about how an

1 "Modern El Dorado Emerges" (July 2002) 17(7) Business Korea 62, 63.

infrastructure project should be carried out, questions persist as to what is the appropriate human rights standard and how to implement human rights in the context of a specific project. In Camisea and elsewhere, protestors excel at naming and shaming strategies and successfully elicit concessions from project planners. These strategies put in place policies that can then be operationalized in the context of specific projects. Michael M. Cernea tells us how essential these groundwork laying strategies are: “It is much more difficult to fight and win battles at project level on issues of broad policy when such general policy is not yet clearly formulated or enacted.”² At the same time, when project planners respond to campaigns by pursuing specific human rights risk mitigation strategies, the problem of ensuring that these strategies help to actualize human rights proves difficult.

As Francis G. Snyder has shown, in a world of global legal pluralism, strategic actors coordinate diverse legal sites to achieve specific goals.³ Strategic actors are “absolutely fundamental in determining which institutional, normative and processual sites have seen the light of day, which have flourished and developed, and which have withered and even died for lack of clients.”⁴ In the international privatized infrastructure context, as the Camisea project demonstrates, companies and governments are adept at uniting various public and private sites to carry out large-scale infrastructure projects. NGOs have identified these linkages among sites and have devised multisited strategies of their own. However, the public-private partnerships (PPPs) often are one step ahead, drawing further on their own transnational strategic resources to devise counteroffensives. Importantly, the NGOs and community groups involved in the Camisea project vary (large international conservation NGOs, indigenous federations, local Peruvian NGOs, farmers’ organizations, trade unions, etc.) and at times tensions have existed among them.⁵

This Chapter relates the Camisea story of how human rights legal strategists mounted campaigns targeting Citigroup, the U.S. Export-Import Bank, and the Inter-American Development Bank (IDB). These financiers in turn responded with human rights risk mitigation strategies. First, however, something should be said about the Camisea project itself. The project has progressed through two main stages. During the first stage, Shell and Mobil were involved and after they exited the project, in stage two, consortia of companies took over. In the first stage, human rights groups targeted the companies, whereas in the second stage the public and private financiers (Citigroup, the U.S. Export-Import Bank, the IDB, and others) have been targeted. This chapter discusses the two stages sequentially.

2 M M Cernea “The ‘Ripple Effect’ in Social Policy and its Political Content” in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65, 75.

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

4 *Id.* 92.

5 I would like to thank Laura Rival for this point.

II The first stage

The Camisea project is now over twenty-five years old. When an agreement was signed with Shell and Mobil to exploit the reserves,⁶ then Peruvian President Alberto Fujimori called the project the “deal of the century.”⁷ If the project fulfilled expectations, then it would make the country a net exporter of hydrocarbons.⁸ Gas was first discovered in 1980⁹ by Royal Dutch Shell.¹⁰ In 1981 Shell signed an exploration contract with Peru for Blocks 38 and 42 in the Ucagali Basin. From 1984 to 1986, Shell drilled five wells.¹¹ In May 1998, Shell and its partner Mobil exited the project.¹² The relationship between Shell and the Peruvian government had been, throughout Shell’s involvement in the project, stop and go with Shell pulling out of the project more than once.¹³ When Shell and its then partner Mobil finally backed out of the project, it was because of disagreements with the Peruvian government over distribution, prices, and the export of gas.¹⁴ At that time, Shell had already spent \$250 million on the project.¹⁵ Despite shifting commercial and political concerns, human rights were on the forefront of the project’s agenda throughout this first stage of Camisea.

In response to NGO campaigns, Shell and Mobil took a proactive, if controversial, public stance on human rights. They employed multiple human rights risk mitigation strategies. Alan Hunt, the General Manager of Shell Prospecting and Development at the time, reinforced the companies’ eagerness to pursue these strategies in response to NGO campaigns. He said “we need criticism from the outside”¹⁶ and the underlying agreement with the Peruvian government will reflect “a high level of sensitivity to social and environmental issues.”¹⁷ This position was a sign of the times. In other projects, Shell had been seriously criticized for its human rights practices, in particular a campaign against Brent Spar and also in relation to its activities in Nigeria.¹⁸ As Phil Watts, Shell Managing Director at the time, indicated: “This is a whole new approach. . . . We know the eyes of the world are on us.”¹⁹

6 Shell held a 57.5 percent stake in the venture. “Mobil, Royal Dutch Quit Project in Peru to Supply Natural Gas” Wall Street Journal (Eastern Edition) (7/17/98) 1.

7 Quoted in J Holligan “Stoking Demand” The Economist Intelligence Unit (1/12/98).

8 B Williams “Camisea Project Transforming Peru into Major Regional Gas Player” (11/25/02) 100(48) Oil and Gas Journal 20.

9 “Lifting Local Power” Latin Finance (March 2002).

10 “Pluspetrol-led Group Wins Camisea Contract” (2/21/00) 98(8) Oil and Gas Journal 26.

11 M Kielmas “Seeking Investors for Gas Exploration” 66(9) Petroleum Economist 35.

12 “Pluspetrol-led Group Wins Camisea Contract” (2/21/00) 98(8) Oil and Gas Journal 26.

13 “Lifting Local Power” (March 2002) Latin Finance. In 1988, for example, Shell and its then partner Mobil pulled out “after failing to reach terms with the government for gas pricing and distribution.” *Id.*

14 “The Americas: Seismic Shock from Camisea” (7/25/98) 348(8078) Economist 35.

15 “Mobil, Royal Dutch Quit Project in Peru to Supply Natural Gas” Wall Street Journal (Eastern Edition) 1 (7/17/98). It is possible that the companies were at least partially reimbursed by the government for sunk costs.

16 Quoted in P Chatterjee “Peru Goes Beneath the Shell” (May 1997) 18(5) Multinational Monitor 14.

17 Quoted in “World Class Peruvian Development” (October 1997) 224(10) Pipeline and Gas Journal 18.

18 Quoted in “It’s Not Easy Being Green” (8/4/97) 136(3) Fortune 124.

19 *Id.*

Shell devised a comprehensive strategy. It adopted a number of measures designed to safeguard human rights. These measures have been detailed elsewhere,²⁰ so here only a brief overview is set forth. First, Shell devised an “Off-Shore” Policy that prevented workers from leaving the site so as to prevent contact with isolated communities. Second, it instituted a Health Passport Scheme to ensure the vaccination of workers to prevent the spread of disease from and to local communities. Third, Shell established a consultation program including one-to-one meetings and workshops with local communities. Fourth, a “No-Road Commitment” was instituted whereby planners avoided building roads so as to prevent exploitation of the area by outsiders. Fifth, planners identified the optimal location for the gas plant, drilling, and pipelines. Sixth, hovercrafts were modified to prevent disruption to community-owned boats. Seventh, long-term Social Capital and Biodiversity Programs were established to involve local communities in the project planning and to support local initiatives. Eighth, planners devised a compensation program that included a process of consultation and negotiation. Ninth, an effort was made to establish a high standard for health, safety, and the environment.²¹

Also, Shell hired an NGO, Natura USA, and a Peruvian group, Red Ambiental Peruana.²² It also hired a Peruvian anthropologist²³ trained at Cambridge University to develop a plan for safeguarding the human rights of indigenous groups.²⁴ The hiring of anthropologists is considered good social practice according to oil company guidelines.²⁵ Laura Rival explains that these anthropologists are supposed to be “familiar with the regions and local communities concerned.”²⁶ Furthermore, Rival tells us that they

are asked to identify social impacts, determine who are the “stakeholders,” manage consultations with local people, encourage participation through formal consultation mechanisms, train local professionals, help mitigate the impacts arising from the presence of outside workers, and, in some cases, plan and coordinate contacts.²⁷

The hope is that “sharing” anthropologists’ local knowledge “can help protect indigenous rights, health and autonomy.”²⁸ However, according to Rival, in her and her colleagues’ experiences, “this rarely occurs.”²⁹ Importantly, institutional

20 A Dabbs and M Bateson “The Corporate Impact of Addressing Social Issues: A Financial Case Study of a Project in Peru” (2002) 76 *Environmental Monitoring and Assessment* 135, 146–150.

21 *Id.*

22 J Friedad “Green Acres: Oil Companies Strive to Turn a New Leaf to Safe Rain Forest – Shell, Mobil Want to Avoid Raising Ire of Activists at Massive Peru Project – But Skeptics Wait and See” *Wall Street Journal* (Eastern Edition) (7/17/97) A1.

23 P Chaterjee “Peru Goes Beneath the Shell” (May 1997) 18(5) *Multinational Monitor* at 14.

24 Friedad A1.

25 L Rival “Oil and Sustainable Development in the Latin American Humid Tropics” (1997) 13(6) *Anthropology Today* 1, 2.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

constraints vary according to the nationality and university position of the particular researcher. In fact, Rival tells us how, “[f]or many, consultancy is the only avenue available to carry out and/or fund field research.”³⁰ Conditions and issues differ from consultancy to consultancy and anthropologist to anthropologist. As well, consultancy in itself is not often considered a universal problem: anthropologists act as consultants for NGOs often without raising eyebrows. Also an anthropologist’s study criticizing the International Finance Corporation-financed Bio-Bio Pangué dam project in Chile was a major factor in the move by the International Finance Corporation to incorporate human rights standards into the projects that it supports. This study led to internal reviews within the World Bank Group.³¹ Thus inside and outside actions can work together functionally.

There was not consensus among NGOs and community groups over how Shell was handling human rights issues. While Shell befriended some NGOs, others like Amazon Watch argued that “gaps between rhetoric and reality” existed.³² A Release by a number of indigenous groups went further, blaming Shell for specific violations of human rights. These alleged violations included the death through spread of disease of fifty percent of the population, an “unjust ‘negotiation’ process,” and contact with isolated groups.³³ Regardless of the efficacy of Shell and Mobil’s actual practices, when the companies pulled out of the project, the landscape changed dramatically with attention shifting away from the construction companies and toward the project financiers during the second stage.

III The second stage

When Shell and Mobil departed from the project, the government set up the Special Committee for the Camisea Project charged with identifying future investors in the project.³⁴ This Committee went on road shows to Asia, Europe, the United States, and Canada to promote the project.³⁵ What resulted is the project as it presently stands comprised of three parts and spearheaded by two consortia already

³⁰ *Id.*

³¹ M M Cernea “The ‘Ripple Effect’ in Social Policy and its Political Content” in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65, 92–93.

³² J Friedad “Green Acres: Oil Companies Strive to Turn a New Leaf to Save Rain Forest – Shell, Mobil Want to Avoid Raising Ire of Activists at Massive Peru Project – But Skeptics Wait and See” *Wall Street Journal* (Eastern Edition) (7/17/97) A1.

³³ Coordinator of Indigenous Organizations for the Amazon Basin, the Inter-Ethnic Association for the Development of the Amazon Rainforest, the Permanent Coordinator for Indigenous Peoples in Peru, the Matsigenka Council for the Urubamba River, the Peruvian Communities Affected by Mining, the Regional Association of Indigenous Peoples of the Central Rainforest of Peru “Declaration by Indigenous Peoples in Defence of Life, Territory and the Environment: The Camisea Project is Threatening the Fundamental Rights of Indigenous Peoples and Damaging Fragile Ecosystems and Amazon Biodiversity” signed 8/25/03 archived at www.bicusa.org/iac/camisea_project_page.htm.

³⁴ “Pluspetrol-led Group Wins Camisea Contract” (2/21/00) 98(8) *Oil and Gas Journal* 26.

³⁵ “Peru’s Camisea Tender Process to Continue” (6/21/99) 97(25) *Oil and Gas Journal* 30; Barrios “Why Camisea is Feasible Today” [2000] *NAFTA: Law and Business Review of the Americas* 525.

contracted to exploit and distribute reserves. The financing of the project has been subject to human rights controversy with campaigns targeting the financiers of the project – Citigroup, the U.S. Export-Import Bank, and the IDB.

The Camisea Project is now divided into three parts; the extraction and production of the gas fields, the transportation and distribution of the gas to Lima (three hundred fifty miles southeast of the fields³⁶), and also the distribution of gas from the capital city.³⁷ In total, it is estimated that the fields contain “eleven trillion feet of natural gas and six hundred million barrels of condensate.”³⁸ The gas will be produced by a consortium of companies, including, Pluspetrol Peru Corporation, S.A., Hunt Oil Company, SK Corporation, and Tecpetrol SA. The distribution of the gas to Lima will be carried out by another consortium, including Tecgas N.V., Pluspetrol Resources Corporation, Hunt Oil Company, SK Corporation, Sonatrach Petroleum Corporation B.V.I., Tractebel, and Grana y Montero S.A.³⁹ Camisea consists of two pipelines: one for natural gas and the other for liquid natural gas.⁴⁰ Gas will first be consumed in Lima and then distributed nationally by Tractebel and perhaps internationally.⁴¹

The Peruvian government regulates the project under the Law for the Promotion and Development of the Natural Gas Industry. The Peruvian Energy Tariffs Commission will charge tariffs at point of sale and also for the distribution of the gas. The government also promises to provide guaranteed use of natural gas during the period for which sunk costs are recovered by companies.⁴² The law firm of Sullivan & Cromwell is representing both the upstream and downstream consortia.⁴³ Clifford Chance is representing the IDB along with Rodrigo, Elias & Medrano. Sullivan & Cromwell and Miniz y Asociados represent the government.⁴⁴

Consortia companies carry out their work through concession contracts including build-operate-transfer (BOT) schemes.⁴⁵ The usual advantage of the BOT arrangement is that companies can be sure to recoup sunk costs and to capture an agreed-on profit before exiting the scene. However, in this case, as the government has committed itself to purchasing a fixed amount of gas during the recoup stage, the financial risk is otherwise mitigated.

During the post-Shell and Mobil period, the Camisea project continues to be controversial with respect to human rights. However, with the exit of the majors and the entrance of relatively speaking minor infrastructure companies, campaigns

36 P Williams, “International Highlights” (September 1998) 1819 *Oil and Gas Investor* 90.

37 L Luxner “Bloom is Off Mining, Energy Sector in Peru” [9/10/98] *Journal of Commerce* 9A.

38 P Williams “International Highlights” (September 1998) 1819 *Oil and Gas Investor* 90.

39 “Camisea Project” www.camisea.com.pe.

40 “Camisea Project: Public Participation and Consultation Process: Summary and State of the Project” (October 2002) 7.

41 *Id.*

42 “Natural Gas Rules for Camisea Project Set” (9/27/99) 97(39) *Oil and Gas Journal* 30.

43 www.sullcrom.com/display.asp?section_id=15.

44 “Latin American Oil & Gas Deal of the Year 2004” (March 2005) *Project Finance*.

45 On BOT projects *see e.g.* D A Levy “BOT and Public Procurement: A Conceptual Framework” (1996) 7 *Indiana International and Comparative Law Journal* 95.

have moved away from targeting companies and toward targeting the major public and private banks that finance the project.

The Camisea project involves the extraction of gas in the Nahua-Kugapakori Reserve which is home to a number of indigenous groups.⁴⁶ In fact, three-quarters of the project is located in the Reserve.⁴⁷ Specifically, the Nahua, Kirineri, Nanti, Marhiguenga, and Yine live in the Reserve.⁴⁸ Since the time of Shell to the present day, tension has existed over how the human rights of these communities will be safeguarded. Strategies to protect human rights have been pursued by community groups, NGOs, governments, and companies. At times, campaigns have been violent as Shining Path was allegedly responsible for the bombing of a Shell office⁴⁹ and on another occasion sixty pipeline workers were kidnapped.⁵⁰ It is in this context that the campaigns targeting the public and private banks arise. Human rights legal strategists first targeted Citigroup, then the Export-Import Bank of the United States, and, finally, the IDB.

A Citigroup

On June 4, 2003, ten of the largest and most influential international banks formalized their commitment to the environment and to human rights by adopting the Equator Principles. In doing so, the banks committed themselves to financing only “socially responsible”⁵¹ projects in emerging markets. Specifically, the Principles apply to infrastructure projects costing over fifty million dollars, underwritten by the signatory banks, which have grown to twenty-five in number. Based on guidelines developed by the International Finance Corporation (IFC) in the context of publicly financed, privately carried out projects, the Equator Principles apply specifically to projects financed by signatory private international investment banks.⁵² The adoption of the Principles is a part of a larger movement to adapt IFC guidelines to private contexts.⁵³ In a nod to this public international lineage, at the press conference announcing the Principles, bank executives sat shoulder to

46 The Reserve was established by Ministerial Resolution No. 00046-90-AG/DGRAAR 2/14/1990.

47 “Execs, Enviros Tussle over Financing of Peru Project” (6/28/02) archived at www.ran.org/news/newsitem.php?id=5542=finance.

48 A Grumbel “Bush, the Rainforest and a Gas Pipeline to Enrich His Friends” London Independent archived at www.ran.org/news/newsitem.php?id=770&area=finance (7/30/03).

49 “Shell and Mobil Agree with Peru’s Oil Firm on Gas Exploration” Wall Street Journal (Eastern Edition) (5/20/96) A8.

50 A Gumbel “Bush, the Rainforest and a Gas Pipeline to Enrich His Friends” The Independent (7/30/03) archived at www.ran.org/news/newsitem.php?id=770&area=finance.

51 The Equator Principles (2003) Preamble.

52 C M Mates “SYMPOSIUM: Markets in Transition: Reconstruction and Development: Part Two – Building Up to a Drawdown: International Project Finance and Privatization – Expert Presentations on Lessons to be Learned: Project Finance in Emerging Markets – The Role of the International Finance Corporation” (2004) 18 *The Transnational Lawyer* 165, 171. At the same time, the International Finance Corporation has just revised its own guidelines. As a result, there is some debate among Equator banks as to whether they will stick with the old ones.

53 G A Sarfaty “Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law. By Mac Darrow. Oxford, England; Portland OR: Hart Publishing, 2003. pp. xv, 353. Index \$80” (2004) 98 *American Journal of International Law* 398, 400.

shoulder with Peter Woicke, the Executive Vice President of the IFC and Managing Director of the World Bank.⁵⁴ In making this commitment, it appeared that the investment banks were taking a moral high road, committing themselves to a form of enlightened global capitalism.

Although this is no doubt part of the story, at the same time, it was also evident to onlookers that the adoption of the Principles resulted from, at least in part, successful campaigns by NGOs and community groups. Student protestors had also played an important role.⁵⁵ These actors actually targeted one of the principle drivers of the Principles – Citigroup. Specifically, they campaigned against Citigroup in connection with the Camisea project. The campaign against Citigroup’s involvement in Camisea was a part of a larger NGO movement targeting the financiers of privatized infrastructure projects.⁵⁶ It also included an advertisement in the *New York Times*.⁵⁷ Citigroup subsequently withdrew from the Camisea project, although “it denies that the protests had any effect.”⁵⁸ In turn, Citigroup “promptly began work on the Equator Principles,” which it spearheaded with ABN AMRO and the IFC.⁵⁹

At its foundation, the Equator Principles are a PPP in which governments, intergovernmental organizations, and companies work together.⁶⁰ Furthermore, although the Principles arguably resulted in part from the Camisea campaign and coincided with the withdrawal of Citigroup, the Principles were subsequently brought back into the Camisea picture by NGOs. They used the Principles as a tool in an attempt to have banks, which subsequently became involved in the project and which were signatories to the Principles, apply human rights standards to their financing decisions. Nonetheless, according to *Project Finance* magazine, the leading specialist publication in the field, the Camisea project “shows up” the “limits” of the Equator Principles.⁶¹

The movement to make private investment banks respect human rights in the projects that they finance is an outgrowth of the successful adaptation of NGO and community group strategies from public to private projects. The constellation of actors involved in specific projects like Camisea has shifted with privatization. Almost eighty percent of privatized projects are financed by the Equator banks and non-Equator banks are also influenced by the adoption of the Principles as a market

54 (June 2003) *Project Finance*.

55 “Environmentalists, Students and Human Rights Advocates Confront Citigroup as Number One Funder of Global Warming” (7/11/01) archived at www.ran.org/news/newsitem.php?id=453&area=finance.

56 See A Dabbs and M Bateson “The Corporate Impact of Addressing Social Issues: A Financial Case Study of a Project in Peru” (2002) 76 *Environmental Monitoring and Assessment* 135, 141. On the involvement of banks in projects see MB Likosky “Editor’s Introduction: Transnational Law in the Context of Power Disparities” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) at xvii, xxiv.

57 “Citigroup Will Be Target of Negative Ad by Rainforest Action Network” *AFX News* (8/26/02) archived at www.ran.org/news/newsitem.php?id=567&area=finance.

58 “Latin American Oil & Gas Deal of the Year 2004” (March 2005) *Project Finance*.

59 *Id.*

60 C E Di Leva “Sustainable Development and the World Bank’s Millennium Development Goals” (Fall 2004) 19 *Natural Resources and the Environment* 13.

61 “Latin American Oil & Gas Deal of the Year 2004” (March 2005) *Project Finance*.

standard.⁶² Thus, the hope is that the targeting of these banks will produce large-scale results. This will reinforce the fact that the World Bank Group guidelines on which the Principles are based also have in part been extended to the policies of individual transnational corporations such as British Petroleum and Shell.⁶³ The question is whether successful strategies premised on naming and shaming will result in real-world human-rights-respecting social practices. Banks seem to be presenting the signing of the Equator Principles as a human rights *fait accompli*. However, it is not yet clear whether this is in fact the case. Perhaps the signing is instead one example of the many “mythologies of compliance”⁶⁴ of human rights conditionalities.

62 M Kamijyo “The ‘Equator Principles’: Improved Social Responsibility in the Private Finance Sector” (2004) 4 Sustainable Development Law and Policy 35, 38.

63 M M Cernea “The ‘Ripple Effect’ in Social Policy and Its Political Content” in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65, 68, 95–96.

64 S F Moore “An International Legal Regime in the Context of Conditionality” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 333, 339.

On compliance with international law see A Chayes and A H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press Harvard 1995); R A Falk “Re-Framing the Legal Agenda of World Order in the Course of a Turbulent Century” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 355; R A Falk, *Predatory Globalization* (Polity Press Boston 1999); L Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press New York 1979); B Kingsbury “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 Michigan Journal of International Law 345; H H Koh “Symposium: International Law: Article: Transnational Public Law Litigation” (1991) 100 Yale Law Journal 2347; H H Koh “Transnational Legal Process Illuminated” in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* 327.

Benedict Kingsbury and also Anne-Marie Slaughter, Andrew S. Tulumello and Stephan Wood point to socio-legal studies as a useful resource in measuring compliance see B Kingsbury “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 Michigan Journal of International Law 345; AM Slaughter, A S Tulumello and S Wood “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” (1998) 92 American Journal of International Law 367, 371–372.

This call coincides with increased attention within sociolegal studies to how transnational legal processes function in practice see e.g. J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge University Press Cambridge 2000); A Carty, *Law and Development* (Ashgate Aldershot 1992); A L Chua “Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development” (1998) 108 Yale Law Journal 1; R J Coombe “Interdisciplinary Approaches to International Economic Law: The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization” (1995) 10 American Journal of International Law and Policy 791; E Darian-Smith “Review Essay: Power in Paradise: The Political Implications of Santos’s Utopia” (1998) 23 Law and Social Inquiry 81; E Darian-Smith “Review Essay: Structural Inequalities in the Global Legal System” (2000) 34 Law and Society Review 809; E Darian-Smith and P Fitzpatrick, eds, *Law of the Post-Colonial* (University of Michigan Press Michigan 1999); Y Dezalay and B G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press Chicago 1996); Y Dezalay and B G Garth, eds, *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press Michigan 2002); Y Dezalay and B G Garth, *The Internationalization of Palace Wars* (University of Chicago Press Chicago 2002); J Faundez, ed, *Good Government and Law: Legal and Institutional Reform in Developing Countries* (MacMillan Press London 1997); L M Friedman “Borders: On the Emerging Sociology of Transnational Law” (1996) 31 Stanford Journal of International Law 65; J Jenson and B S Santos, eds, *Globalizing Institutions: Case Studies in Regulation and Innovation* (Ashgate Aldershot 2000); M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities*; M B Likosky, “Who Should Foot the Bill?”

Importantly, it represents a transposing of the issues surrounding conditionalities from the public to the private context. Generally, discussions of conditionalities focus on public international financial institutions and government-based assistance,⁶⁵ rather than on loans from private investment banks.

- in R Scholar, ed, *Divided Cities: 2003 Oxford Amnesty Lectures* (Oxford University Press Oxford 2006); M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005); M B Likosky, *The Silicon Empire: Law, Culture and Commerce* (Ashgate Aldershot 2005); M B Likosky "Response to George" in M Gibney, ed, *Globalizing Rights: The 1999 Oxford Amnesty Lectures* (Oxford University Press Oxford 2002) 34; U Mattei "SYMPOSIUM: Globalization and Governance: The Prospects for Democracy: Part III: Globalization and Empire: A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance" (2003) 10 *Indiana Journal of Global Legal Studies* 383; B Maurer, *Recharting the Caribbean: Land, Law, and Citizenship in the British Virgin Islands* (University of Michigan Press Michigan 1997, 2000); S F Moore "Certainties Undone: Fifty Years of Legal Anthropology, 1949–1999" (2001) 7: *Journal of the Royal Anthropological Institute* 93; L Nader "The Influence of Dispute Resolution on Globalization: The Political Economy of Legal Models" in J Feest, ed, *Globalization and Legal Cultures: Onati Summer Course 1997* (Dartmouth Aldershot 1999) 87; A Riles, *The Network Inside Out* (University of Michigan Press Michigan 2000); C V Rose "The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study" (1998) 32(1) *Law and Society Review* 93; B d S Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd edition Butterworths London 2002); B d S Santos "Review Essay: Commentary: Power in Paradise: The Political Implications of Santos' Utopia: Oppositional Postmodernism and Globalizations" (1998) 23 *Law and Social Inquiry* 121; S Sassen "SYMPOSIUM: Globalization and Governance: The Prospects for Democracy: Part I: Transnational and Supranational Democracy: The Participation of States and Citizens in Global Governance" (2003) 10 *Indiana Journal of Global Legal Studies* 5; M Shapiro "The Globalization of Law" (1993) 1(1) *Indiana Journal of Global Legal Studies* 1; S S Silbey "Let Them Eat Cake: Globalization, Postmodern Colonialism, and the Possibilities of Justice" (1997) 31(2) *Law and Society Review* 207; B Z Tamanaha "BOOK REVIEW: Law and Development (Vol. 2, Legal Cultures). Edited by Anthony Carty. Dartmouth Publishing Co., Ltd., Gower House (distributed by New York University Press), 1992. Pp. xxiii, 504. Index \$150. Law and Crisis in the Third World. Edited by Sammy Adelman and Abdul Paliwala. Hans Zell, 1993. Pp. xii, 332. Index 40" (1995) 89 *American Journal of International Law* 470; G Teubner, ed, *Global Law Without a State* (Dartmouth Aldershot 1996); D M Trubek "Law and Development: Then and Now" (1996) *American Society of International Law, Proceedings of the 90th Annual Meeting*; D M Trubek, Y Dezalay, R Buchanan and J R Davis "SYMPOSIUM: The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas" (1994) 44 *Case Western Law Review* 407; W Twining "A Post-Westphalian Conception of Law" (2003) 37 *Law and Society Review* 199; W Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press Oxford 1997); W Twining, *Globalization and Legal Theory* (Butterworths London 2000); R Wilson, ed, *Human Rights: Culture and Context* (Pluto Press London 1997).
- 65 See e.g. S F Moore "An International Legal Regime in the Context of Conditionality" in M B Likosky, ed, *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge University Press Cambridge 2002) 333; A Bittens "NOTE: Trade Conditionality and the Crane Bill: Rewarding Caribbean Basin Nations for Human Rights Failures" (Spring 1998) 6 *Cardozo Journal of International and Comparative Law* 159; D J Linan Noguera and L M Hinojoa Martinez "Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems" (Fall 2001) 7 *Columbia Journal of European Law* 307; D Fuhr and Z Klughaupt "NOTE: The IMF and AGOA: A Comparative Analysis of Conditionality" (Spring 2004) 14 *Duke Journal of Comparative and International Law* 125; C C Lichtenstein "COLLOQUIUM: Aiding the Transformation of Economies: Is the Fund's Conditionality Appropriate to the Task?" (May 1994) 62 *Fordham Law Review* 1943; T A Amato "NOTE: Labor Rights Conditionality: United States Trade Legislation and the International Trade Order" (April 1990) 65 *New York University Law Review* 79; A Galano III "COMMENTS: International Monetary Fund Response to the Brazilian Debt Crisis: Whether the Effects of Conditionality Have Undermined Brazil's National Sovereignty?" (Spring 1994) 6 *Pace International Law Review* 323; C H Lee "COMMENT: To Thine Ownself Be True: IMF Conditionality and Erosion of Economic Sovereignty in the Asian Financial Crisis" (Winter 2003) 24 *University of Pennsylvania Journal of International Economic Law* 875.

It bears reminding that the Equator Principles are a wholesale transfer of IFC guidelines to the privatized context. The text of the Principles is identical to the IFC guidelines. At the same time, the IFC has revised its guidelines and it is not yet clear whether the Equator Principles will be amended to bring them back in line with the IFC guidelines. It is also important to point out that NGOs were in part responsible for the initial IFC guidelines through an earlier generation of strategies targeting publicly financed projects. Of course, the World Bank Group is a complex institution and members of the Bank itself also authored the guidelines. Furthermore, some of these same members were responsible for adapting the guidelines to the privatized context.

However, with regard to implementation, the World Bank Group's IFC had a well-developed apparatus for carrying out its guidelines.⁶⁶ Sarah Joseph argues that “[c]odes will not be effective unless there is vigorous enforcement and independent monitoring of their implementation.”⁶⁷ Under the Equator approach, banks will carry out the Principles in a bank-specific way. Banks are developing internal divisions devoted to this. Not only will each bank devise its own approach to enforcing the Principles but also these approaches will not be subject to formal external scrutiny.⁶⁸ For this reason, the international law firm of Sullivan & Cromwell issued the following statement on the Equator Principles:

The Equator Principles represent *an incremental step* toward the adoption of the [International Finance Corporation's] environmental and social practices and procedures as a market standard for emerging market project finance, even where financing is expected to come primarily from private sector sources of capital.⁶⁹

The international law firm of Norton Rose viewed the implications of the Equator Principles more dramatically, titling its own briefing on the issue *Equator Principles: new environmental and social standards shake up project finance sector*.⁷⁰ Whether the Principles are indeed an incremental step or else a watershed is not yet determined.

Only time will tell whether the Equator banks implement the Principles in the same way that the IFC did. A uniform set of rules⁷¹ may betray a diversity of meanings as such rules are differentially applied. Importantly, NGOs have even been highly

66 However, on the limitations of the IFC compliance mechanism see D Kinley and J Tadaki “From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law” (Summer 2004) 44 *Virginia Journal of International Law* 931, 1003–1006.

67 S Joseph, *Corporations and Transnational Human Rights Litigation* (Hart Oxford 2004) 8.

68 R F Lawrence and W L Thomas “The Equator Principles and Project Finance: Sustainability in Practice?” (Fall 2004) 19 *Natural Resources and Environment* 20.

69 Sullivan & Cromwell LLP, *Memorandum: Re: Equator Principles – New Environmental and Social Guidelines for Project Finance Transactions* (6/18/03) (emphasis added). For the opinion of another international law firm see Linklaters, *The Equator Principles* (7/23/03).

70 Norton Rose (June 2003).

71 On the move toward more uniform rules promulgated by public and private bodies see L J Danielson “Sustainable Development, Natural Resources, and Research” (Fall 2004) 19 *Natural Resources and Environment* 39.

critical of how the World Bank Group itself applies the guidelines.⁷² Michael M. Cernea explains with reference to the World Bank's resettlement policy, which is part of the Equator Principles package:

Interestingly enough, the NGOs were carrying the fight, so to say, on both sides of the World Bank's resettlement policy. While in their assessments of the World Bank performance they were deploring the "weaknesses of the Bank policy" and its "inconsistent implementation," in criticising the private sector displacements they were contrasting the private sectors lack of policy, normlessness and ad-hoc-ism in forced displacement with the World Bank's policy standards. Time and time again, the critique was that such displacement [sic] were not meeting "even" the international standards set by the WB for avoiding, or minimising, or mitigating the effects of, development-caused displacements.⁷³

A number of questions might be asked about the Equator Principles. Will the Equator banks hire World Bank employees to translate the Principles into practice? Will banks coordinate their implementation efforts? With time, will an oversight institution or mechanism be put in place to promote uniform application of the Principles? Who will police the implementation of the Principles? Can NGOs function as *de facto* monitors of the Principles? Who will fund the NGO efforts? It is not yet certain whether NGOs and community groups will pursue further campaigns to have the Principles expanded in scope and applied robustly in practice, although recent activity suggests that this will be the case.⁷⁴ Will "Northern" rights be delivered to "Southern" communities?⁷⁵ The answer to these questions will represent a new chapter in development diplomacy.

After helping to produce the Equator Principles, NGOs attempted to use them to influence financing decisions by signatory banks involved in the Camisea project subsequent to Citigroup's withdrawal. A number of NGOs are participating in this campaign. They hail from diverse countries including the United States, Italy, Germany, Finland, Belgium, Australia, Portugal, and the Netherlands. They include Rainforest Action Network, Campagna Perla Riforma della Banca Mondiale, the Berne Declaration, Greenpeace, Friends of the Earth, International Rivers Network, Urgewald e.u., Finnish ECA Reform Campaign, FERN, EURONATURA, Mineral Policy Institute, World Economy, Ecology and Development, Quercus, Both Ends, Environmental Defense, Institute for Policy Studies, Friends of the Earth, the Corner House, and the Wilderness Society. These NGOs sent letters to Equator banks urging

72 M M Cernea "The 'Ripple Effect' in Social Policy and its Political Content" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65, 91.

73 *Id.*

74 The Equator Principles, "Banks Meet with NGOs to Discuss Progress on the Equator Principles" (7/13/04) available at www.equator-principles.com/90130704.

75 G P Neugebauer III "NOTE: Indigenous Peoples as Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America" (June 2003) 78 *New York University Law Review* 1227, 1256.

them to withdraw financing from the Camisea project. Letters were sent to an equally international group of investment banks from the Netherlands, the United Kingdom, the United States, France, Switzerland, Germany, Italy, Canada, Australia, and New Zealand. The banks were ABN AMRO, Barclays PLC, Citigroup, Credit Lyonnais, Credit Suisse Group, Dresdner PLC, HVB Group, ING Group, MCC, Rabobank Group, Royal Bank of Canada, the Royal Bank of Scotland, West LB AG, and Westpac Banking Corporation.⁷⁶ It is difficult to assess the impact of this campaign, as many banks are involved in different capacities. However, subsequent campaigns targeting public banks involved in Camisea have produced concrete measurable results.

NGO campaigns targeted not only private banks but also public ones. The two sources of financing are often linked in the context of a specific project. For a private bank to advance capital, it is sometimes necessary for a public bank to be involved. Public banks may advance loans or else provide political risk insurance.

B Public banks

Infrastructure projects with a significant element of risk involved often receive funding from public banks such as export credit agencies and development banks. These banks may guarantee private loans, issue their own loans, or else insure projects against political risks associated with them. In the case of Camisea, money was sought from export credit agencies and the IDB. NGOs devised strategies targeting both. The campaign targeting the U.S. Export-Import Bank, an export credit agency, produced results. However, when the battle line shifted to the IDB, the actualization of human rights by Camisea became increasingly thorny. NGOs' strategies targeting the IDB were helped out by a star-studded group of Hollywood celebrities and musicians who wrote letters to U.S. President George W. Bush. This group included Sting, Ruben Blades, Esai Morales, Kevin Bacon, Susan Sarandon, Chevy Chase, Cary Elwes, and others. Bianca Jagger penned letters to the presidents of the IDB and Peru in addition to President Bush.⁷⁷

U.S. consortium participants sought loans from the U.S. Export-Import Bank. Specifically, companies asked for \$214.6 million in loans.⁷⁸ A number of NGOs including Amazon Watch, Friends of the Earth, the Bank Information Center, Environmental Defense, Amazon Alliance, and the Institute for Policy Studies targeted the Export-Import Bank, attempting to influence it to deny funding.⁷⁹

76 "Press Release: Camisea Project is Litmus Test for New Equator Principles: Environmental Allies Urge Banks to Uphold Commitments" (9/6/03) archived at www.ran.org/news/newstitem.php?id=807&area=finance.

77 "Hollywood Stars Rally for the Rainforest: Bianca Jagger, Sting, Ruben Blades, Kevin Bacon, Susan Sarandon, Chevy Chase and More Urge Presidents Bush and Toledo: 'Don't Finance the Destruction of Peru's Amazon Rainforest'" Newsroom Press Release: Friends of the Earth/Amazon Watch, 2003-09-04 http://www.amazonwatch.org/newsroom/view_news.php?id=699.

78 T Ichniowski "Ex-Im Bank Denies Aid for Peru Gas Project" (8/9/03) 25(10) Engineering News Round 1.

79 "Financing for Peru's Camisea Project Voted Down by U.S. Ex-Im Bank: U.S. Agency Applauded for Upholding Indigenous and Environmental Safeguards in Controversial Amazon Energy Project" www.bicusa.org/lac/camisea_project_page.htm (8/28/03).

NGOs involved pursued two strategies. First, they detailed the human rights and environmental problems of the project. Second, NGOs identified the political linkages between company executives and the current presidential administration. This second strategy parallels the strategy pursued by the Center for Public Integrity in the context of the Iraq infrastructure reconstruction contracts discussed in Chapter 4. In the Camisea context, NGOs indicated that Ray Hunt, who was the chairman of the consortium company Hunt Oil, had fund-raised \$100,000 for the current administration. In response to this campaign and based on their own assessment, the Export-Import Bank declined to fund the Camisea project.⁸⁰ At the same time, despite the NGO success with the Export-Import Bank, the consortium companies sought financing from other public banks. They sought financing from the export credit agencies of Germany and Italy.⁸¹ This ultimately was tied to importing materials from these countries rather than from the United States. Export credit agencies outside of the United States generally do not apply as strict human rights criteria to their lending. In fact, the U.S. Export-Import Bank often conditions financing of pipeline and dam projects on resettlement procedures that are traceable to the World Bank Group policies.⁸² Also, consortium companies sought funding from the IDB, leading to further NGO campaigns.

When consortium companies sought financing from the IDB, it was not clear how the U.S. government would respond. The United States had denied funding through the Export-Import Bank. However, it was now faced with a decision on the same project except in a different institutional forum, an intergovernmental organization in which the United States is a member. The United States holds a thirty percent voting share and veto rights in the IDB.⁸³ At issue were two loans, one was a \$75 million direct loan and the other \$60 million in privately syndicated loans.⁸⁴ NGOs launched a campaign to persuade the IDB to refuse financing for the project. The results of this campaign differed from the campaign targeting the Export-Import Bank.

Initially, the NGO campaign succeeded in delaying a decision by the IDB.⁸⁵ The lobbying of the IDB was, however, difficult, as it does not have a formal public consultation process. NGOs, specifically the Institute for Policy Studies, the Bank Information Center, Friends of the Earth, Environmental Defense, and Amazon

80 "Ex-Im Declines Financing Request to Bank Peru's Camisea Gas Development Project" www.exim.gov/pressrelease.cfm/49A5YDF9-A3ED-883F.OCB97EKDBF5423 (8/28/03); "Sonatrach Buys Pluspetrol's Share in Camisea Project" (9/15/03) 101(35) *Oil and Gas Journal* 37.

81 "Sonatrach Buys Pluspetrol's Share in Camisea Project"

82 M M Cernea "The 'Ripple Effect' in Social Policy and its Political Content" in M B Likosky, ed, *Privatising Development: Transnational Law, Infrastructure and Human Rights* (Martinus Nijhoff Leiden 2005) 65, 91.

83 T Ichniowski "Big Peru Gas Project Gets Lift from Multilateral Bank Loan" (9/22/03) 251(12) *Engineering News-Record* 17.

84 "World Watch" *Wall Street Journal* (Eastern Edition) (6/8/03) 11.

85 J Griffiths "Progress is a Four-Letter Word: Sometimes Even Pipe Dreams Come True" *The Ecologist* (October 2003); "Gas for Peru v. Green Imperialism" (8/9/03) 368(8336) *Economist* 28.

Watch, pointed out that an IDB report had recommended a forum for public consultation.⁸⁶

Ultimately, the IDB agreed the loans on September 10, 2003.⁸⁷ The United States abstained from voting on the project. As a member of the Board of Directors of the Bank, the United States could have vetoed the Camisea's funding. Although the United States had declined to fund the project through the Export-Import Bank, Jose A. Fourquet, the U.S. representative to the IDB, abstained from voting rather than veto the project. Fourquet gave two grounds for the abstention: first, private financing would be available for the project. Second, Fourquet argued that the United States had "not been able to allay doubts about the adequacy of the environmental assessment conducted for the project."⁸⁸ For the United States, these concerns went to the decision of whether to vote yes or instead to abstain.

The option of vetoing the project on these grounds was not put forward. In effect, by abstaining rather than vetoing the project, the U.S. taxpayers were now financing the project through the IDB. This was even though the U.S. had refused to do so through its Export-Import Bank. This decision to abstain drew fire from NGOs and also from U.S. Congresswoman Nancy Pelosi.

Congresswoman Pelosi argued that the U.S. government should have voted against the proposed loans by the IDB. Specifically, Pelosi cited to the Pelosi Amendment of the International Development Finance Act 1989.⁸⁹ This Act prevents the United States from supporting projects in the IDB with "significant impact on the environment unless the environmental assessment is made publicly available."⁹⁰ Pelosi also referenced the human rights of indigenous communities as a concern.⁹¹

Although the IDB did agree financing, it appeared to make a major concession to NGOs. Specifically, the IDB made its loan conditioned on the inclusion of measures intended to safeguard human rights and to protect the environment. In an unprecedented move by the IDB, the failure to comply with the human rights conditions is grounds for default on its loans. As well, although the IDB only loaned money to the upstream component, it made its loan with the upstream consortium companies also conditioned upon the implementation of human rights conditions

86 Institute for Policy Studies and Amazon Watch, *Evaluation: The Inter-American Development Bank's Public Consultation on the Camisea Project (8/12/02)* archived at www.bicusa.org/lac/camisea_consultation_evaluation.htm.

87 J Griffiths "Progress is a Four-Letter Word: Sometimes Even Pipe Dreams Come True" *The Ecologist* (10/03); "Gas for Peru v. Green Imperialism" (8/9/03) 368(8336) *Economist* 28.

88 T Ichniowski "Big Peru Project Gets Lift from Multilateral Bank Loan" (9/22/03) 251(12) *Engineering News Record* 17.

89 22 USC 262m-7.

90 "Pelosi Statement on Camisea Project in Peru" from the Office of Congresswoman Nancy Pelosi, San Francisco, California, Eighth District, www.house.gov/pelosi/press/leases/sept03/p_camiseapipeline09/0003.htm (9/10/03).

91 *Id.* See also, "USAID recommended that the U.S. Treasury Department Not Fund Camisea and Overseas Private Investment Corp. Declined Funding." Senator P Leahy "Letter to the Editor of the Economist" www.bicusa.org/lac/camisea/leahy_letter.htm/ (8/23/03).

in the downstream component of the project.⁹² This condition resulted in the adjustment of several contracts “to comply with internationally recognized social and environmental standards.”⁹³ In an effort to ensure compliance with the loan conditionalities, over four hundred consultations on the environmental and human rights impact of the project were made during the design phase.⁹⁴

The IDB required that the consortium companies implement an array of policies. Many of these focused on planning and human rights risk mitigation such as:

the development and implementation of environmental, social, health and safety, and contingency plan, procedures and systems, in form and content acceptable to the IDB; use of independent environmental and social consultants to monitor the entire Camisea Project, as well as company, governmental and community monitoring consultants to monitor the entire Camisea Project, ongoing reporting and monitoring with companies to the IDB and project stakeholders; and specific financial mechanisms to ensure compliance with environmental and social requirements.⁹⁵

So, although the IDB did approve the project loan with reservations expressed regarding environmental and human rights risks, it did require the project planners to implement certain measures to mitigate these risks.

The IDB conditionalities are far reaching. They include:

- compliance with the socioenvironmental legislation and with the Consortium Corporate Policy on Environment, Health and Safety;
- respect toward the Communities: “Good Neighbor Policy;”
- respect for property and land possession;
- collaboration with the Government of Peru to meet local needs-sustainable development;
- recognition of the high sensitivity and biodiversity;⁹⁶
- the production of an Environmental and Social Impact Assessment;
- the convening of public consultations;⁹⁷

The public consultations were extensive and involved multiple stakeholders:

Over a period of four months the social team of ERM along with project engineers from Pluspetrol were involved in a series of workshops in order to inform stakeholders about the project component, and receive their inquiries and concerns. The process involves a broad sector of society, including local authorities, unions, church

92 “Camisea Pipeline. Deal of the Year Nomination.” Region: Latin America (Peru). Sector: Oil & Gas 3–4 available at <http://enct.iadb.org/idbdocswebservices/idbdocsInternet/IADBPUBLICDOC.aspx?docum=496697>.

93 Inter-American Development Bank, *Report Summarizing Performance of Environmental and Social Commitments in the Camisea Project* (June 2004).

94 Inter-American Development Bank, *Report Summarizing Performance of Environmental and Social Commitments in the Camisea Project* (December 2004) 16.

95 Inter-American Development Bank “Project Abstract: Camisea: Peru” 4.

96 CAMISEA PROJECT: *Public Participation and Consultation Process: Summary and State of the Project* (October 2002) 11.

97 *Id.* 29.

representatives, NGOs, universities, different groups of fisherman present in the area, and representatives form [*sic*] the Paracas National Reserve. The consultations were, and are, conducted in the City of Pisco and the villages of San Andres y Paracas, and has [*sic*] not ended with the submission to the EIA, since it has been conceived as a continuous process.⁹⁸

In addition to these consultations, planners have established a Community Relations Program to evaluate the social impact of different stages of the project. This Program will:

- identify and involve the local population;
- establish communication and participation channels;
- identify the institutions (public and private) and organizations (national/regional/local);
- establish contacts;
- [organize] recurrent disclosure workshops.⁹⁹

As well, the project will hire members of the local communities.¹⁰⁰ URS Corporation, a major transnational engineering design firm, conducts monthly reports on the environmental and social state of the project.

Another important aspect of the human rights aspects of the Camisea project is the framework for compensating local communities. This framework sets forth a number of principles including: an agreement to make sure that compensation benefits the entire community; that dependence on the planners is to be avoided; that compensation would be “oriented toward improving the education, health, productive activities, training, communication, native communities’ organization and the role of women in the local economy”;¹⁰¹ and that the community assemblies would legitimate the agreements.¹⁰² Compensation is to be distributed directly to communities, although sometimes the NGO Pro-Naturaleza is to be involved.¹⁰³

A Social Contingency Program is also in effect with the aim of maintaining the way of life of indigenous communities. It involves efforts to understand local communities, gain knowledge about how to communicate with them, devise rules governing the interaction between communities and project workers, develop a protocol in case of contact with isolated communities, and also to devise a plan for handling “difficult situations.”¹⁰⁴ Related, a Community Relations Plan aims “to identify, understand and handle the social aspects related to the Project, minimize and/or eliminate potential negative impact resulting from construction activities and increase the positive environmental impacts.”¹⁰⁵

98 *Id.* 29–30.

99 *Id.* 32.

100 *Id.* 33.

101 *Id.* 34.

102 *Id.* 33–34.

103 *Id.* 34.

104 *Id.* 35.

105 *Id.* 43.

The IDB has directed money to increasing the government's capacity to handle social issues involved in the project. It gave the government of Peru five million dollars. This grant aimed at "institution-building" and also sought "to help police" the project.¹⁰⁶ In conjunction with the grant to the government, the IDB is investing in "parallel monitoring by local groups."¹⁰⁷ Furthermore, the IDB earmarked money for the government to set-up an ombudsman for the project as a human rights risk mitigation measure.¹⁰⁸ The goal of the ombudsman is:

to develop conflict-prevention activities between people, organizations and entities related to the development of the Camisea Project. Other functions will be to mediate, conciliate, or facilitate solutions in case of disagreement or conflicts related exclusively to the social and/or environmental aspects derived from the implementation and start up of the Camisea Project.¹⁰⁹

Time will tell how project-affected communities use the ombudsman to resolve disputes or to solve other problems.

Despite these human rights risk mitigation measures, human rights groups and members of local communities have argued that Camisea does not show appropriate concern for human rights. For example, a number of community groups¹¹⁰ authored a report directed at the Peruvian government sharply criticizing the project.¹¹¹ These groups argued: "The participation of civil society would not only improve the project's content and proposals, but also would serve to strengthen the credibility and legitimacy of the decision-making process."¹¹² Even with extensive community consultations, questions have persisted as to the human rights accountability of Camisea. In addition to scrutinizing the activities of the major consortia companies, the practices of subcontractors must be examined carefully to judge the extent to which the project has delivered on its human rights promises.

In August 2002, NGO representatives from Amazon Watch, the Institute for Policy Studies, CEADES, OICH, Shina, and Serjall undertook a field mission to Peru to see how human rights commitments were translating into practice. These

106 "Gas for Peru v. Green Imperialism" (9/8/03) 368(8336) *Economist* 28.

107 *Id.*

108 Supreme Decree No. 030-2002-EM.

109 "Camisea Project: Camisea Project Ombudsman" www.camisea.com.pe viewed on 2/12/03.

110 These groups included: Association for the Conservation of the Cutivireni Patrimony; Peruvian Association for Nature Conservation; ProHuman Rights Association; Center for the Development of Indigenous Amazonians; Peruvian College of Architects; Conservation International; Peruvian Committee of the World Union for Nature; National Coordinator of Rural Communities Affected by Mining; City for Life Forum; Ecological Forum; Peruvian Group for the Resolution of Conflicts; Oxfam America; Shinai Serjali; National Environmental Society; Peruvian Society for Environmental Law; Association for the Conservation of the Peruvian Sea; World Wildlife Foundation-Peru Program Office; Confederation of Amazonian Nationalities of Peru; Institute of the Commons; Machiguenga Council of the Urubamba River; Labou Civil Association; Management Committee for Sustainable Development of the Lower Urubamba; Racimos de Ungurahui. "Position and Recommendations Presented by Various Peruvian Civil Society Organizations to the IADB, the Andean Development Corporation (CAF) and the Export-Import Bank" 7/2/03 archived at www.bicusa.org/lac/camisea_ngo_position_nov02.htm C2.

111 *Id.*

112 *Id.* 9.

representatives reported alleged violations of worker codes of conduct, noted that contact had occurred with isolated indigenous groups, observed that no clear methodology for calculating compensation existed, and indicated that no system of monitoring was in place and that no independent system was in place for responding to local communities' concerns. In fact, they argued that companies had undermined parallel monitoring efforts. The findings of this mission were written up in report form.¹¹³ It is unclear how this report has or has not affected human rights policies.

Further, protestors continue to target the Camisea project. URS, the monitoring company for the planners, tells us how on:

June 9, 2003 an armed group took 71 Techint workers hostages [sic]. The incident occurred at the Tocate camp early in the morning where workers were staying. No fatal casualties occurred and the hostages were released on June 10. All construction activities were shut down in the Sierra 1 sector until hostages were liberated. It appears the hostage situation was created in order to force TGB into implementing their commitments before the construction front moves away from the community.¹¹⁴

Similarly, another URS report recounts a strike. Here, local laborers were demanding better wages and payment of overtime benefits.¹¹⁵

IV An evaluation

Human rights are contested in the Camisea project. The human rights risk mitigation strategies, however comprehensive, have not allayed the concerns of project opponents. Privatization remains essentially contested. Similar privatized development and extraction infrastructure projects have faced related problems. So intense has the movement against the projects been that in Peru another infrastructure project involving a common prime contractor, Tractebel of Belgium, has been halted by social protestors. Decisions to privatize two state electricity companies in 2002 resulted in protests on the streets of Arequipa, the second largest city in Peru. The government declared a state of emergency as “[p]olice and troops poured” into the city to quell “violent demonstrations.”¹¹⁶ President Alejandro Toledo mounted a defense of the privatization in a television address.¹¹⁷ However, unlike the Camisea project which also involved an agreement between the government and Tractebel,

113 “Report on the Social and Environmental Impacts of the Camisea Gas Project by the International Delegation to the Lower Urubamba” (August 2002) archived at www.bicusa.org/lac/camisea_ngo_report_impacts.htm.

114 URS, *Environmental and Social Monitoring Report: Camisea Natural Gas and Natural Gas Liquids Pipeline Project, Peru* (June 2003) 13.

115 URS, *Environmental and Social Monitoring Report: Camisea Natural Gas and Natural Gas Liquids Pipeline Project, Peru* (April 2003) 13.

116 “Peru Clamps Down as Riots Spread” BBC News (6/17/02).

117 *Id.*

in this case sustained protests halted the privatization. With privatization in the limelight, a number of conclusions may be drawn from the Camisea case.

First, in the Camisea case, a quick “race to the bottom” occurred. The U.S. Export-Import Bank has the highest human rights standards of export credit agencies. However, in practice, when the Export-Import Bank denied funding, the U.S. government sanctioned funding by other means in the IDB. Also, the consortium itself simply imported its goods from another jurisdiction. So lobbying pressure on the Export-Import Bank might have succeeded in the short run, but it was deficient in the long term.

Second, during the phase of the project when Shell and Mobil were heading up things, it was possible for NGOs and community groups to capitalize on the reputational risk of those companies to push for the institutionalization of human rights into the project. However, with this shift away from brand-name companies to lesser-known ones, strategies have shifted and targeted the most high profile private and public institutions involved in the project – the banks. At the same time, advances made against the major oil companies during the first stage of the project were not always directly built upon by the consortia companies during the second stage.

Third, as has been discussed, NGO campaigns in the Camisea project focused on detailing the political connections of companies with governments and also putting forth the human rights problems incurred by company projects and lawsuits against companies.¹¹⁸ Although this is an important first step, project planners have responded with human rights risk mitigation strategies that have not addressed the core issues raised by human rights strategists. Instead, what has resulted is denials of funding and the setting of human rights standards at the aspirational level, rather than the implementation of human rights norms in the context of the project itself. Importantly though, the IDB has taken steps in this regard. At the same time, NGOs and community groups have made a case for the limitations of the IDB’s approach.

Fourth, in the Camisea case study, NGOs and community groups have been incorporated into the project planning and spottily during the construction phase. A need exists to involve additional NGOs and community groups at other stages of the project.

Fifth, it is unclear whether the indigenous groups in the Camisea case have been fully included in project decision making and also the extent to which they have been able to monitor the effects of decisions on their natural resources. Laura Rival has argued: “The success of the private sector’s model of equal partnership will depend on the sharing of control, and on how much training indigenous peoples receive to enable them to monitor and control exploitation of their natural resources.”¹¹⁹ As a part of the monitoring mechanism, independent oversight is necessary.

118 A Gray “BIC Letter to the IDB Board of Executive Directors, Camisea Project” archived at www.bicusa.org/lac/camisea_amy_letter.htm. (7/24/03).

119 L Rival “Oil and Sustainable Development in the Latin American Humid Tropics” (1997) 13(6) *Anthropology Today* 1.

Sixth, in the context of partially privatized projects such as Camisea, often the state does not receive an appropriate level of scrutiny for its actions. States maintain rights under the BOT scheme within the concession contracts. Not only are tariffs set, but projects will often ultimately devolve into state hands. In the Camisea project, international NGOs did not tend to target the host state, although Peruvian civil society organizations did. These organizations argued for the centralization of monitoring of human rights standards under the auspices of the Peruvian state. Specifically, they advocate:

The Peruvian Government, supported by a panel of internationally renowned experts and representatives of Peruvian civil society, should ensure the effectiveness, enforcement and integration of monitoring that is being carried out by the consortia, OSINERG, IADB, and others.¹²⁰

Such an independent institution is necessary and a proposal in the concluding chapter for a UN-based one to handle human rights issues arising in the context of privatized international infrastructure projects will be explored.

Peter Muchlinski points out that transnational companies “will never be seen as legitimate without some type of public interest scrutiny of such power, judged in the light of values other than purely economic ones.”¹²¹ The question here is what is the most effective means for scrutinizing corporate activity.

120 Export-Import Bank of the United States “Position and Recommendations Presented by Various Peruvian Civil Society Organizations to the IADB, The Andean Development Corporation (CAF) and the Export-Import Bank” (7/2/03) archived at www.bicusa.org/lac/camisea_ngo_position_nov02.htm.

121 P T Muchlinski “Globalisation and Legal Research” (2003) 37 *International Lawyer* 221, 240.