

BOOK REVIEW

Kinnari I. Bhatt, *Concessionaries, Financiers and Communities. Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects* (Cambridge: Cambridge University Press 2020)

Allow me to begin with a personal note. Project finance (PF) and human rights was the issue my mentor Sheldon Leader was researching when I joined his team as a research assistant about 20 years ago, attempting the first stumbling steps in understanding business and human rights. When reading Kinnari Bhatt's book, I was surprised how little sustainable finance laws on reporting and transparency, or the twice updated Equator Principles, seem to have achieved in changing the main pressure points on the ground: time and 'obsess[ion] with shareholder return' (p. 189) to compensate for non-recourse risk. I was also surprised to see how little research seems to have gone into (technical aspects of) the subject in the time between the volume on Project Finance, Human Rights and Sustainable Development edited by Leader and Ong in 2011 and Bhatt's book in 2020. Secrecy, as Bhatt highlights, continues to surround PF and impedes effective respect and protection of human rights, particularly indigenous peoples' rights. As several case studies published after Bhatt's book confirm, this impact is heightened in countries in the Global South.

In her book, the author leads the reader through different stages of analysis, starting from a case-based problem description and a review of the main 'lacunas' of protection: the fragmentation of risk and privatization in demise of public control. Bhatt then critically assesses the capacity of private initiatives to implement indigenous peoples' rights to land, and illustrates the problems encountered through several case studies (chapters 5 and 6) and examples (chapter 7). The final chapter entitled 'Moving Forward' contains a summary of the protection deficits and a sketch for an agenda of change, focused on both regulatory and private initiatives. Jennifer Lander's review already provided a detailed account of the main arguments,¹ and Ethan Guthro analysed the book's recommendations.²

Through different actors' perspectives, already used by Leader,³ and their techniques of contractual assurance of their interests, Bhatt shows the 'lacunas' through which rights violations creep into projects, even if the sponsors have committed to respecting these rights in the concession agreement. Bhatt demonstrates the structural and intentional, often complicit, absence of the state when setting up concessions in a (public) law-free space, through its withdrawal from its regulatory and oversight functions. At the micro-level, she comes to similar conclusions about the role of public law as Van Harten in his seminal *Investment Treaty Arbitration and Public Law*.

¹ Jennifer Lander, 'K. Bhatt' (2020), 30:2 *Social and Legal Studies* 330.

² Ethan Guthro, 'Concessionaires, Financiers and Communities: Implementing Indigenous Peoples' Rights to Land in Transnational Development Projects' (2022) 59 *Osgoode Hall Law Journal* 831.

³ Sheldon Leader, 'Risk management, project finance and rights-based development' in Sheldon Leader and David Ong (eds.), *Global Project Finance, Human Rights and Sustainable Development* (Cambridge: Cambridge University Press, 2011) 107.

For this purpose, the author provides examples of state contract clauses, concession contracts and finance contracts, undertaking a rich analysis and confirming that even under the fourth version of the Equator Principles, social and environmental standards do not permeate into the granular contractual structure of a project. It is perhaps telling that besides Bujagali project contracts, the book contains surprisingly few examples of verbatim cited clauses. This shows the continuous difficulty in accessing primary sources on PF, even for a researcher who has worked for years as a practitioner in the field. The reader may trust that the selected clauses are a faithful representation of how PF is drawn up, but would be unable to appreciate exceptions or more recent innovations in contractual drafting because the other cases are mainly analysed through secondary sources.

Bhatt has little confidence in private soft-law mechanisms and is rather distrustful of the state capacity to regulate. Her contribution to the business and human rights debate is therefore a sceptical one, both regarding Pillars I and II of the UN Guiding Principles, mainly pointing to very concrete and technical accountability gaps regarding due diligence exercises in PF contexts. This is because due diligence is often *de facto* tasked to the project sponsors, leaving the state ‘off the hook’ (p. 79) regarding its human rights obligations; particularly in the implementation of free, prior and informed consultation and consent (FPIC) of indigenous communities in eviction processes (p. 80). Bhatt also reiterates the Guiding Principles’ incapacity to tackle structural issues, such as the land-grabbing debate (p. 81). Private actors ‘trickle away risk’ (p. 94) or ‘transfer away the cost of meeting a risk’ (Leader, p. 109). This goes as far as turning the purpose of performance standards regarding indigenous land rights *upside down* when accelerating loan repayment, especially in cases when the project’s land resources are ‘at risk’, for example, because of indigenous opposition to the project – the exact resources that are meant to be protected when committing ‘voluntarily’ to respecting indigenous peoples’ rights (p. 119). In that sense, PF puts indigenous rights at even greater risk than other human and labour rights.

The business and human rights debate could benefit from taking up Bhatt’s technical analysis and ask whether there should be recourse to development finance institutions (DFIs) and private lenders in case their own or the project sponsor’s due diligence is incomplete. The OECD Due Diligence Guidance (2017) and the RBC Due Diligence for Project and Asset Finance (2022) set such a standard. Debate on this point should take the analysis of lenders’ ‘tick the box mentality’ (p. 121) one step further and challenge their continued prioritization of project completion over the respect of performance standards they committed to. Bhatt briefly addresses the problem of remedies in the recommendation section (p. 192) and points to the necessity of considering the whole ‘ecosystem of remedies’. The remedies available to indigenous peoples, however, should not only address public and private mechanisms, as Bhatt highlights, but furthermore tackle the responsibilities of all actors involved in PF, including lenders. In this context, Bhatt might have asked the question whether effective implementation of responsibilities of financial institutions is possible without mandatory human rights due diligence, a question that certainly is even more urgent today when the EU directive is about to be adopted without such a standard.


Bhatt’s study thus confirms, from an insider perspective, the constellations of actors, the pressure points and the structural human rights risks already identified by Leader, while adding other issues such as the decisive role of completion certificates (p. 112). Leader considers PF design in principle capable, with certain structural changes, of respecting human rights. He highlights the capacities of lenders and insurers to do so but does not analyse their willingness to do so. Bhatt is pessimistic regarding the actual readiness of the actors involved. She finds that the same deficits that Leader criticised a decade earlier have not been remedied despite the reform of the Equator Principles and the increased number of adhering banks. Bhatt shows how contracts at the micro-level of the project (finance structure) bring shareholder primacy back in and ‘debunk the DFI’s [Development

Finance Institution's] own policy' (pp. 106 and 116). She argues that there would be enough time to carry out FPIC and make sure due diligence is not just a 'purely formalistic and paperwork process' (p. 190) in the exploration phases, but that this does usually not occur.

Regarding the case studies, it would have been a welcome addition if the author had engaged with literature available at the time of writing. In particular, Hofbauer in 2017 had already critically discussed extraterritorial state obligations and victims' access to justice in the context of climate project finance.⁴ This case would have benefitted Bhatt's own analysis of the Barro Blanco case. It would have complemented her analysis of the regulatory role of the financiers' home states.

Finally, it would have been interesting to see Bhatt report and comment on data (or the lack thereof) regarding cumulative impacts of several PF contract structures in one country or in cross-border regions. What consideration do financiers give to indigenous peoples' rights when participating in syndicates regarding different projects in one territory?

Overall, the Danish Institute for Human Rights' recent comments on the IFC/MIGA standard updates confirms Bhatt's critical analysis.⁵ Thus, most of the recommendations for 'improvement' included in the updates, consist of acknowledgments similar to Bhatt's findings and should have been implemented back in 2006. Still, the UN General Assembly wholeheartedly appreciated the contribution of PF to sustainable development and climate change finance in 2022.⁶ Climate change requires very urgent action. But this action should not be rushed through given the risk of exacerbating the weaknesses of PF and being detrimental for both the environment and rights-holders who cannot count on states to prevent irreversible impact on indigenous peoples' and communities' rights.

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⁴ Jane Hofbauer, 'Operationalizing Extraterritorial Obligations in the Context of Climate Project Finance – The Barro Blanco Case' (2017) 8 *Journal of Human Rights & Environment* 98.

⁵ DIHR, Response to Draft IFC/MIGA Approach to Remedial Action and IFC Responsible Exit Principles, April 2023. See also Sarah E Light and Christina P Skinner, 'Banks and Climate Governance' (2021) 121 *Columbia Law Review* 1895.

⁶ Res AG/77/156 (2022), adopted 14/12/2022, preamble para 4.