Contents

Acknowledgements	vii
Introduction	1
Transnational Influences In An Andean Valley	1
Mining and Community Conflicts	3
What Is Transnational Law?	4
The Organisation Of This Book	8
1 Understanding Regulation and Legitimation: The Challenges for	
Transnational Law	11
Understanding Regulation: The Interaction of Two Kinds of Law	11
Constituting Legal Authority through Legitimation	13
Three Sources of Perceptions of Legitimacy	16
Legitimation Strategies and the Psychology of Rule Makers Legitimation and Power: Organised and Disorganised	17
Audiences	19
Categorising Concepts of 'Right Process'	20
Challenges for Democratic Governance: Drawing Boundaries in a Transnational World	23
2 The Selective Absence of the State: Delegating Responsibility for	
Mining and Community Conflicts	27
The Social Mediation of Mining Development	28
Historical Background to the Predicament	29
The Rise of Local Claims for the Social Mediation of Mining	
Investment	37
Ideological Shifts, Transnational Linkages	37
The Evolution of Mining and Community Conflicts in Peru	38
The Predicament of the State	43
Peru's Response to the Predicament: a Strategy of Selective Absence	45

x Contents

The Sale of Land Required for Mine Development	45 47
Implications from the State Perspective Environmental Assessment	47
The Evaluation of Social Impacts	40 49
Public Participation in EIA Decision-making	51
Limitations on State Administrative and Regulatory Capacity	54
Implications from the State Perspective	55
Conclusion: State Absences and the Promotion of Local and Transnational Legal Ordering	58
3 Transnational Law-making in a Global Policy Arena: Addressing Mining and Community Conflicts	61
Introduction	61
Transnational Law-Making and Corporate Accountability in	01
Globalising Industries	62
Developing a Taxonomy of these Transnational Legal Regimes	62
Globalisation Backlash and the Rise of Certification Institutions	64
Activist Threats and Legal Responses	68
Explaining Variation in Certification Institutions	70
Regulation and Legitimacy in Certification	71
The Global Stakes Involved in Certification: the Globalisation	
of Legal Models	73
Transnational Law-making and Mining and Community Conflicts	74
Certification and the Mining Industry	75
Industry Perspectives: Globalising Opportunities and Threats A Snapshot of the Global Mining Industry: Capacity for	75
Self-organisation to Defend a Reputational Commons	77
Broader Industry Initiatives: the Australian Minerals Code The Global Mining Initiative and the ICMM Sustainable	82
Development Framework	83
Conclusions Regarding Mining Industry Certification Efforts	86
Transnational Law-making at the World Bank	87
The World Bank as a Site of Global Norm Production	87
How Leverage was Developed to Move the Bank	88
Development of the Safeguard Policy Regime: 1980s to mid-1990s	89
The Spread of the Safeguard Policy Regime to Private Sector	
Projects: mid-1990s to the Present	92
Why has Law-making Occurred at the Bank?	94
A Note on the Globalisation of the World Bank's Regulatory Model	97
Conclusions Regarding the Development of Transnational Legal Regimes for Addressing Mining and Community Conflicts	99

Contents	xi

4	The World Bank Safeguard Policy Regime: A Globalising	
Re	gulatory Model	101
	What is the Social Responsibility of Large Project Developers? The	
	World Bank Group's Answer	101
	Overview of the World Bank Safeguard Policy Regime	102
	How the Regime is Organised	102
	Indigenous Peoples Policies	105
	Policy Divergence within the World Bank Group	106
	Involuntary Resettlement	107
	The Formal Provisions of WBG IR Policy	107
	The IR Policy Regime's Decision-making Architecture	113
	Decision-making Structures and Legitimation Strategies in the WBG Safeguard Policy Regime Public Participation in Decision-making: Contrasting Liberal	115
	Legal Approaches with Safeguard Policy Regime Approaches	117
	Private Autonomy and the Marginalisation of Project-affected Groups in Decision-making (or Navigating between	
	Due Process and Privity of Contract)	119
	Using 'Participation' to Structure Public Involvement in	
	Decision-making	122
	Expert Involvement in IR Policy Decision-making: the Role of the Social Specialist	127
	The Emergence of a New Form of Professional Knowledge	127
	Social Specialists and Mining Enterprises	129
	Social Specialists and the World Bank Group	133
	Closing Summary	135
5	Communities and Corporations	137
	Approaching the Concepts of Corporation and Community	137
	Questioning Community	138
	Community, Identity and Authority in the Peruvian Andes	141
	Are Andean Populations Solidaristic? Essentialised Visions of Andean Society	142
	The Historical Origins of Solidarities and Divisions in the Rural Andes	143
	Implications of Andean Identity Politics for the Construction of Community Solidarity	145
	Are Andean Populations Defined by Subsistence Livelihoods?	145
	Are Andean Populations Isolated?	147
	Do Andean Peoples in Peru Call Themselves Indigenous?	148

	A Hypothesis Regarding the Goals and Behaviour of	
	Community Actors	149
	Problematising the Corporation: Understanding Transnational	
	Mining Projects	150
	How do we Think about Companies?	150
	Do Companies only Care about Money? Modelling Regulato	•
	Conversations within the Firm	152
	Do Mining Enterprises make Rational Decisions about	
	Community Relations?	154
	Does the Mining Project either Think with One Brain or Spea	
	with One Voice?	157
	Who is Working for the Project at Any Given Time?	157
	Are Community Relations Issues Effectively Integrated into	158
	Project Planning Processes? Are Attitudes within the Mining Industry towards Communit	
	Relations Uniform?	.y 159
	Incentives, Co-ordination, Control and Community Relations	
	Policy	161
	Hypotheses Regarding Motivations and Challenges within	101
	Mining Enterprises	161
	Concluding Remarks	162
6	Case Study: Antamina in San Marcos	163
	Introduction	163
	Part I: Introductions to the Actors	165
	A Snapshot of the District of San Marcos	165
	Geography, Demography and Politics	165
	Agricultural and Pastoral Production Systems	168
	Law Governing Ownership, Use and Exchange of Highland	
	Pastures in San Marcos	170
	A Snapshot of the Compañía Minera Antamina	178
	Part II: The Processes of Land Acquisition and Resettlement	186
	The Development of Local Legal Ordering	186
	The Acquisition of Land by CMA	188
	Analysing The Negotiations: Looking at the Construction of	
	an Informal Legal Order	201
	Resettlement: the Local Legal Order Unravels	208
	Community and Corporate Perspectives on the Local Legal	
	Order	216
	Part III: Re-Engagement under the Auspices of the WBG Involunta	•
	Resettlement Policy Regime From Stalemate to Re-engagement	221 221

....

	Contents	xiii
	The Assertion of Transnational Legal Ordering: MIGA's IR Policy Regime	227
7	Assessing the World Bank Safeguard Policy	237
	Introduction Objectives of the Chapter The Safeguard Policy Regime Decision-making Model	237 237 238
	Circumstances Affecting the Interpretive Power of Social Specialists How to Identify Social Specialist Influence in the Case Study? Three Rationalities of Decision-making Roles Assigned to the Rationalities by the IR Policy Regime An Additional Factor: Co-operation Versus Defection Limitations of the Approach and a Hypothesis	
	IR Policy Regulatory Decisions Made in the Case Study Analyzing the Regulatory Decisions Made A Brief Recapitulation of WBG IR Policy's Eligibility,	254 254
	Entitlement, and Participatory Requirements First Phase: Resettlement Planning Second Phase: Land Acquisition Third Phase: Accelerated Resettlement Plan (ARP) Fourth Phase: MIGA Compliance Audit	255 256 257 259 261
	Assessing the Relative Influence of the Decision-making Rationalities The First Three Phases: Resettlement Planning, Land	264
	Acquisition and the ARP A Note on Competing Professional Rationalities: the Influence of Lawyers	264 271
	Explaining the Weakness of Social Specialist Rationality in the First Three Phases	271
	What about Peer Review? Looking for a Strong Epistemic Community of Social Specialists Conclusions Regarding Social Specialist Influence	273 276
	The Quality of Social Specialist Decision-making in the IR Policy Model Regulatory Effectiveness Legitimation	278 278 282
	Moving Forward: Bridging 'Social Acceptability' and 'Social Acceptance'	284

xiv Contents

8	Transnational Law and Democratic Governance	287
	Posing the Question: Antecedents to an Inquiry into Democratic	
	Legitimacy	287
	The Dynamics of a Global Policy Arena	290
	Modelling Flows of Legal Authority: the Privatisation and	
	Transnationalisation of National Law	290
	Modelling Industry Certification	291
	Interlegality	292
	Interlegality and Access to Information	292
	Interlegality and Discretionary Power within the Corporation	294
	Legitimacy and Transnational Ordering	295
	Publicness versus Privacy in the Transnational Sphere	296
	Technical versus Political Legitimation Strategies in	
	Transnational Arenas	299
	Appropriate Decision-making Processes for the IR Policy	
	Regime	301
	Legitimacy, Political Identity and Transnational Law	302
Bil	bliography	307
Inc	dex	331