Symposium 'The World Bank Environmental and Social Framework in a wider realm of public international law'

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1. Introduction

In October 2018, the World Bank (the Bank) has launched an upgraded version of its safeguard policies, the Environmental and Social Framework (ESF). It took over six years of discussions, hundreds of consultation meetings, thousands of pages of commentary and exchange, and extensive preparations for implementation, for the ESF to be introduced. For the Bank this is one of the largest internal reforms in decades, affecting its operations in over 100 countries with the annual lending volume of 45 billion USD (Dann & Riegner). In the field of development cooperation at large, consultations over the ESF triggered a major debate about how to ensure the sustainability and fairness of development operations, whilst also respecting the national autonomy of the borrowing states. It goes without saying that many of the changes introduced by this reform, as well as the process through which the ESF was adopted, have direct relevance to public international law, particularly in the areas of environmental, labour and human rights' protection. However, given the recent nature of these developments, thus far there has been a limited academic engagement with this topic, especially from a legal perspective[1]. Therefore,

[1] See for instance, S. de Moerloose, 'Sustainable Development and the Use of Borrowing State Frameworks in the New World Bank Safeguards', (2018) 51 (1) *Law and Politics in Asia, Africa and Latin America* 53; G. Jokubauskaite, 'The Legal Nature of the World Bank Safeguards' (2018) 51 (1) *Law and Politics in Asia, Africa and Latin America* 78; C. Passoni, A. Rosenbaum and E. Vermuni,

building on the discussions that first took place among the authors at the University of Durham (UK) in September 2017, the papers in this Symposium highlight the impacts that the ESF is likely to have on the functioning of international legal framework.

In order to understand the impacts of the ESF on the international legal order, one must understand how this framework operates. As the name suggests, the safeguards aim to protect a natural environment and local populations from the negative effects of development financing. In order to achieve this aim, the safeguards are binding on the Bank's staff and they are also mandatory for its borrowers[2]. The safeguards then shape and guide the negotiations over development finance agreements among the World Bank, its borrowers and private investors. As a result, officially, the ESF governs the projects funded by the World Bank, but it does not create general legal obligations for the states in the same way as treaties or customs do. In doctrinal terms, the safeguards only create legal effects through the implementation of financing agreement(s) to which the World Bank is a party.

However, this is only a fraction of influence that the World Bank's rules have on law in practice. Because of its role in shaping project finance, the ESF also shapes the implementation of international law in certain sensitive areas such as environment, investment, labour and human rights. In practice, development projects are the precise instances where the 'rubber hits the road', i.e. where international law sets a concrete standard of protection for a given group of people in a given territory. Environmental, social and economic commitments have to be

'Empowering the Inspection Panel: the impact of the World Bank's new Environmental and Social Safeguards', (2017) 49 (3) *New York University Journal of International Law and Politics* 921-58.

[2] The World Bank ESF (01 October 2018), World Bank Environmental and Social Policy for Investment Project Financing, para. 1, 5.

reconciled and weighed against one another in each and every development project. In the midst of these tensions, the safeguards dictate to the negotiating parties which conditions and commitments matter in each instance, and also to what extent. In that sense, the ESF captures a practice-oriented standard of authoritative behaviour set by international legal obligations, not only for the staff of the Bank but also for its borrowing states as well as private partners.

The second way in which the World Bank's influences international law is through diffusion of its safeguards, and their informal acceptance into other international legal regimes and eventually into domestic laws. Building on the existing research in international relations, Dann & Riegner in their contribution to this Symposium show that 'the Safeguards had become a globally diffused normative model for socially and environmentally sound development' (Dann & Riegner). This means that as well as interacting with existing norms of international law and reframing them for the purpose of individual development projects, the ESF is likely to give rise to new norms and/or to trigger reinterpretation of existing rules in international law more generally. This explains why a number of papers in this Symposium examine the way in which the ESF has integrated the existing and emerging international legal standards, such as the Core Labour Standards (CLS), Consultation and Free, Prior and Informed Consent (FPIC), and access to land, among others. Most of the authors also underline the problematic link between the World Bank safeguards and human rights (e.g. Mares, Cabrera & Ebert, Brunori), since the ESF is likely to solidify but also dilute some of the (emerging) norms that govern the position of individuals and groups in public international law, thus making it more difficult to tackle these issues in other fora of international policy-making.

The third way in which the ESF reform is relevant to international lawyers concerns its capacity to represent the *status quo,* and also the evolution of global governance. For instance, an extensive public debate surrounding the ESF revealed the level of environmental and social standards that developing states are currently willing to internalise and comply with. The process of arriving at the ESF is also a reflection of certain recent trends of rule-making in global governance, where an institutional set-up of an international organisation is used as an alternative to traditional law-making methods via treaty and/or COP decisions. Dann & Riegner capture this quality of the ESF reform eloquently by calling it a 'looking glass' of the global order. This means that the ESF, with its rich, heated and well-documented deliberation process, allows us to glance at some of the deeper shifts that are currently taking place in international law and governance.

The contributions to this Symposium each capture a different element of this 'reflection' of global order by engaging with various innovations of the ESF. They examine the shift towards 'democratisation' of international institutions (Houghton), the level of international protection accorded to workers and indigenous peoples (Cabrera & Ebert), the attitude to international regulation of land-related issues (Brunori), the level of tolerance to human rights-related risks in investment and economic development (Mares), and the changing nature of multilateralism (Dann & Riegner). The rest of this introductory piece will outline some of these key shifts identified by the authors in their original research, also underlining the impacts that the ESF reform might have on the contemporary international legal order.

2. Intra-institutional law-making

The pathway of creating the ESF is an illustration of two developments that are becoming commonplace in modern international law: institutionalisation of global politics, and the rise of non-state actors. The two seem to be closely interlinked, because they both have a limiting effect on the decision-making powers of sovereign states and the extent to which their 'voice' matters in global politics. To be sure, it would be naïve to claim that western donors such as the US allowed an 'open' global debate about contentious issues of development without maintaining a relative control over the content and the general outcomes of the reform. For instance, it was probably safe for these donors to assume that some of the most influential international NGOs will adhere to a liberal ideology[3]; or that the Bank's staff, notwithstanding their widely construed prerogatives, will protect a predominantly neoliberal outlook of development[4]. In that sense, the process of arriving at the safeguards' reform seems to not so much curtailed the 'voice' of the donor countries, as it enabled a productive alignment between their agenda, and that of the non-state actors.

Even with such caveats in mind, the ESF reform presents a departure from the more traditional template of inter-state law-making. Differently than the classic, inter-state model of treaty negotiations, which is based on the representation of geographical and political constituencies, the intra-institutional model of rule-making leading up to the ESF was specifically tailored to the interests of different *stakeholders* within the sustainable development debate. Indeed, the ESF

[3] For an exposition of a relationship between the donor states, the Bank and civil society, see M. van Putten, *Policing the Banks. Accountability Mechanisms for the Financial Sector* (2008, McGill-Queen's University Press).
[4] For a good overview of the Bank's governing structure and the changing meaning of 'development' see generally Dann, *The Law of Development Cooperation* (2013, Cambridge University Press);

was never presented as a quest for a 'deal' acceptable to all, or even a majority of states. Instead, the ESF reform was packaged as a global *deliberation*, which was meant to satisfy civil society, indigenous and local communities, academics, business representatives, and borrowing as well as donor states. It is important to understand that the very possibility of such intra-institutional deliberation offers an alternative to a traditional process that would lead to a binding legal framework, and that this alternative was chosen instead of negotiating a subsequent treaty or a treaty-based amendment. Arguably, given the many difficulties involved in the classic inter-state law-making process, such intra-institutional route is likely to be utilised with increasing intensity. It is therefore important to gain further understanding of what is at stake in choosing this alternative, including the pitfalls and advantages that it entails.

Ruth Houghton's paper in this Symposium exposes the deficiencies of such intra-institutional rule-making, by invoking the conceptual framework of *deliberative democracy* to assess the legitimacy of the ESF rule-making process. Building on Habermas' theory and also the insights of his critics, Houghton discusses the core elements of deliberative democracy – people, public sphere, deliberation, and decision-making – and the way that they were construed by the Bank in the context of the ESF. Houghton's analysis is two-fold: one the one hand, she questions the value of democratic analogy for the understanding of decision-making processes at the global level. On the other hand, she uses the benchmark of democratic decision-making to uncover the systemic issues and the power dynamic that were at play in the ESF process.

In her findings Houghton shows how the Bank continued acting as an interface for deliberation at all times throughout the reform, without ever letting go of control over decision-making, nor

enabling the stakeholders to discuss contentious issues directly, rather than through the Bank. The 'weight' of input by different stakeholders also depended on the future benefits that a given stakeholder can create for the institution, more so than the validity of their arguments. For instance, Houghton demonstrates that countries with the greatest borrowing capacity (such as India or China) had the most space to provide input and shape the final outcome of the reform, despite civil society playing relatively prominent role at the early stages of agenda-setting of the reform. Here, Houghton's work highlights the idea that international institutions are more than sites for contestation between different groups of countries. Rather, they also have an agenda and agency of their own, through which they seek to protect the institution's interests and role in global politics. The broader message of Houghton's contribution is that the intra-institutional route of rule-making, even if it contains such extensive consultations as were used for the ESF, can silence the dissenting voices whilst at the same time creating an impression of taking them seriously.

3. The price of institutional legitimacy

While Ruth Houghton's paper appraises the process legitimacy of the ESF law-making, Franz Christian Ebert & Maria Victoria Cabrera Ormaza focus on the *substance* of the ESF and its impacts on organisational legitimacy. Their argument is based on the premise that by updating the ESF the World Bank responded to increasing 'legitimacy demands' from the borrowing states on the one hand, and the human rights-oriented audiences on the other. These demands conflict, because they 'pull' the ESF towards greater deference to borrowing state's sovereignty on the one hand, and more effective ways of preventing negative human rights impacts and

increasing participation of affected groups on the other. Since the Bank had to enhance its legitimacy vis-à-vis both of these audiences in order to compete in a changing environment of development finance, it adopted various strategies of 'decoupling'. Decoupling enabled the Bank 'to correspond to different legitimacy demands while leaving its core activities largely unaffected' (Ebert & Cabrera).

One such strategy identified by Ebert & Cabrera is to 'decouple' the discourse advanced by the ESF from its actual content. This means including more statements proclaiming better social and environmental standards, whilst at the same time backing them with no concrete policy tools needed for their implementation. In their analysis of how the ESF incorporates current international law standards on labour and indigenous peoples, the authors identify techniques through which such decoupling operates. For instance, a key technique – also discussed by Dann & Riegner – concerns deference to domestic legal frameworks of the borrowing states, allowing for them to take precedence over the international legal standards, such as the CLS. Here, a universal standard is made contingent on the domestic laws, potentially leading to diverging understanding of the same international provision in different countries. This is relevant for a wider discussion in international law because 're-articulation of the key concepts at stake', as argued by Ebert & Cabrera, can lead to inconsistent understandings of human rights standards and weaken their normativity more generally.

The analysis advanced by Ebert & Cabrera is significant because it points towards alternative battlefields taking place over the content of international law. In addition to treaty-making and judicial disputes one must also take into consideration these intra-institutional arenas, where

international law is not only re-articulated through an internal policy of international institution but is also left for further interpretation and application by the 'in-house' lawyers of international organisations. The argument by Ebert & Cabrera also shows that at least in the context of international financial institutions, the strategies of legitimation are elastic, and their outcome is contingent on political and economic concerns of a given institution. In case of the ESF, the price of substantive legitimacy demanded by the civil society activists and/or donor countries has proven to be too high. As a result, their legitimacy demands were accommodated through 'empty' statements without much actual policy content, which might nonetheless at least partially increase organisational legitimacy of the Bank vis-à-vis human rights-oriented audiences. On the other hand, the legitimacy demands from emerging economies with significant borrowing powers were of crucial financial importance to the Bank. Hence, a lot of leeway was created for these countries to eschew the more stringent requirements of human rights protections that might have already existed or were emerging in other areas of international law.

4. Selective 'hardening' of the 'soft law' standards

One area where the World Bank's approach is advanced relative to many other international regimes is access to land. Given that currently the binding sources of international law in this area are extremely limited, the ESF contains a rather stringent procedural framework, which is also advanced in a sense that it recognises multiple functions of land, its social value, its role in the life of indigenous peoples, and the fact that not all land rights might be derived formally. Generally, the Bank had to deal with issues related to land in its projects since at least the 1980s, which in turn lead to an elaborate 'home-grown' intra-institutional regime in this area. Then, in

the context of the ESF, the Bank had to merge its own rules and past experiences with external evolving standards on land issues. In that regard, including the existing and emerging soft law standards on land into the ESF enables their 'hardening' over time.

This impact of the ESF on the on-going international debate about land rights is examined by Margherita Brunori in her contribution to this Symposium. She identifies two core dimensions of emerging international standard of access to land: security and equity. By comparing the provisions of the ESF with some of the milestone developments in international debate about land, Brunori shows that the Bank's approach to *security* of land rights is attuned with other international instruments. It is therefore likely that the ESF will further consolidate the emerging standards in this area, such as the relevant provisions in the Voluntary Guidelines of Responsible Governance of Tenure adopted by the Committee on the World Food Security (CFS).

On the other hand, in her research Brunori shows that the position of the ESF on the *equitable* access to land is considerably more cautious. For instance, there are some references made in the ESF to the equitable benefit-sharing with project-affected communities, but all related requirements are presented in a vague language. The borrowers therefore have a wide discretion to interpret their precise meaning. Generally, by examining some relevant human rights jurisprudence and also other soft law instruments such as Mo'otzkuxtal Voluntary Guidelines adopted under the Convention of Biodiversity, Brunori paints a nuanced picture of the Bank's approach to access to land. Land-related provisions in the ESF are both, progressive and conservative, depending on which aspect of access to land one chooses to focus on.

Another area where the ESF is likely to have an impact on emerging international law standards concerns the assessment of social risks in the context of economic development, including the issue of human rights due diligence. This topic is explored by Radu Mares, who examines the ESF as one of the three relevant instruments in this area, the other two being International Finance Corporation's (IFC) Performance Standards and the UN Guiding Principles on Business and Human Rights (UNGP). Mares sets the scene for his analysis by explaining the institutional differences between the UNGP framework, and that of the ESF/IFC Performance Standards. He underlines the fact that the World Bank Group (the World Bank and IFC together) has a self-standing capacity to enforce the emerging standards of human rights due diligence that does not rely on the good will of the business enterprises and member states, as in case of the UNGPs. This capacity, based on the economic power and availability of financial resources of the World Bank Group, differentiates the ESF and the IFC's Performance Standards from other instruments developed in this area and explains why these instruments have greater authority to condition the behaviour of states and private entities.

Mares identifies a key issue that the ESF does not make a distinction between the social impacts of development finance, and the impact that development finance might have on human rights. This distinction warrants conceptual clarity and, according to Mares, it should be based on the fact that differently than social impacts, human rights are meant to set a *minimal threshold* of human dignity. Therefore, whilst it is generally accepted that some negative social impacts are acceptable in the context of development projects, the same logic of tolerance to 'residual impacts' should not be permitted in the area of human rights. Mares then analyses the notions of 'avoidance' of harm and 'mitigation' of adverse impact, in order to explain what 'not tolerating

residual impacts' means conceptually and in practice The underlying argument of Mares' paper is that prevention should be taken more seriously in the context of negative economic impacts on human rights, and the notion of human rights due diligence in the UNGPs can be further developed by including new parameters. According to him, prevention should be understood as 'reduction at source' and thus tackled at the level of designing financial intervention and throughout the project, to properly addresses the consequences of economic development. Similar to Brunori, Mares shows that the World Bank Group has the capacity to 'upgrade' the existing soft law standards in this area. Accordingly, the choice of *not* addressing human rights in the ESF gives more discretion for the borrowers to opt for mitigation and compensation measures, rather than trying to ensure a more effective prevention of human rights violations.

Overall, in terms of substantive legitimacy, Ebert & Cabrera, Brunori and Mares all demonstrate two motions that are at play in the ESF. Firstly, depending on the strategic importance of a given provision to the interests of the Bank, the ESF either dilutes or enhances the existing standards of international law. The latter is particularly true for the 'softer' end of the soft law normative spectrum. Secondly, there is a certain level of ambiguity deliberately built into the ESF, which creates an opportunity for the Bank to expand or shrink the discretion of the borrowers, depending on their economic power to resist the more stringent interpretations of the ESF.

5. The winners and losers of the ESF reform

The issue of normative differentiation between the borrowing countries is tackled by Dann & Riegner in their contribution. As mentioned previously, Dann & Riegner approach the ESF as a

'looking glass' of contemporary global governance. They use the ESF in comparison with previous safeguards of the Bank, in order to appraise the changes that took place in the structure of international law and governance over the last few decades. The authors examine how certain key concepts of international law such as sovereignty, responsibility and international authority were reconfigured throughout the evolution of the Bank's safeguards, including the impacts that the safeguards had on other regimes of international law. The key shift noted by Dann & Riegner is towards a 'more competitive multilateralism'. In this changing set-up, global norms that condition states behaviour are no longer set by the US as a dominant global power but are also influenced by emerging powers such as BRICS. These countries gain their influence because of their capacity to do both; to borrow from traditional institutions such as the World Bank, and to establish new institutions such as Asian Infrastructure Investment Bank in order to compete with traditional funders.

As illustrated by Dann & Riegner, but also Ebert & Cabrera and Houghton, these rising economies are probably the main 'winners' of the ESF reform. That is because the new ESF potentially enables them to opt out from the regime of the World Bank safeguards, and to invoke instead the equivalent provisions of environmental and social protection in their domestic legal systems, provided that they can prove to have sufficient administrative capacity to replace the ESF with domestic law.

At first sight this might appear as a reasonable 'legal graduation strategy' for the states with sufficient economic and administrative capacity. After all, none of the environmental and social standards set in the ESF are applicable to the donor countries, which is why it might be difficult

to justify the need for such international standards to govern fast-growing economies of developing countries. However, this is a 'race to the bottom' argument that is bound to facilitate further diffusion of social and environmental safeguards at the international level. In fact, the ESF is a representation of processes visible across the wider terrain of international law, where countries are backtracking from the international standards of social and environmental protection and are invoking their domestic legal systems to justify such a move (see for instance, a debate over a 'domestic bill of rights' as a replacement of the ECHR in the UK). The claim here is that domestic legal framework is equivalent to (or even furnishes a better level of protection than) the one at the international level. Dann & Riegner acutely calls this the 'ultimate victory of the Bank's good governance agenda', emphasising the fact that the particular way of delineating 'good states' from 'bad states' based on their administrative capacity and the 'quality' of their legal system was also first introduced and advocated by the World Bank.

In addition to diluting the level of protection accorded to individuals and sub-state groups, the 'dark side' of this reliance on the borrowers' framework is that it creates yet another vehicle of differentiation among developing countries. Depending on their economic and administrative capacity, developing countries are either subjected to international authority such as the one projected by the ESF, or they are free to exercise their national discretion. This difference, in turn, creates an ever greater and more complex distinction in the international legal order between the countries that are norm-takers, and those that are norm-givers.