The Legal Nature of the World Bank Safeguards

By *Giedre Jokubauskaite*[*]

Abstract: Building on the Brunnée and Toope's theory of interactional law and its use of Fuller's criteria of legality, this paper argues that the World Bank safeguards, especially their reincarnation through the Environmental and Social Framework (ESF), is a source of law that is binding on all international legal subjects. The paper criticises categories such as 'internal law' and 'soft law' that are traditionally used to describe the status of non-treaty rules, arguing that such categories are theoretically opaque, thus leading to a 'dead-end' in the discussion about sources of normativity beyond the Article 38 of the ICJ statute. The core aim of this paper is to demonstrate that international legal obligations such as those created by the ESF can be understood in dynamic terms, and that we can only ascertain their legal nature by observing their impacts, operation and authoritativeness in practice.

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A. Introduction

The World Bank's safeguards, as the name suggests, have a function to safeguard people and environment from the negative effects induced by development interventions. This function distinguishes these policies from the rest of the World Bank Operations Manual, which consists of all the rules that govern operations of the institution.[1] In 2016 the World Bank has adopted a new Environmental and Social Framework (ESF), which is due to replace the current set of safeguard policies sometime in 2018.[2] The ESF introduces signifi-

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1 The current full version of the World Bank's current Operations Manual can be found here: https://policies.worldbank.org/sites/ppf3/Pages/Manuals/Operational%20Manual.aspx (last accessed on 27 April 2018). At the moment of writing no comprehensive version of the Manual was available to download from the Bank's official website.

2 The final draft of the ESF was adopted by the World Bank Board of Directors in August 2016; at the moment of writing, the launch of the framework is set for October 2018 (see 'Environmental and Social Framework: Countdown to ESF Launch', https://olc.worldbank.org/about-olc/environmental-and-social-framework-countdown-esf-launch (last accessed on 27 April 2018).

cant reforms to the Bank's functioning.[3] This new framework also incorporates the content of current safeguard policies by moulding them into a new form and structure,[4] and by expanding their scope and reach. All its novelties aside, the ESF can therefore be perceived as a part of the same, yet evolving, structure of the World Bank safeguards. The main role of this structure is to regulate deliberation processes that lead up to the conclusion of financing agreements between the World Bank and other entities, focusing in particular on the sensitive issues such as mitigation of negative environmental impacts, effects on cultural heritage, indigenous peoples, use of land, etc. Once the deliberation is finished and the development intervention has been agreed upon, these policies also govern the oversight and the implementation of each project. To a large extent, that is because the relevant requirements of these policies are incorporated into a loan agreement between the borrower and the Bank, which becomes binding on the two parties.[5]

As is often the case with instruments that are outside the triad of sources listed in the Article 38,[6] the legal nature of these safeguard policies is difficult to pin down. Officially, they are enacted by one of the two political bodies of the Bank, the Board of Directors.[7] They are also binding on the Bank's staff, but potentially not on the governing bodies, nor on those outside the institution. That is because their binding nature is recognised in the policies themselves, rather than in some other formal source of public international law, such as the founding treaties of the Bank.[8] Given the above, it is commonplace to refer to these safeguards as 'internal law' of the Bank;[9] or to perceive them as a broad and largely

3 The analysis of substantive content of changes proposed by the ESF is *not* a focus of this paper. See the Symposium 'The World Bank Environmental and Social Framework in a wider realm of public international law' in the Leiden Journal of International Law (2018, forthcoming) for an in-depth analysis on the substance of this new framework.

4 The ESF is composed of three main documents: the Vision, the Policy and the Standards. The Vision sets out general approach of the World Bank; the Policy lists the responsibilities of the Bank in each project; the Standards set out the responsibilities of the borrowers. It is possible to argue that each three of these parts have a separate role and thus a different legal status. In this paper I choose to treat the three documents together, since in my view they all create an indivisible legal regime.

5 When a borrower is a state (i.e. the agreement is concluded between two subjects having international legal personality) this agreement acquires a status of a treaty under public international law.

6 Statute of the International Court of Justice (1945).

7 Note the ambiguous wording in the ESF's ' Environmental and Social Policy for Investment Project Financing' para 65: 'This Policy will be reviewed on an ongoing basis and will be amended or updated as appropriate, *subject to approval* by the Board of Directors' (emphasis added).

8 It is commonly accepted that decisions of international institutions can bind member states if such binding nature is spelled out explicitly in the constituent instruments of that institution; see *Philippe Sands and Pierre Klein*, Bowett's Law of International Institutions, London 2009, pp. 285-91.

9 The term is from *José E. Alvarez*, International Organisations as Law-makers, New York 2005. Other authors writing in international institutional law usually use more cautious terms such as 'legal instruments' (*Jan Klabbers*, An Introduction to International Organisations Law, Cambridge 2015), 'institutional acts' (*Sands and Klein*, note 8), 'legal outputs' (*Nigel D. White*, The Law of Inter-

undefined category of 'soft law'.[10] Soft law, however, is generally not considered to be international law proper.[11] It can only create legal consequences, rather than be a source of legal rights and obligations itself.[12] According to this view, safeguard policies can potentially influence state practice in international development cooperation, which, for instance, might lead to a formation of a new custom.[13] They might also be legally relevant because they shape (in an indeterminate manner) the content of agreements between the Bank and its borrowers.[14] However, according to this traditional view, they do not, in their own right, create international legal obligations.

In this paper I wish to articulate my suspicion towards such 'traditional' line of legal analysis. Part of the issue is that the aforementioned official view towards safeguard policies is only partially correct in a descriptive sense. In practice the safeguards were often adopted by the Bank's management, and only sometimes approved by the Board of Directors.[15] More importantly, their evolution was decidedly shaped by various external forces beyond internal governing bodies – which also potentially contributed to their authority.[16] Indeed, safeguards appear to have strong 'normative ripples'[17] that go beyond vague influences on state practice and their role in formation of customary law. They potentially set an authoritative standard of behaviour that directly impacts the procedures and content of decision-making not just within the World Bank, but also all its partners. Moreover, compliance with these policies is ensured by the World Bank's oversight mechanisms, the Inspection

national Organisations, 2005). The phrase 'internal law' used in this paper is invoked as a synonym to all these alternative terms.

10 See generally *Alan Boyle and Christin Chinkin*, The Making of International Law, 2007, for a classic example of such analysis.

11 Ibid.

12 See for instance *Jean d'Aspremont*, Softness in International Law: A Self-Serving Quest for New Legal Materials, EJIL 19 (2008), p. 1075, who makes a distinction between 'legal act' (formal sources of international law) and 'legal fact' (e.g. soft law).

13 *Alvarez*, note 9.

14 These policies shape loan and project agreements 'in an indeterminate manner' because in legal terms the borrower and the Bank can agree to deviate from them, provided that such deviation is approved by the Bank's Board of Directors.

15 Cf. *Philipp Dann*, The Law of Development Cooperation, Cambridge 2013, pp. 188-9. He claims that the process of adopting the policies reflects a precarious institutional balance. I partially agree with his claim; however, my treatment of the topic is based on the fact that the law-making process supposedly creating this 'balance' is not clearly set out either in the Articles of Agreement or another official document.

16 See part D of this paper for a more detailed exposition of this claim.

17 *José E. Alvarez*, International Organisations Then and Now, AJIL 100 (2006), p. 324.

Panel[18] and the Independent Evaluation Group[19]. Looking at all the facts, it seems too simplistic to claim that these rules are authoritative only as a 'legal fact',[20] or that their claim to obedience stems solely from economic and/or political influence of the Bank. Accordingly, this paper suggests an alternative approach to the legal status of these policies; notably the one that takes into account the dynamic nature of the evolution, the operation and the authoritativeness of these policies.

Overall, my claim in this paper is that both, 'soft law' and 'internal law' are theoretically opaque categories that help us little in terms of explaining the legal nature of the safeguard policies. Instead, in order to open up this debate, I propose to go beyond the focus on the Article 38 of the Statute of the International Court of Justice, the theory of sources, and other cannons of analysis that are associated with doctrinal reasoning in international law. As an alternative, I suggest taking a more sociologically-oriented approach that helps us to examine how exactly these policies have evolved, how they come into being and become authoritative, and also how they operate in practice. The theory of 'interactional law' by Brunnée and Toope[21] is used in this paper as a helpful theoretical framework in that regard. On the one hand, this theory enables us to capture the dynamic elements of the Bank's safeguards and their development, instead of portraying them as a static set of fixed rules. More importantly, Brunnée and Toope's account, which also incorporates Fuller's criteria of legality,[22] provides us with means of assessing whether or not the ESF has reached the status of law.

My argument in this paper will advance in several stages. After a brief explanation about why the question of legal status of the safeguards matters in practice (Part B) I set out to outline why it is unsatisfactory to treat these policies as an 'internal law' of the World Bank (Part C). I then provide a brief overview of how these policies have evolved (Part D), which serves as an entry point to the core question of this paper, notably whether or not the ESF can indeed be considered a self-standing legal source. I invoke the theory of 'interactional law' by Brunnée and Toope to assess the extent to which these safeguards currently adhere to criteria of legality (Part E). I finish with some concluding remarks about the need to take seriously the unconventional sources of normativity in public international law (Part F).

18 The World Bank Inspection Panel (Founding resolution), Board of Directors (1993), which is governed by its Operational Procedures (April 2014) http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf (last accessed on 27 April 2018).

19 An internal unit of the Bank's management in charge of evaluation: https://ieg.worldbankgroup.org / (last accessed on 23 June 2018).

20 *D'Aspremont*, note 12.

21 *Jutta Brunnée and Stephen J. Toope*, Legitimacy and Legality in International Law: An Interactional Account, Cambridge 2010.

22 Ibid., pp. 20-55. See also Section E in this paper for more details.

B. The question of legal nature – why does it matter?

The working title of the World Bank policies – safeguards – can be misleading. In reality these policies straddle a fine line between protection and exploitation, inclusion and exclusion, participation and authoritative command.[23] They are often used as an alternative framework that substitutes for weak domestic provisions related to land expropriation, vague environmental commitments, inadequate enforcement, and other imperfections of general legal frameworks that are supposed to protect local groups from arbitrary state powers.[24] However, by facilitating deliberation process, safeguards do not just put in place mechanisms that are meant to ensure protection. They also enable development projects and thus authorise their positive, but also negative effects.

Why then, does it matter, whether we endow these safeguards with a legal status, or not? Theoretical reasons aside, on a practical level the answer to this question becomes apparent if we look at the operation of these policies beyond the institutional confines of the World Bank. For instance, their legal status becomes significant if we ask whether or not the obligations set out in these policies can be invoked in front of domestic courts instead of the Inspection Panel.[25] Or, whether certain entities, such as private funders or donor states that co-fund with the Bank, should be obliged to follow these rules in their development-related operations. Alternatively, can the content of these rules be challenged in a judicial set-up if, for instance, their application allegedly goes against the constitutional provisions and/or international human rights obligations?[26]

The questions outlined above point towards two types of consequences that can be triggered if we recognised the legal status of these policies. The first one is an expansion of their extra-institutional authority. Legal sources tend to create rights and obligations that are valid beyond the entity that has issued them in a first place.[27] For instance, if a parliament

23 *Giedre Jokubauskaite*, Accountability towards people affected by the World Bank development interventions: a project law approach, PhD thesis, University of Edinburgh, Edinburgh 2016, https://www.era.lib.ed.ac.uk/handle/1842/22007?show=full (last accessed on 23 June 2018).

24 Ibid.

25 Note that the World Bank Inspection Panel can only assess the compliance with these policies by the Bank (see the Founding Resolution, note 16; also ibid.); whereas domestic courts can only assess decisions by the government but not the Bank (under the rules of domestic constitutional law).

26 Since these policies are applied by the borrowers *directly* (see in particular the third part of the ESF, 'Environmental and Social Standards'), the acts and decisions by domestic authorities in this area could potentially be scrutinised by domestic courts. This does not mean that the courts could question the overall validity of the policies thus triggering the issue of immunity of international organisations (the World Bank). Instead, they might have the jurisdiction to appraise the implementation of the safeguards within the domestic legal order.

27 Hart, for instance, claims that law is distinct from other forms of social ordering because it claims 'general obedience', see *Herbert L. A. Hart*, The Concept of Law, Oxford 2012, pp. 21-4. Fuller agrees that law has to be 'general' and not limited to an act of order-giving; but his concept of law is much wider than Hart's because it does not accept the centrality of state-made law; see *Lon L. Fuller*, The Morality of Law, New Haven 1969, pp. 122-132. Legal obligation created by *contract*

issues a law, then such law will be valid and binding on all entities in that jurisdiction, without the necessary direct intervention of the parliament. If on the other hand a university issues a rule, such rule will be fairly useless outside the sphere of operation of that university.[28] It therefore seems plausible to claim that assigning a legal status to the ESF would endow the safeguards with more authority. That is because various entities and persons would be able to apply them and rely on them, without direct recourse to compliance mechanisms of the World Bank. This, in turn, would solidify the level of social and environmental protection accorded to groups and individuals affected by development interventions. However, treating the ESF as a self-standing legal source would also potentially increase the overall authority of the World Bank, because with greater certainty furnished by a legal status comes a more assertive claim to command obedience.

The second type of consequence of recognising legal status leads to an opposite dynamic than the one described above. As well as expanding the authority of a given rule and its issuing institution, legal status also places this rule in a systemic fabric of law, alongside various constrains that this entails. For instance, it might enable the courts of general jurisdiction to scrutinise the application of safeguards.[29] And if a court could apply and thus question the content of the ESF, then potentially it could also identify any existing conflicts between these safeguards and the rights and responsibilities set by the constitution, or other laws that govern development projects. This, then, could set concrete limits to the authority of the Bank; if and when its governance framework proves to be too demanding on the functioning and interpretation of domestic legal system. Arguably, under the current conditions such constraints do not exist: the reach of these policies is not formally limited, because there is no need to limit something that is supposedly not binding in the first place.

At this point it is important to emphasise that the current situation, in which the status of the World Bank safeguards is uncertain, does not mean that the reach of these policies is actually limited to the institutional regime of the Bank. Unclear status might mean that these policies are still authoritative and thus command obedience beyond their immediate sphere of application; but that they do so in a manner that is more nuanced, informal and malleable than is the case with 'hard' law.[30] At the same time, undefined legal status means that the normative force of the ESF remains outside the 'legal registry' and that it therefore

potentially create further complication in making such distinction; see *Fuller*, p.127-129 for an explanation about how contractual obligations link to his broader concept of law.

28 In Fuller's view, university rules can be law; provided that they adhere to the criteria of legality. See *Fuller*, note 27, pp. 125-6. See however his further distinction between managerial direction and law: 'The directives of a managerial system regulate primarily relations between the subordinate and his superior and only collaterally the relations between the subordinate with third persons. The rules of a legal system, on the other hand, normally serve the primary purpose of setting the citizen's relations with other citizens', pp. 207-8.

29 Ibid. pp. 125-6; see also notes 25-26.

30 See generally *Joost Pauwelyn, Ramses Wessel and Jan Wouters*, Informal International Lawmaking: An Assessment and Template to Keep it Both Effective and Accountable, in: Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds.), Informal International Lawmaking, Oxford 2012. See also

can neither be confidently relied upon, nor challenged.[31] All in all, whilst the current status of the safeguards cannot guarantee individual protection, these policies can be authoritative and relied upon to justify the decision-making leading up to development interventions. Moreover, from a methodological point of view, this misbalance can only be observed by looking at the operation of the ESF in practice, rather than appraising its legal nature in the abstract.

It is also notable that one is generally pressed to choose a particular concept of law, in order to be able to articulate what having a *legal* status actually means. There are many competing accounts that advance diverging concepts of law.[32] It is difficult to choose one out of many existing theories, given that they all provide a different lens to evaluate a real-life social phenomenon called 'law'. Similarly, such theories cannot be readily qualified as 'true' or 'false' because they each have different appeal and deal with different jurisprudential issues.[33] Nonetheless, such theoretical plurality is not necessarily replicated in practice. An ordinary meaning of what we call 'law' ought to be more or less settled in order for it to be used predictably in legal practice, such as the court proceedings, project negotiations, etc. Because of this need for predictability and communication, there exist social conventions that govern our understanding of legal status, and which are in many ways informed by the prevalent outlooks of legal theory.[34] It is commonly accepted that currently the positivist outlook prevails in international legal discourse: international law is predominantly viewed as system driven by state consent, which is meant to protect state sovereignty from undue intervention. However, all social conventions can change and evolve; particularly if commonly accepted sources of law prove to be ineffective, and if the prevalent theoretical outlook fails to provide a convincing framework for communication and analysis. For instance, the prevalent positivist framework in international law has been forcefully challenged by the ideas of global governance, and such strands of legal scholarship as global administrative law, global constitutionalism, international public authority, etc.[35]

An account of legal obligation by Brunnée and Toope places a lot of emphasis on the role of social conventions;[36] which is one of the key reasons why it offers such an appealing

Philipp Dann and Michael Riegner, The World Bank's 2016 Safeguards and the Evolution of the Global Order, Leiden Journal of International Law (2018, forthcoming), who explain clearly how these policies are diffused into the normative frameworks of other multilateral development banks, and also domestic policy-making.

31 This refers to the fact that most probably these policies cannot officially be relied upon in front of national courts; see *Jokubauskaite*, note 23.

32 On the incompatibility of various concepts of law see *Brian Z. Tamanaha*, Realistic Socio-Legal Theory, Oxford 1997, pp. 91-128.

33 Ibid.

34 Ibid., p. 128.

35 See generally *B. Kingsbury, Nico Krisch and Richard B. Stewart*, The Emergence of Global Administrative Law, Law and Contemporary Problems 68 (2005), p. 15; *Jan Klabbers, Anne Peters and Geir Ulfstein*, The Constitutionalisation of International Law, Oxford 2009; *Dann*, note 15.

36 *Brunnée and Toope*, note 21, pp. 56-87.

framework for further engagement with the ESF. Instead of positing an *a priori* analytical concept of law, Brunnée and Toope argue that legal obligations are generated through a 'shared understanding' within a 'community of practice' in a given area of social interaction. This sense of obligation is not fixed; it can change depending on the shifts in shared understanding and/or the resulting practice. Based on this theory, the legal nature of the ESF is not necessarily settled. It can change depending on the attitudes surrounding it; and also depending on the social conventions that are formed in the process of rule-making and application. This view seems to be better equipped as a starting point of approaching the legal status of the ESF; more so than the category of soft law and/or internal law. The inadequacy of this latter concept to provide a valid analytical framework will be discussed next.

C. ESF as 'internal law' of the World Bank

The idea of 'internal law' has been introduced into international legal vocabulary by a group of scholars associated with international institutional law.[37] By and large in this scholarship the authority of internal acts of international organisations (such as the ESF) is justified under the so-called delegation theory.[38] The idea here is that institutional acts are mandated by the founding treaty of a given international organisation. Thus, by adopting internal acts such as the ESF, governing bodies of international organisations are implementing the institutional mandate expressed in their founding treaties. In this understanding, internal law of international organisation is analogous to a narrow understanding of administrative law at the domestic level: it governs the functioning of a delegated authority, and it is valid as long as it functions within the limits set out by this institutional mandate.[39]

Theoretical framework of international institutional law can be applied to qualify the legal status of the World Bank safeguards; but arguably, its explanatory appeal is limited. Firstly, there is the aforementioned issue of descriptive accuracy. In case of the World Bank, no clear competence of the Board of Directors to enact internal instruments is mentioned directly in the Articles of Agreement.[40] The sole relevant provision in the Articles establishes that 'The Board of *Governors*, and the Executive Directors *to the extent authorized*, may adopt such rules and regulations as may be necessary or appropriate to conduct the business of the Bank'.[41] The safeguard policies at present are only approved by the

37 See note 9.

38 See for a general overview of 'delegation theory' *Klabbers*, note 9, p. 62.

39 This also seems to be the position of global administrative law (GAL). Their reasoning is too complex to be unpacked in this paper, but the core proposal appears to be based on the assumption that global institutions exercise some form of delegated authority (see *Kingsbury, Krisch and Stewart*, note 35). See also *Dann*, note 15, pp. 299-504.

40 By referring to the 'Articles of Agreement' I generally mean both the founding treaties of the IBRD and the IDA, as the two documents have analogous provisions on many accounts.

41 See Art. V s. 2 (f) of IBRD Articles of Agreement, also Art. VI s. 2 (h) of IDA Articles of Agreement. The founding treaties mention such internal regulations under the competences of Board of

Board of Directors alone, i.e. neither in line with the requirement of internal authorisation set out in the Articles of Agreement, nor in the relevant by-laws.[42]

Secondly, the notion of 'internal law' provides us with a very few theoretical tools to analyse the law-making processes that shape the World Bank safeguards. For instance, we know that these policies are used to put pressure on the borrowers because of a support that they enjoy amongst the civil society, and also because they are adopted in a close coordination with other stakeholders involved in international development.[43] We also know that many provisions of the safeguard policies are resisted by the borrowing governments as being too intrusive and pushing the donor-driven social and environmental agenda.[44] Seeing the ESF as 'internal law' puts theoretical blinders on our understanding of these important practices of resistance and patterns of authority. It highlights the legitimating role of delegation and renders these other sources of legitimacy and/or domination invisible.

This, then, underlines probably the most problematic aspect of a theoretical framework based on the delegation theory: it gives us no reliable tools to assess the interpretation, application and transformation of the ESF. The main analytical tool that is acquired by calling the ESF 'internal law' is the idea that the safeguards should be *subordinate* to the World Bank Articles of Agreement, and also to other formal sources of public international law. According to this analytical position, ESF is valid if and only if it fits within the functional limits of the World Bank mandate. Whilst such position might seem compelling, it is difficult to see how such notion of functional subordination can be helpful in evaluating the ESF in practice. That is because over time the mandate of the World Bank had been increasingly opened up to contentious interpretations,[45] which in turn means that the official purposes of the Bank can no longer be understood in a strict textual sense.[46] Instead, their meaning is continuously constructed through institution's day-to-day operations, as well as

Governors (i.e. the body involving full membership), and not the Board of *Directors* (i.e. the body of elected representatives).

42 There was an unsuccessful attempt to implement this provision through the Bank's by-laws, according to which 'The Executive Directors are authorized by the Board of Governors to adopt such rules […] as may be necessary or appropriate to conduct the business of the Bank. Any rules and regulations so adopted, and any amendments thereof, shall be subject to review by the Board of Governors at their next annual meeting.' See section 15 ('Rules and Regulations') in the by-laws of IBRD. However, operational policies were never presented to the Board of Governors for such review.

43 See generally the essays in Susan Park and Jonathan R. Strand (eds.), Global Economic Governance and the Development Practices of the Multilateral Development Banks, London 2015, especially *Chris Humphrey*, 'The "Hassle Factor" of MDB Lending and Borrower Demand in Latin America, pp. 134-166.

44 Ibid.

45 See generally *Devesh Kapur, John P. Lewis and Richard Webb*, The World Bank. Its First Half Century. Volume 1: History, Washington DC 1997.

46 Ibid.; *Dann*, note 15, pp. 192-5.

ideologies behind them.[47] Due to this open-endedness, it proves very difficult, if not impossible, to assess the rules or operations of the Bank against any kind of 'functional frame' that this mandate is supposed to provide. It is also hard to imagine a scenario in which these broad purposes of the Bank could be invoked to challenge the safeguard policies; precisely because they are so indeterminate and lacking in concrete normative content.[48] Accordingly, the status of the ESF as internal law of the World Bank implicitly assigns and validates its authority, but helps us little in terms of then restraining it, especially within the loose boundaries of its institutional mandate.

This brings me to the core danger of qualifying the ESF as 'internal law' and thus the main reason why this category is not desirable from a normative perspective. By claiming that the ESF is merely a set of internal regulations, we are bound to accept that these safeguard policies are, above all, a tool of administrative action by the Bank's management. In such line of reasoning it should be acknowledged that the management can freely limit the level of protection currently accorded by these policies; as long as it gets the approval to do so from the Board of Directors. Such interpretation therefore makes the policies and their protective qualities extremely vulnerable to an ideological climate within the Bank, which has been known to change considerably over its institutional history.[49] Similarly, according to this theory, safeguard policies potentially can be tamed and twisted by those involved in the project negotiations; provided of course that they can secure a favourable attitude of the governing bodies of the Bank.[50]

Finally, as well as being descriptively inaccurate and normatively undesirable, the category of 'internal law' helps us little in terms of understanding the actual legal nature of these policies. As most scholars of international institutional law had acknowledged, the category of internal law does not necessarily tell us whether a given instrument is binding or not.[51] It also tells us little how the ESF 'fits' within a wider framework of public international law; nor to what extent its external legal effects are justified.[52] In other words, it leads us to a similar analytical dead-end as the over-inclusive category of 'soft law'.

The main analytical move proposed by this paper, as means of moving away from this 'dead-end', is to rethink the idea of legal status as a dynamic quality. It seems plausible to imagine that the legal nature of these safeguards could change over time, depending on the social forces that shape them and attitudes towards them, but also on external circumstances. In that respect, it makes sense to look at least briefly at the history of these policies

47 *Kapur, Lewis and Webb,* note 45, 'Introduction'.

48 *Jokubauskaite*, note 23.

49 *Kapur, Lewis and Webb,* note 45, 'Introduction'.

50 The World Bank Inspection Panel adds a layer of protection as it is meant to ensure consistency of safeguard application practice; but in formal terms, the Board of Directors controls all the outcome of Panel's investigation (see 'Founding resolution', note 18).

51 The preoccupations about uncertainty of legal effects from *Alvarez*, note 9.

52 Ibid.

and to understand how exactly their legalistic qualities were first triggered, and eventually came into being.

D. Evolution of the safeguard policies

Generally, the World Bank safeguards can be described as a product of a heated exchange between civil society organisations (largely backed by the donor states), the Bank, and the borrowing states.[53] With a few alterations, this dynamic has been visible since the injection of the first safeguard policies into the Bank's operational policies in the early 1980s, until the present reform that led to the ESF. Generally, civil society and donor countries tended to insist on the rules leading to a more stringent level of protection and more restrictions on how development projects should be conducted.[54] The borrowing states on the other hand tended to demand for less conditionality and more freedom to spend their funds for development.[55] The Bank, by and large, sought greater effectiveness of its development interventions, with a view of attracting more 'clients' and creating more development outputs.[56] These tensions explain why the evolution of these policies was so dynamic, but also often erratic. Overall however, it is possible to ascertain several trends that are apparent in the evolution of these safeguards, from their initiation up to their present reincarnation within the ESF. These evolutionary trajectories point towards more *generality and coherence*, and also towards more *public exposure* of these policies[57].

I. Generality and coherence.

The story of operational policies of the World Bank[58] starts with the early years of the International Bank for Reconstruction and Development (IBRD) and the reference documents

53 See generally *David Hunter*, International Law and Public Participation in Policy-Making at the International Financial Institutions, in: Daniel Bradlow and David Hunter (eds.), International Financial Institutions and International Law, Alphen aan den Rijn 2010.

54 See for instance www.brettonwoodsproject.org (last accessed on 23 June 2018) for a record of claims by the civil society on the topic.

55 In the more recent years, and especially in the case of the ESF, some of the borrowing countries have acquired more pronounced voice in these negotiations. This is largely due to the increasing competition in development financing and the fact that many newer institutions, especially at the regional level, do not require such strong safeguards. See generally *Humphrey*, note 43, pp. 134-166.

56 *David A. Philips*, Reforming the World Bank: Twenty Years of Trial - and Error, Cambridge 2009, see particularly pp. 263-279.

57 It is of course possible to note other trends in this process; these are just several notable features that I have chosen to focus on in the context of this argument. See for instance *Dann and Riegner*, note 30, for alternative angles of analysis.

58 Note that until the ESF, the World Bank was governed by the set of Operational Policies and Bank Procedures (in this paper I use the common term 'operational policies' to describe both sets of

that the management issued to staff in order to guide their dealings with clients.[59] These instances of operational standard-setting were truly *ad hoc*. Such earlier standards were detailed and technical, and also short on what we would now consider to be the policies that structure development governance.[60] The staff was expected to follow them as benchmarks of internal good practices.[61] Their function was to mainstream these best practices amongst different operational units. As a matter of efficiency, such management memos had to be concrete, practical, and based on the real-life examples of the Bank's operations. They also had to be unambiguous, and to leave little space for diverging interpretations. This meant that by the end of the 1980s it became difficult to manage the volume of these directives. Also, their breadth and the complexity were such that it would be difficult to speak of them as a common regulatory framework.[62]

The situation changed significantly in the 1980s, when external criticism of the Bank started mounting up, especially following its engagement in several high-profile large-scale projects in Brazil and India.[63] It was during this era of project controversies of the 1980s that the first operational standards with an emphasis on safeguards had been adopted by the Board of Directors.[64] Eventually these social and environmental policies from the 1980s

rules) that covered not only social and environmental, but also many other (economic, financial, administrative, etc.) matters.

59 Most of the facts about the evolution of the safeguard policies in this section are from *Kapur, Lewis and Webb*, note 45, pp. 1161-1216.

60 The first official history of the Bank does not mention these standards at all (see *Edward Mason and Robert Asher*, The World Bank since Bretton Woods, Washington DC 1973).

61 *Laurence Boisson de Chazournes*, Policy Guidance and Compliance: The World Bank Operational Standards, in: Dinah Shelton (ed.), Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System, New York 2000.

62 See *Andres Rigo Sureda*, The Law Applicable to the Activities of International Development Banks, The Hague 2005, p. 82 para 153: 'some were policy instruments of a very specific nature, others provided very general guidance […] At times, it may have been unclear who had the authority to make exceptions required by particular needs of changing circumstances as policy statements may not have been updated for a long time.'.

63 For the general overview of issues related to Sardar Sarovar project in India see *Bradford Morse and Thomas R. Berger*, Sardar Sarovar. Report of the Independent Review, International Environmental Law Research Centre, Geneva 1992, http://www.ielrc.org/content/c9202.pdf (last accessed on 18 June 2018); for Polonoroeste project in Brazil see *Robert H. Wade*, Boulevard of broken dreams: the inside story of the World Bank's Polonoroeste Road Project in Brazil's Amazon, Grantham Research Institute for the Environment Working 2011.

64 There exists no official and comprehensive overview of how environmental and social policies of the Bank had come about, with some relevant reviews scattered through the literature. See for instance *Michael M. Cernea*, The "Ripple Effect" in Social Policy and its Political Content: A Debate on Social Standards in Public and Private Development Projects, in: Michael B. Likosky (ed.), Privatising Development: Project Finance Law and Human Rights, Leiden 2005 (for an overview of origins of policies on involuntary resettlement); *Benedict Kingsbury*, Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples, in: Guy S. Goodwin-Gill and Stefan Talmon (eds.), The Reality of International

were pronounced to be binding on the Bank's staff.[65] Arguably this very commitment to a legalistic binary code of reasoning was a defining moment in the evolution of the safeguard policies.

The main challenge, and arguably a considerable achievement at the time, was to synthesize these dispersed points of reference scattered throughout multiple memos into a *set* of binding rules.[66] Because of the density of the material at hand, this 'switch' from an array of empirically-grounded best practices to a limited list of norms, proved to be a struggle, which for a long time undermined the clarity and the overall coherence of these policies. Due to this difficult translation, there also appears to have been many reforms in the history of these rules that resemble the process of codification,[67] which was mostly aimed at fostering the clarity as well as further coherence of the policies. This process was supposedly finally completed with the adoption of the ESF, which, as the name suggests, transformed the original safeguard policies into a single 'framework'.

II. Public exposure

Another feature that became increasingly common in the adoption of safeguard policies and that reached a whole new level in the context of the ESF, is the consultations between the Bank and its internal and external stakeholders.[68] Generally such consultations have enhanced the acceptance of these policies by the civil society organisations, as well as their 'purchase' with the powerful donor countries.[69]

It is crucial to note that the safeguard policies were not always visible to the public. Initially this was not even perceived as 'a lack of transparency'. They were simply considered to be something that is of no interest to those outside the institution, as in a case of com-

Law: Essays in Honour of Ian Brownlie, New York 1999 (for the origins of policies on tribal/indigenous people); *Rigo Sureda*, note 62, p. 89 para 173 (for the origins of policies on environmental protection).

65 *Rigo Sureda*, note 62, p. 82 para 155.

66 See *Kapur, Lewis and Webb*, note 45, p. 1204.

67 In the last decade there were at least four major reforms of operational policies, many of them lasted for several months or even years (systemic amendments were made in 2007, 2012, 2013, and 2015); it is possible to trace the 'waves' of mass revision through archived policies by analysing the so-called archived statements, see the list on the Bank's page: http://web.worldbank.org/archive/website01541/WEB/0__MEN-4.HTM (last accessed on 03 July 2018).

68 *Rigo Sureda*, note 62, p. 90 para 177, describing the reform of environmental policies in the 1990s and how it was influenced by consultations with civil society. See also David Hunter's argument that such practice of consultation means has acquired the status of a custom: *Hunter*, note 53, pp. 199-238.

69 For a critical evaluation of these consultations see The World Bank, Safeguards and Sustainability Policies in a Changing World. An Independent Evaluation of World Bank Group Experience, 2010, p. 8.

mercial banks.[70] In 1988, the Board had introduced the first relevant changes to the Bank's Disclosure Policy (currently the Access to Information Policy), following which operational policies were classified as material authorized for publishing.[71] Following these changes, the requirement of transparency was mainstreamed into the Bank's rule-making.

Finally, in 1993, following a controversial process triggered by both external and internal pressure,[72] the Bank had established the World Bank Inspection Panel, which is the mechanism for assessing institution's compliance with its operational policies.[73] The very principle of specialized review comes across as a move towards normativity that is amenable to scrutiny by external participants, and that is therefore more accessible to those outside the institution.

This brief historical overview reveals the qualities of the safeguard policies that cannot be discerned merely from looking at the final text of the ESF, or even comparing it with the previous policies. At the surface, the ESF tells us that all the safeguard policies are approved by the Bank's Board of Directors, based on the recommendations by the Bank's management. This might lead to a misconception that the Board has singlehandedly put these regulations in place, or that they are merely a tool for the Board to administer the operational units of the Bank. However, for over three decades of Bank's operation the function of these policies has been evolving, and its role in development governance has been shifting constantly.

The final version of the ESF might also mislead us because it looks as a formal document, familiar to a lawyer in terms of its 'neat' structure and legal aesthetics. This in turn hides the fact that this final document is a product of decades of ideological conflict not only amongst different actors and their interests, but also between the legal, political and economic outlook on development governance. Only by observing the transition of these policies from a managerial-economic to a general-legal form, we can appreciate the route that has been travelled by many generations of the Bank negotiators and civil society advocates, in order to arrive at the current level of clarity, accessibility and coherence.

70 On commercial origins of the Bank see *Philips*, note 56, pp. 3-5; also *Mason and Asher*, note 60, pp. 28-32; but cf. *Amy L. S. Staples*, The Birth of Development: How the World Bank, Food and Agriculture Organisation and World Health Organisation Changed the World, 1945-1965, Kent 2006, pp. 9-12, who argues that the Bank was inspired by the Tennessee Valley Authority in the United States, which was a public institution created to fight the consequences of the Great Depression.

71 *Cernea*, note 64.

72 See generally *Maartje van Putten*, Policing the Banks. Accountability Mechanisms for the Financial Sector, Montreal 2008.

73 Ibid.

E. ESF as a self-standing legal source

Up until now this paper took issue with the abstract, 'placeholder' categories such as soft law and/or internal law, considering them to be the 'filler' concepts that merge together a vast diversity of rules outside the formal sources of public international law. The argument also emphasised the advantages of, and also the practical need for, an assessment framework that is able to 'register' the law-like qualities of the ESF. A brief overview of evolutionary trends in the previous section was one way of showing the dynamic nature of these safeguards, and how these law-like qualities came about. However, historical overview alone does not help us to tackle the question of legal nature. We still need a theoretical framework that enables us to appreciate the significance of these trends, and their impacts on the legal status of the ESF. The theory of interactional international law by Brunnée and Toope offers a helpful analytical structure in this regard.

In their account, Brunnée and Toope combine the observations of constructivism with a theory of law by Fuller.[74] The core element of Fuller's thesis, invoked by these authors, concerns the famous eight desiderata that Fuller considers to be a part of the 'inner morality of law'.[75] The authors also build a great deal of their argument on Fuller's emphasis on reciprocity of law[76] – thus justifying the name of the theory, *interactional* international law. Brunnée and Toope argue that international legal obligation consists of three elements: the existence of a (minimum) shared understanding, the adherence to criteria of legality (based on the eight criteria set out by Fuller), and the practice of legality (i.e. the process of law-making, implementation and enforcement).[77] Thus, differently than more formalistic approaches, Brunnée and Toope portray law as a social process, which is constantly evolving, and which rests largely on the attitudes as well as acceptance of those who are taking part in this process.

I. The ESF according to the theory of interactional international law

Based on the theory of interactional international law, legal obligation is first and foremost generated by forming a *shared understanding* in a given 'community of practice'.[78] In case of the World Bank, the epistemic and operational 'community' interested in these safeguards seem to have evolved over time. Judging from the structure of communication sur-

74 The main facets of this theory are set out in *Fuller*, note 27. The attraction of Brunnée and Toope's account is that they tone down Fuller's natural law inclinations and use his criteria to describe the law that is, above all, socially constructed (through their focus on social constructivism). Due to this twist, their theory could also be acceptable to positivists.

75 A full list and analysis of these principles by *Fuller*, note 27, pp. 46-90.

76 *Brunnée and Toope*, note 21, pp. 23-25.

77 *Jutta Brunnée and Stephen J. Toope*, Interactional international law: an introduction, International Theory 3 (2011), p. 307.

78 *Brunnée and Toope*, note 21, pp. 62-65.

rounding the ESF and beyond, this 'community' consists of the World Bank governing bodies and management; borrowing states and donor representatives at the Bank; some interested academics;[79] and a growing cluster of NGOs, especially those that have a physical presence close to the Bank's headquarters in Washington DC.[80] Arguably this community of practice has been expanding over the last few decades; especially since the Inspection Panel has created opportunities of involvement for community-based organisations from the Global South.[81] Nonetheless, such expansion in terms of reach and participation does not necessarily challenge the US-based, donor-driven ethos of communication surrounding these policies.[82]

There is a fairly well-defined period in the history of the World Bank, already highlighted with regards to the evolution of the ESF, in which a 'shared understanding' about the overall need for the safeguards came about.[83] This moment can roughly be associated with the aforementioned controversial projects in Brazil and India in the late 1980s to early 1990s,[84] and the process of review that followed suit. At that time an increasing external pressure from civil society[85] had been matched with an internal critique in the so-called Wapenhans report.[86] These developments, alongside mounting protests by civil society, shifted the general policy climate within the Bank.[87] Increasingly, there came about an inclination amongst the donor states to reform the operation of financial institutions, in order to ensure a more controlled model of development governance. Whilst the governments of the borrowing countries were by and large more reluctant, if not hostile, towards such emerging trends of governance, they lacked the capacity to block this joint donor-NGO-Bank agenda.[88] Hence, the shared understanding about the need for more regulation was

79 See generally *van Putten*, note 72, for a discussion about the crucial role of academic activists in this set-up.

80 NGOs active in this area are too numerous to be listed here; see for instance the members of the European Network on Debt and Development for a preliminary list, http://www.eurodad.org (last accessed on 23 June 2018). The role of geographical proximity with the Bank's headquarters is documented in van Putten, note 72.

81 See Coalition for Human Rights in Development for active organisations from the Global South, https://rightsindevelopment.org (last accessed on 23 June 2018). It is also notable from submissions of complaints to the World Bank Inspection Panel; and also to the consultation process leading up to the ESF that the overall presence of community organisations in the Bank's operations is growing.

82 *Humphrey*, note 43.

83 See sources in note 63; *van Putten,* note 72; *Kapur*, note 45.

84 See note 63.

85 *Morse and Berger*, note 63.

86 The World Bank, Effective implementation: key to development impact (Wapenhans Report), 1992, http://documents.worldbank.org/curated/en/596521467145356248/Effective-implementation-key-to-development-impact-Wapenhans-Report (last accessed on 27 April 2018).

87 *Van Putten*, note 72.

88 Ibid.

formed; however, there should be no illusion that this 'shared' quality signified consensus amongst all the relevant participants. This incomplete shared understanding backlashed against donors and civil society in the reform leading up to the ESF, when some key borrowers such as India or China, having acquired sufficient economic power, were able and eager to challenge the key facets of the safeguards.[89]

It took a while for the World Bank safeguards to evolve beyond a very minimal level of shared understanding and to display something that Brunnée and Toope call the 'social practice around substantive values'.[90] At the beginning such shared commitment was limited to a few narrow, specific ideas: the need to avoid adverse environmental impacts;[91] the disruptive nature of large-scale involuntary resettlements;[92] and the vulnerable position of indigenous and tribal peoples in development projects.[93] This baseline of social and environmental protection expanded very slowly, by gradually recognising a more extensive catalogue of potential negative consequences induced by development.[94]

According to Brunnée and Toope, once a minimal level of shared understanding had been reached, social practice can generate legal obligation. In their view, 'what distinguishes law from other types of social ordering is not form, but adherence to specific *criteria of legality*: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action'.[95] This transformation happens if and when the relevant social practice begins to adhere to these requirements of legality, which were originally identified by Fuller.[96] In Brunnée and Toope's

89 As evidenced by the increased flexibility of the safeguard policies and in particular the new approach to the 'use of country systems', see *Stéphanie de Moerloose and Makane Moïse Mbengue*, Sustainable Development and the Use of Borrowing State Frameworks in the New World Bank Safeguards, Law and Politics in Asia, Africa and Latin America 51 (2018, forthcoming); also see for instance 'Comments from Government of India' (2017) on the ESF Draft Guidance Notes for Borrowers, http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-and-social-framework-esf-draft-guidance-notes-for-borrowers (last accessed on 18 June 2018).

90 *Brunnée and Toope*, note 21, p. 69.

91 *Rigo Sureda*, note 62.

92 *Cernea*, note 64.

93 *Kingsbury*, note 64.

94 This is visible from the 'archived statements of the safeguard policies' (note 67). The ESF introduce several new areas of regulation, for instance, the provisions concerning labour conditions in development projects. However, during the ESF consultations no substantive agreement could be reached with regards to the human rights commitments; see 'Review and Update of the World Bank's Safeguard Policies', ESF (Proposed Third Draft), and also 'Summary of Phase 3 Consultations and Bank Management Responses' (The World Bank, on 4 August 2016, Board paper), https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies (last accessed on 27 April 2018).

95 *Brunnée and Toope*, note 21, p. 6.

96 See note 75; note that for Fuller, adherence to these principles is always a matter of degree. Law is not an 'on' and 'off' phenomenon (*Fuller*, note 27, pp. 122-123). Brunnée and Toope, however, disagree with him (note 21, p. 46).

terms, 'these features of legality are crucial to generating a distinctive legal legitimacy and a sense of commitment – what Fuller called 'fidelity' – among those to whom law is addressed.'[97]

As the analysis of the evolutionary trends has shown, the World Bank safeguards have come a long way towards adherence with these internal qualities of law set out by Fuller. Arguably in their early days safeguards functioned as a straightforward example of a 'managerial direction', rather than a legal order, to use another useful distinction made by Fuller.[98] This means that at the time they represented, almost exclusively, 'a one-way projection of authority',[99] governed the relationship between the 'order-givers'[100] (the Bank management) and the 'order-executors'[101] (the Bank staff and its borrowers).

For Fuller, the principle that separates law from managerial direction is *congruence*. He suggested that this principle, more than any other, gives law its quality of reciprocity. That is because it ensures that the rules are not only functioning as a one-way projection of authority, but that instead they are also binding on those who govern through official action. Arguably in the history of the Bank this principle of congruence was first mainstreamed through the creation of the World Bank Inspection Panel,[102] and then Independent Evaluation Group.[103] Together, these two bodies make sure that the safeguards do not just function as a set of commands binding the World Bank staff. If the governing bodies of the institution intend to deviate from the established practice of interpretation and application, they cannot do so without a valid justification. Similarly, the Inspection Panel has opened up the application of the safeguards to challenges from the people affected by development projects; which arguably created further congruence between their text, the official practice of its implementation, and also the wider social practices in which these policies operate. Thus, at least at the conceptual level of analysis, it appears that the safeguards adhere to this core criterion of legality identified by the theory of interactional law.

As explained in the earlier overview of evolutionary trends, another notable shift towards legality in the evolution of safeguards took place at the level of generality, promulgation, clarity and coherence (non-contradiction). In fact, it is possible to interpret the entire history of the safeguards as a move towards such 'legalistic' form; which has in many respects reached culmination in the ESF. Indeed, the text of the ESF is tidy and organised in a familiar legal structure, especially if we compare it to the current and previous operational policies. It is also true that the law-making process of the ESF has been more accessible to

97 *Brunnée and Toope*, note 21, p. 6.
98 *Fuller*, note 27, p. 207.
99 Ibid., p. 209.
100 Ibid.
101 Ibid., pp. 210-212.
102 See note 18.
103 See note 19.

the public than any of the previous reforms in this area.[104] All this suggests that the safeguards have now been moulded into a normative structure that adheres very closely to criteria of legality in terms of their abstraction, clarity, coherence and publication standards.

The situation is arguably different if we assess how these safeguards 'fit' the criteria of constancy and non-retroactivity. Generally, the safeguards do not contain sufficiently clear 'secondary rules'[105] to govern their application and interpretation. For instance, whilst we know that the Board of Directors can adopt and amend the existing safeguards,[106] there are no mechanisms that set out clearly what to do when relevant safeguard provisions are amended in a middle of a project; or how to approach situations where the same provision lead to diverging outcomes in different projects. The World Bank has recently adopted the Guidance Notes for Borrowers[107] that are meant to help ensure a more consistent application of the safeguards. However, these Notes for the most part repeat and at least partially clarify the actual text of the ESF, rather than offering new mechanisms that would address the wider, application-related issues identified in this paragraph. At the moment the guarantee of consistency and predictability of these policies rests almost uniquely on the role of Inspection Panel.[108] The text of the policies, on the other hand, has been subject to numerous reforms of different ambition and scale, which arguably were often too frequent to ensure the reliability of environmental and social protection.[109] Similarly, with regards to the current safeguards, it is generally difficult to trace the previous versions and/or precise moments of their amendment.[110] Hence, whilst it is tempting to presume that a reform as far-reaching and systemic as the ESF will 'iron out' these inconsistencies and inadequacies of current legal framework, there is currently nothing in the text of the ESF that would indicate such shift towards a guaranteed compliance with these two principles of legality.

There is one remaining principle, which arguably threatens a close 'match' between Fuller's notion of legality and the ESF in a most serious manner. According to this last cri-

104 See 'Archived phases' at https://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies (last accessed on 27 April 2018).

105 A famous distinction between primary and secondary rules was made by *Hart*, note 27, pp. 79-99.

106 See note 7.

107 Non-binding, explanatory notes clarifying the modalities of implementation to the authorities that have to apply the safeguards; see the current version on the Bank's website: http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/environmental-social-framework-guidance-notes-borrowers (last accessed on 03 July 2018).

108 Note that current policies in the Operations Manual are self-standing policy statements that do not facilitate 'meta-questions' about law-making, consistency of application, means of interpretation, link with other sources of law, etc.

109 See note 67.

110 Each policy tells us when it was last revised, but not *how* exactly it was amended, nor the date or scope of the previous amendments, see for instance this operational policy on Environmental Impact Assessment https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1565&ver=current (last accessed on 27 April 2018).

terion, the law cannot 'require the impossible'.[111] Here, the problem with the new structure of the ESF is that it shifts a considerably greater burden of responsibility for the implementation of these safeguards to the borrowers, whilst at the same time leaving the Bank with a more detached supervisory role.[112] The problem with this shift is that it presumes that the borrowers are able and willing to accept this responsibility. It also presumes that they would have the necessary capacity and/or resources to navigate these complex demands and apply such ambitious new rules on their own right, within their own discretionary powers. Whilst in principle such shift seems justifiable as means of protecting state sovereignty;[113] it also seems plausible to suspect that this shift might be 'demanding the impossible' of (some of) the borrowers. In that respect, the ESF arguably pushes the structure of the safeguards away from conditions of legality; although the precise implications of this shift are yet to be observed in a future practice.

The final element of Brunnée and Toope's theory grounds the notion of legal obligation in the *practice of legality*,[114] which to a large degree rests predominantly on the principle of congruence noted above. For Brunnée and Toope, the practice of legality is wider than a simple application of rules though an official action. Instead, they emphasise the entire cycle of law: law-making, interpretation, application, review – which then leads to further law-making, interpretation, implementation, review, etc. Because of the practice of the World Bank Inspection Panel, but also the review system that is constantly triggered by its cases, the processes in the World Bank resembles more and more a 'complete' process found in developed legal regimes. For instance, it is becoming commonplace for the Panel to underline the lessons learned and issue recommendations for the future practice.[115] This influences the practice of policy application, and in turn gives impetus for further revisions of policies and an on-going reform.[116] This indicates the existence of a cyclic, dynamic process that is taking place around the ESF and which generally seem to fit the description of the 'practice of legality' that is put forward by Brunnée and Toope.

Altogether, it is possible to conclude that the ESF adheres to the elements of law under the interactional international law theory by Brunnée and Toope, and that accordingly, it should be capable of creating self-standing international legal obligations.

111 *Fuller*, note 27, pp. 70-78.

112 This is not to say that the role of the Bank under the current policies is not supervisory. However, it is more intertwined with borrowers' tasks and the responsibilities than is envisioned in the ESF. See *Dann and Riegner*, note 30, for a more detailed argument about how the ESF reshuffles the responsibilities between the Bank and its borrowers.

113 Ibid.

114 *Brunnée and Toope*, note 21, pp. 27-55.

115 See for instance The World Bank Inspection Panel, South Africa: Eskom Investment Support Project, Investigation Report 2010, the part on 'Systemic Issues and Contributions to Corporate Learning'.

116 See for instance Independent Evaluation Group Report, Safeguards and Sustainability Policies in a Changing World. An Independent Evaluation of World Bank Group Experience, 2010, which triggered the current reform leading up to the ESF.

II. Some immediate objections

Up until now the argument in this paper has favoured chiefly a flexible notion of legal obligation that could capture the instances of legal normativity beyond the formal sources of public international law. However, this analysis would be incomplete if I did not consider some of the critical reactions that such dynamic and sociologically-driven approach might provoke. By and large, a critique of this argument might be directed at three different layers of this analysis: one might disagree with the ground theory by Fuller; or with the transformation of this theory by Brunnée and Toope; or with the suitability of these two theories to critically assess the legal nature of the ESF. The rest of this paper is mainly concerned with this latter set of potential objections; although inevitably, such response will defend some of the general facets of Brunnée and Toope's account.

Probably the most obvious potential criticism is that this analysis portrays an image of the safeguard policies that is unjustifiably naïve. It can be suggested that the choice of calling interested agents surrounding the World Bank a 'community of practice' with 'shared understanding' that leads to 'practice of legality' is not ideologically neutral. It potentially masks or, worse still, implicitly legitimates the power dynamic that actually dominates this area of international cooperation.[117] At the centre of this power is the US government, closely followed by other powerful donor states such as the EU, whose actions are then supported by the liberal elites of western NGOs. The NGOs might claim to speak on behalf of affected communities, but in fact they might only stir the debate towards their own liberal agenda; rather than in favour of finding the most pressing development solutions.[118] In this realist reading of interactional law theory, the account presented in this paper potentially attempts to socialise the hegemon;[119] which is why it fails to notice how this policy framework is but a tool for a hegemon to advance its own political interests.

There is some persuasiveness in this criticism. For instance, judging solely by the number of submissions to the consultations about the ESF,[120] the debate in this area is still predominantly stirred by the NGOs and academics from developed states. Most disagreements too, were ultimately resolved by the US-based staff in the World Bank's headquarters, rather than in public round tables, or by using other methods of public bargaining. However, at the same time, we should observe that the World Bank Inspection Panel cases – through which the real 'teeth' of these policies usually become apparent – are often initiat-

117 This could be an argument of critical scholars writing in the spirit of Third World Approaches to International Law; for instance, *Sundhya Pahuja*, Decolonising International Law. Development, Economic Growth and the Politics of Universality, Cambridge 2011.

118 See *Jochen von Bernstorff et al*., Empowering the Affected in Global Governance and International Law: Introduction, Third World Thematics, 2018, forthcoming; for the analysis of a problematic link between 'affected people' and the western NGOs that claim to speak on their behalf.

119 *Jeffrey L. Dunoff*, What is the purpose of international law?, International Theory 3 (2011), pp. 326–338.

120 See note 104.

ed by community organisations that speak directly on behalf of affected people. Similarly, the consultation rounds during the ESF deliberation process were held in a number of countries and involved a variety of stakeholders, ranging far beyond national elites.[121] Moreover, it is notable from observing the consultation documents that none of the parties which took part in the ESF negotiation process – including the most powerful donors – were able to dominate the process entirely.[122] In that respect the most recent law-making of the ESF and also its application by the Inspection Panel all seem to represent at least some level of shared understanding within a (global) circle of interested agents, rather than a simple power-driven agenda disguised under the cloak of popular participation.

Another closely related criticism could be that this account potentially diminishes the relevance of 'hard' institutional checks and balances in adopting binding decisions. Generally, most states seem to accord great importance to such matters as representation of their interests in the Board of Directors of the World Bank, or the general distribution of voting rights in the institution. What happens then, if we move away from such state-centric, vote-based view of international decision-making? Would this not further undermine the chances of equal participation in international legal system? There are many possible replies to this critique, but the most obvious one is that the system of development cooperation is currently not – and never has been – based on the sovereign equality of states. The core structure of the voting rights in the World Bank but also other multilateral development banks is based on the share of a given state in the founding capital of an institution and/or the overall weight of national economy in the global economic system.[123] Hence, the law-making process that shifts current decision-making away from these wealth-based 'checks and balances' towards a more horizontal system of social and political interaction has the potential to foster equality, rather than undermining it.

The third related criticism is more conceptual, and probably the most difficult one to refute. It concerns the fluidity of a notion of legal obligation that is advanced by Brunnée and Toope. In particular, it seems fair to ask how, if at all, such 'dynamic' approach to the ESF can help to ascertain the status of the ESF in the context of doctrinal legal reasoning? Put otherwise, does it really help to answer the real-life challenges of applying the ESF beyond institutional confines of the Bank that were identified at the beginning of this paper? The critics have noted that Brunnée and Toope's account might work well as an explanatory account, i.e. as a sort of sociological framework that helps us to understand the social dynamic that underpins formal sources.[124] However, it might not necessarily be helpful for the

121 Ibid.

122 See note 94.

123 Art. 2, IBRD Articles of Agreement; and Art. 3, IMF Articles of Agreement. For an overview of recent attempts to revise the system of voting shares, see Bretton Woods Project, The IMF & the World Bank decision-making and governance, http://www.brettonwoodsproject.org/2016/03/imf-world-bank-decision-making-and-governance-existing-structures-and-reform-processes/ (last accessed on 27 April 2018).

124 *Christian Reus-Smit*, Obligation through practice, International Theory 3 (2011), pp. 339–347.

purpose of drawing a bold line between law and non-law, which the authors are claiming to do.[125] After all, this was precisely Fuller's position: he argued that law is a system of social interaction that cannot be understood in binary terms.[126]

This observation appears to be at least partially valid. Indeed, as Dunoff claims in his appraisal of Brunnée and Toope's theory,[127] every jurisprudential account has a specific purpose, and the purpose of this particular theory is to explain social phenomenon[128] rather than to clarify a legal status of concrete set of rules such as the ESF. Nonetheless, such critique does not altogether preclude the possibility of interactional international theory to be employed for broader purposes, including the possibility of providing a better notion of international legal obligation. In case of the ESF, as we have seen previously, this theory can be employed productively to assess the extent to which the safeguards already display the qualities of legality. The main issue, in my view, is how and where do we set a threshold? At what point exactly, does the social practice transform into *legal* obligation? To what extent the source must adhere to criteria of legality before this threshold is reached? This paper was not meant to answer these questions; nor, in my view, were sufficiently clear answers provided by Brunnée and Toope in their account. However, this does not mean that such threshold is altogether impossible; or that dynamic notion of legal obligation has no possibility to provide a clear guidance to the reasoning of courts, negotiators and other practitioners applying the law.

One final criticism that should be noted concerns the level of normativity that is potentially advocated by Brunnée and Toope, and consequently, by this argument. Koskenniemi argues in his critique of Brunnée and Toope's theory that the emphasis on (informal) shared understandings and a subsequent practice of legality is too biased towards the status quo.[129] Put otherwise, by losing the benefit of explicit, formal law-making procedures, we also lose the possibility to reshape the system through a conscious agreement. Thus, whilst we might like the idea of wide-reaching participation that includes various stakeholders, we also ought to accept that such participation might not be able to produce ambitious solutions to development issues.

This argument has some purchase; but to a large extent it is built on an overly optimistic assumption of how international law-making operates at present. Arguably, for the moment, both multilateral treaty negotiations, and the formation of international custom through state practice exhibit exactly the sort of qualities of low normativity that were ascribed to the notion of dynamic legal obligation in this critique. Because state practice and interests are so diverse, any traditional law-making process, especially at the global level,

125 See note 96.

126 Ibid.

127 *Dunoff*, note 119; *Tamanaha*, note 32.

128 *Brunnée and Toope*, note 21, p. 2: 'Our purpose in this book to explain […] how international law influences the behaviour of actors in contemporary international society.'.

129 *Martti Koskenniemi*, The mystery of legal obligation, International Theory 3 (2011), pp. 319–325.

ought to run into difficulties of forming 'shared understandings', but also of generating a sufficiently uniform practice to mainstream such new norms. Accordingly, the law-making model such as the one used in the context of the ESF is actually able to avoid some of the geopolitical tensions and stale-mates that are so detrimental in the state-centric international legal processes. And since the negotiations in this context are explicitly organised around the diversity of interests in development process (borrowers, donors, affected communities, etc.), it helps in some respects to channel the plurality of views, and thus to form new layers of (global) shared understanding. In this respect, the model of law-making such as the one leading up to the ESF potentially leads to a higher normativity than the one that is traditionally found in treaty-making and/or formation of international custom.

F. Concluding remarks

Ultimately, in this paper I argued that despite the worry about powers hidden under the surface of legality and the potential of political domination, the ESF *is* already a source of normativity that fulfils the function of law in this domain of international cooperation. Hence, whilst resistance to prescribe a legal status to these policies might continue to discredit an attitude towards them amongst international lawyers, it does not in any way stop their functioning or their effects in real terms.

It should also be reiterated that in denying the ESF a status of law we, rather ironically, run into a range of legal issues that stem from our inability to perceive these policies *as a part of a legal system*. That is because if they are not law, and if we are not fully satisfied with the curious categories of soft law or internal law, then what after all are they? The straightforward answer to that would presumably be that they are the technocratic, 'managerial' arrangement of the Bank's operations, and little else. If that was indeed the case, then we probably might want to keep the 'genie inside the bottle' and deny the legitimate possibility for these rules to influence the behaviour of other international actors, to impose conditions, and to be widely quoted or applied in other domains of international life. This would mean 'policing' the boundaries of a legal system and remaining on guard every time a reference to these rules comes up in a judicial dispute, or in negotiations over development assistance, or over the draft of a new treaty.

However, the problem with this position is that it can only operate at a level of theoretical imaginary, rather than in practice. The genie was never inside the bottle to begin with, and the operational as well as normative reach of the World Bank, alongside other agencies involved in international development, is wider than many would be comfortable to admit.[130] By continuing to see the ESF as internal soft law or internal law, we merely deny whatever positive qualities these policies might have on the protection of affected people and environment, whilst allowing the more contentious effects of their functioning to re-

130 As illustrated by *Pahuja*, note 117; and also *Luis Eslava*, Local Space, Global Life: The Everyday Operation of International Law and Development, Cambridge 2015.

main unchecked. We also prevent ourselves from having a meaningful discussion about the measures that could be taken, in order to bring this body of rules closer to the 'criteria of legality', and in turn, we shut off the questions how to reduce the political and economic biases in their law-making process. In other words, it is hard to see what might be gained by keeping these policies invisible to a legal registry and away from the potential of its critical gaze.