

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE: SYMPOSIUM ON THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK

Looking at the World Bank's safeguard reform through the lens of deliberative democracy

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Abstract

The sheer amount of non-state participation in the creation of the World Bank Environmental and Social Framework (ESF) is surely noteworthy. The aim of the Bank's consultation was to get 'global' input and feedback, and with over 8,000 stakeholders from over 63 countries taking part, it is laudable. The extent of the participation challenges the positivist approach to international law-making, which views only states as having the power to make law and raises questions about how to legitimize such international soft-law making. Legitimacy is entangled with democracy, as scholars debate whether democracy is the required benchmark for decision-making processes at international organizations. This article uses deliberative democracy to analyse the ESF consultation process. Whilst, democratic legitimacy has been interpreted to mean inclusivity and participation, deliberative democracy raises a series of hard questions about equality and power that scholarship on global governance needs to grapple with. Although this participatory process at the World Bank challenges traditional narratives in international law, analysing it through a lens of deliberative democracy exposes the work that still needs to be done to discuss democracy in international decision-making.

Keywords: consultation process; deliberative democracy; Environmental and Social Framework; international organizations; World Bank

1. Introduction

The adoption of the Environmental and Social Framework (ESF) on 4 August 2016 was the result of the 'most extensive consultation ever conducted by the World Bank'.¹ Across a four-year period, the World Bank engaged with governments, experts, indigenous peoples, and civil society groups (CSOs). The breadth of participation in the consultation process was coupled with live-streaming of events and online discussions on social media platforms.² The aim of the

*Thank you to Durham Law School and the Global Policy Institute at Durham University for providing funding for the symposium workshop. Thank you to Dr Matthew Nicholson, Dr Giedre Jokubauskaite and the two anonymous reviewers for their comments on this piece.

¹World Bank, 'World Bank Board Approves New Environmental and Social Framework', 4 August 2016, available at www.worldbank.org/en/news/press-release/2016/08/04/world-bank-board-approves-new-environmental-and-social-framework.

²For example, World Bank Live, 'Global Live Chat: Review and Update of the World Bank's Environmental and Social Safeguard Policies', 8 March 2016. For civil society examples, Human Rights Watch, 'World Bank: Dangerous Rollback in Environmental, Social Protection: New Framework Undermines President Kim's Commitment to "No Dilution"', 4 August 2015, available at www.hrw.org/news/2015/08/04/world-bank-dangerous-rollback-environmental-social-protections; U. Khatri, 'World Bank's New Environmental and Social Framework is a Huge Step Backward for Human Rights', *Earth Rights International*, 17 August 2016, available at www.earthrights.org/blog/world-banks-new-environmental-

World Bank's consultation was to get 'global' input and feedback,³ and with over 8,000 stakeholders from over 63 countries taking part the consultation is laudable. The attempts to engage non-state actors, and the attitude of transparency that facilitated world-wide engagement, are symptomatic of the legitimization of decision-making at international organizations, which is advocated for by scholars.⁴ Ideas of participation, inclusion and transparency have been offered as markers of legitimacy but have an elusive relationship with democracy.⁵ This article considers the ESF through the lens of deliberative democracy to expose the types of debates and questions that should underpin a discussion on democracy in international decision-making.

The ESF is the new framework that applies to World Bank investment projects, and it seeks to protect environmental and human rights interests as well as strive for sustainable development. The ESF includes instructions for World Bank Staff, as well as other national or international funding agencies,⁶ and it includes 'standards' or norms, which are mandatory requirements for borrowing countries and projects.⁷ The World Bank argues that the ESF promotes sustainable borrower institutions⁸ but the Framework has been criticized for giving too much decision-making power to the borrowing countries, rather than generating rules for the borrowing countries to comply with.⁹

The normative nature and the implications of the ESF demand that the framework is considered legitimate by those affected by it¹⁰ but the literature is divided on whether democracy is the requisite standard of legitimacy in international decision-making. On the one hand, decision-making within international legal governance is increasingly being held against a so-called 'democratic' standard by academics and civil society.¹¹ On the other hand, scholars make deliberate choices to separate ideas of participation, inclusion, accountability, and transparency from the transfer of democracy from the nation-state to international governance.¹² Keenly aware of the opposition to transferring state-based models of democracy to international institutions, scholars, such as Dryzek, argue that deliberative democracy is a more appropriate model for global

and-social-framework-huge-step-backward-human-rights; D. Hill, 'The UK Must Fight For Better World Bank Environment Policy', *Guardian*, 19 February 2015, available at www.theguardian.com/environment/andes-to-the-amazon/2015/feb/19/uk-must-fight-better-world-bank-environment-policy.

³World Bank, 'The World Bank's Safeguard Policies Proposed Review and Update: Approach Paper', 10 October 2012, available at siteresources.worldbank.org/EXTSAFEPOL/Resources/584434-1306431390058/SafeguardsReviewApproachPaper.pdf, para. 45.

⁴See, for example, T. Kleinlein, 'Non-State Actors from an International Constitutionalism Perspective: Participation Matters!', in J. d'Aspremont (ed.), *Participation in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (2011), 40. For an alternative discussion on legitimacy see F. Ebert and M. V. Cabrera Ormaza, 'The World Bank, human rights, and organizational legitimacy strategies: The case of the 2016 Environmental and Social Framework', in this issue (doi:10.1017/S0922156519000268).

⁵See, for example, A. Buchanan, 'Political Legitimacy and Democracy', (2002) 112 *Ethics* 689; A. Buchanan and R. O. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics and International Affairs* 405.

⁶World Bank, 'The World Bank Environmental and Social Policy for Investment Project Financing', in World Bank, *The Environmental and Social Framework* (2017), 1.

⁷World Bank, 'The Environmental and Social Standards', *ibid.*, at 38.

⁸World Bank, *The Environmental and Social Framework* (2017), ix.

⁹For example, Human Rights Watch, *supra* note 2; Khatri, *supra* note 2. Ebert and Cabrera Ormaza, *supra* note 4.

¹⁰For a discussion on whether it is just law, soft law or other norms that require legitimacy see S. Besson, 'Theorizing the Sources of International Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 163, at 173; M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present and Future Approaches to International Soft Law', (2012) 25 *Leiden Journal of International Law* 335, 364–5. For a discussion on the legal status of the ESF see G. Jokubauskaite, 'The Legal Nature of the World Bank Safeguards', (2018) 51(1) *Law and Politics in Asia, Africa and Latin America* 78.

¹¹A. Peters, 'Dual Democracy', in J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (2009), 263; J. P. Trachtman, 'Constitutional Economics of the World Trade Organization', in J. L. Dunoff and J. Trachtman (eds.), *Ruling the World?: Constitutionalism, International Law, and Global Governance* (2009), 206; A. O'Donoghue, *Constitutionalism in Global Constitutionalisation* (2014).

¹²For example, M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism In and Beyond the State', in Dunoff and Trachtman, *supra* note 11, at 260; Buchanan and Keohane, *supra* note 5.

governance.¹³ Multi-stakeholder consultation processes in international decision-making have been explained as exercises of deliberative democracy.¹⁴ Building on these debates on the legitimization of global governance, this article unpacks deliberative democracy and uses it to analyse the World Bank ESF consultation process.

Deliberative democracy can be said to include four components, which are: a *demos* constituted according to social relations rather than territory; an informal public sphere; deliberation; and an act of decision-making. There is much overlap between the public sphere, deliberation and decision-making, given that the importance of the public sphere lies in its communication of interests, views and concerns to formal decision-making processes.¹⁵ For the purposes of this article, three components will be extrapolated: the *demos*, deliberation, and the act of making a decision. Deliberative democracy is critiqued for ignoring power dynamics and homogenizing the *demos*.¹⁶ Thus, to discuss deliberative democracy requires an understanding of its component parts and the critiques. The 'global' scope of the consultation, to the extent that it is suggestive of world-wide participation, can be praised for its inclusion and participation. But, as will be explored in this article, breadth of participation is not sufficient to amount to an exercise in deliberative democracy, which requires genuine connections between the *demos*, deliberation, and the act of decision-making.

This article will discuss the deliberative qualities of the World Bank consultation process using publicly available World Bank reports of the proceedings and the uploaded consultation submissions.¹⁷ These reports give a sense of who participated and through what channels, and the Bank provides commentary on what they took into account and how they responded to comments from participants. However, relying on these summaries of the consultation meetings has its weaknesses: Chatham House rules are used, which makes it difficult to recapture how stakeholders were participating and to ascertain if certain participants had greater leverage or dominance in meetings; some of the documentation is incomplete, with lists of participants not uploaded or in some cases no documentation is provided;¹⁸ and although there are sporadic transcriptions of 'feedback' sessions that give insight into the format of meetings, these findings cannot be generalized across the consultation process. Using only the available summaries does limit what inferences can be made about the deliberative quality of the consultation, but a picture of the proceedings emerges.

Reading international decision-making exercises, such as the World Bank's consultation process, through the lens of deliberative democracy can uncover the difficult questions that international scholarship still needs to grapple with when discussing democracy in international decision-making.¹⁹ This article considers the consultation process leading up to the adoption of the ESF from the perspective of deliberative democracy. The first section of the article provides an overview of the reform process. The second section briefly explores the requirements for

¹³J. S. Dryzek (with S. Niemeyer), *Foundations and Frontiers of Deliberative Governance* (2013), 177. See also R. Higgott and E. Erman, 'Deliberative Global Governance and the Question of Legitimacy: What Can We Learn From the WTO?', (2010) 36 *Review of International Studies* 449, 454; H. Stevenson and J. S. Dryzek, 'The Legitimacy of Multilateral Climate Governance: A Deliberative Democratic Approach', (2012) 6 *Critical Policy Studies* 1, 2.

¹⁴See J. S. Fishkin, *When the People Speak: Deliberative Democracy & Public Consultation* (2011), 33–43; W. Martens, B. van der Linden and M. Wörsdörfer, 'How to Assess the Democratic Qualities of a Multi-stakeholder Initiative from a Habermasian Perspective? Deliberative Democracy and the Equator Principles Framework', (2017) *Journal of Business Ethics* 1.

¹⁵J. Habermas, *Between Facts and Norms* (1996), 375. Cf. J. S. Dryzek, *Deliberative Global Politics: Discourse and Democracy in a Divided World* (2006), at 47.

¹⁶L. M. Young, *Inclusion and Democracy* (2000), 81, 108; A. Phillips, *Feminism and Politics* (2009), 143.

¹⁷World Bank, 'Review and Update of the World Bank Safeguard Policies', available at www.consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies.

¹⁸For example, there is often no documentation for meetings with development partners in Phase 1 and sometimes documentation for government meetings in Phase 1 are missing. Some participant lists are missing from consultations with civil society and multi-stakeholder meetings in Phase 2.

¹⁹For example, see the instrumental and functional approach adopted by Buchanan and Keohane, *supra* note 5.

deliberative democracy and critiques of this model of democracy, which are then used to analyse the consultation process in the third section. In this third section, the article will discuss both the types of participants and the quality of the deliberations. It draws on examples from indigenous peoples and human rights issues to demonstrate potential gaps in the consultation process.

2. The World Bank ESF and the consultation process

The ESF, approved in 2016 and implemented in October 2018, includes a series of standards to protect people and the environment from the effects of development projects that are financed by the World Bank. The ESF is comprised of a Vision for Sustainable Development, the World Bank Environment and Social Policy for Investment Project Financing (which outlines mandatory requirements for the World Bank) and the Environmental and Social Standards (which set out mandatory requirements for Borrowers and projects, and in particular they outline the requirements for Borrowers when identifying and assessing environmental and social risks and impacts arising from investment projects). The ESF guides the deliberations on financing agreements between the World Bank and other entities, as well as governs the oversight and implementation of projects. There are ten Environmental and Social Standards (ESS): assessment and management of Environmental and Social Risks and Impacts; Labour and Working Conditions; Resource Efficiency and Pollution Prevention and Management; Community Health and Safety; Land, Acquisition, Restrictions on Land Use and Involuntary Resettlement; Biodiversity Conservation and Sustainable Management of Living Natural Resources; Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities; Cultural Heritage; Financial Intermediaries; and Stakeholder Engagement and Information Disclosure. Compliance with the ESF is ensured by the Inspection Panel and the Independent Evaluation Group.

The ESF is criticized for weakening protections in certain aspects.²⁰ Rather than a rules-based approach, the ESF favours the national laws of borrowing countries, with academic and civil society actors criticizing the relaxed approach adopted by the Bank.²¹ Whether this was a result of deferring too heavily to the interests of borrowing states or the outcome of balancing poverty reduction and profits,²² it highlights how, potentially, the interests of community groups and civil society actors were less influential in discussions. This section will elaborate on the specific features of the World Bank consultation process.

Reform of the ESS was a long process,²³ with years of consultation and stakeholder participation. In the World Bank's discussions on the reform process, the scale of participation and depth of consultation are key.²⁴ Across the four-year period the World Bank consulted with: member countries, known as shareholders; development partners, such as the EU, the US Agency for International Development (USAID), the Asian Development Bank, the Inter-American Development Bank, as well as a meeting with the Japan International Cooperation Agency;²⁵

²⁰See E. Hey, 'International and the Anthropocene', (2016) 5 ESIL 1, 4. See also R. Mares, 'Securing human rights through risk-management methods: Breakthrough or misalignment?', in this issue (doi:10.1017/S0922156519000244); M. Brunori, 'Protecting the access to land for indigenous and non-indigenous communities: A new page for the World Bank', in this issue (doi:10.1017/S0922156519000232).

²¹M. Alamgir et al., 'Economic, Socio-Political and Environmental Risks of Road Development in the Tropics', (2017) 27 *Current Biology Review* 1130, 1134; B. Sovacool, 'Cooperative or Inoperative? Accountability and Transparency at the World Bank's Inspection Panel', (2017) 1 *Case Studies in the Environment* 1, 6.

²²Sovacool, *ibid.*, at 6.

²³World Bank Independent Evaluation Group, *Safeguards and Sustainability Policies in a Changing World: An Independent Evaluation of World Bank Group Experience* (2010).

²⁴World Bank, Review and Update of the World Bank Safeguard Policies, *supra* note 17.

²⁵World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (Tokyo, Japan)', 2 February 2016, available at consultations.worldbank.org/Data/hub/files/consultation-template/

international organizations, including the International Labour Organization, the United Nations, and the United Nations Development Programme; selected experts; and various stakeholders, which includes indigenous peoples, academics, CSOs, and non-governmental organizations (NGOs). The World Bank held consultation meetings with and read submissions from states, indigenous peoples, stakeholders, and 'project-affected communities'.²⁶ Furthermore, the reform process sparked an online discourse as academics and specialists provided commentary on the process and substance of the ESF.²⁷

In the run-up to the consultation process, various stakeholders were incorporated into the review of the Environmental and Social safeguards and possible reforms. The Independent Evaluation Group carried out an assessment of the safeguards and sought feedback from a variety of stakeholders.²⁸ In the World Bank's Approach Paper, which was a starting point for the consultation process, there are indications that stakeholders had input into its content. Paragraph 35 of the Approach Paper states '[s]ome stakeholders have requested the World Bank to consider in the review and update process a number of areas that are not addressed under the current set of safeguard policies'.²⁹ These areas include: 'human rights, labor and occupational health and safety, gender, disability, the free, prior, and informed consent of Indigenous Peoples, land tenure and natural resources, and climate change'.³⁰ Whilst, it is unclear which stakeholders had input,³¹ and how this input was collected, it is laudable that stakeholders had input into the agenda, which would shape the consultation process. Moreover, the Approach Paper was opened to consultation. In Annex A of the Approach Paper, the World Bank lists Consultation Questions that are open-ended and facilitate stakeholder-led reforms. In these questions, the World Bank asks for additional factors and examples that should be considered in the reform.³² The World Bank, therefore, appreciates that stakeholders had different perspectives on the shape of reform,³³ perspectives that might have been excluded in the initial drafting of the World Bank's approach to reform.

The World Bank consultation on the ESF was divided into three phases. Phase 1 saw consultations with stakeholders on the approach of the new safeguards.³⁴ An approach paper was prepared by the World Bank and opened for public consultation.³⁵ Phase 1 focused on ten thematic areas: areas for improvement, implementation, sustainable development and disabilities, labour and occupational health and safety, human rights, land tenure and natural resources, free, prior, and informed consent (FPIC) of Indigenous Peoples, gender, and climate change.³⁶

[review-and-update-world-bank-safeguard-policies/pt/meetings/final_feedback_summary_for_phase_3_consultation_with_jica_february_2_2016.pdf](http://www.worldbank.org/pt/meetings/final_feedback_summary_for_phase_3_consultation_with_jica_february_2_2016.pdf).

²⁶P. Dann and M. Riegner, 'World Bank Group Safeguard Review: A New Gold Standard for Global Environment and Social Protection?' (forthcoming).

²⁷N. Sinani, 'World Bank Must Prioritize Genuine Citizen Engagement', *Huffington Post*, 8 December 2016, available at www.huffingtonpost.com/nezir-sinani/world-bank-must-prioritiz_b_11400318.html.

²⁸World Bank Independent Evaluation Group, Independent Evaluation, *supra* note 23.

²⁹World Bank, Safeguard Policies Proposed Review and Update: Approach Paper, *supra* note 3, para. 35.

³⁰*Ibid.*

³¹The Terms of Reference for Indigenous Peoples outlines that the Bank held 'pre-dialogue meetings with Indigenous Peoples to gather their input and ideas on best ways for engagement on the safeguards review'. World Bank, 'World Bank Environmental and Social Safeguard Policies Review and Update: Regional Dialogue with Indigenous Peoples: Terms of Reference', 2013, available at consultations.worldbank.org/Data/hub/files/safeguards_review_terms_of_reference_for_ip_regional_dialogue_2013.pdf.

³²World Bank, Safeguard Policies Proposed Review and Update: Approach Paper, *supra* note 3, Ann. A, 17.

³³*Ibid.*, para. 35.

³⁴World Bank, 'Review and Update of the World Bank Environmental and Social Safeguard Policies: Consultation Plan', 22 December 2012, available at: consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/safeguardsreview_consultationplan.pdf.

³⁵World Bank, Approach Paper, *supra* note 3.

³⁶World Bank 'Review and Update of the World Bank's Safeguard Policies. Environmental and Social Framework (Proposed Third Draft)', 4 August 2016, available at consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/board_paper_for_es_framework_third_draft_for_disclosure_august_4_2016.pdf, at 9.

These Phase 1 consultations reached more than 2,000 stakeholders from over 40 countries.³⁷ The World Bank states that it received 81 position papers.³⁸ In this Phase there were 73 consultation events.³⁹ As part of this phase, the World Bank also held expert focus groups on gender, human rights, climate change, disability, labour and occupational health and safety, FPIC of Indigenous Peoples, and land tenure and natural resources, as well as 16 dedicated dialogues with indigenous peoples.

Phase 2 included the release by the World Bank Board's Executive Committee on Development and Effectiveness (CODE) of a 'Proposal Document' that was open for consultation for three months.⁴⁰ During this phase, the World Bank held 88 events with government representations and different stakeholders, which included video conferences as well as two online consultations. There was an online forum where stakeholders could submit feedback,⁴¹ and the World Bank received 136 submissions during Phase 2. There were expert focus groups on, managing social risk, non-discrimination, labour, two groups on cultural heritage, and two on biodiversity, as well as eight consultation meetings with indigenous peoples. In Phase 2, countries were selected by the World Bank to participate to ensure the balanced representation of middle- and low-income economies.⁴²

Phase 3 was more concerned with the implementation of the proposed ESF. This Phase included a three-month consultation on a revised draft of the proposed ESF,⁴³ and on the 'indicative list of outstanding issues' drawn up by the World Bank.⁴⁴ The executive directors requested that the focus of the consultation was on 'implementability from a borrower perspective', which meant that consultations focused on 'government officials and project implementation units in borrowing countries'.⁴⁵ The World Bank convened 72 meetings, three online consultations, and received 92 submissions. There were focus groups on religious concerns, financial intermediaries, indigenous people, non-discrimination, ensuring environmental and social integrity, and labour. At each phase of the consultation, the World Bank writes a reply to demonstrate how comments are taken into account.⁴⁶

Throughout the consultation process there were divergences in relation to certain issues between the borrowing countries and civil society participants and donor countries. On issues such as: land acquisition and involuntary resettlement; FPIC of Indigenous Peoples; labour issues including those with brokers, agents and other intermediaries; non-discrimination; and, biodiversity conservation, the borrowing countries were concerned with respecting national laws.⁴⁷ Whilst donor countries and civil society called for strong FPIC for Indigenous Peoples, '[b]orrowers in Africa and in Latin America were also concerned that FPIC could be interpreted as having a veto function'.⁴⁸ In relation to human rights, it was predominantly the donor countries and civil society

³⁷World Bank, Review and Update of the World Bank Safeguard Policies, *supra* note 17.

³⁸World Bank, Review and Update of the World Bank's Safeguard Policies. Environmental and Social Framework (Proposed Third Draft), *supra* note 36. However, there are only 58 submissions clearly identified as submissions and made available online.

³⁹Where an 'event' might include more than one meeting.

⁴⁰World Bank, 'Environmental and Social Framework: Setting Standards for Sustainable Development: First Draft for Consultation', 30 July 2014, available at consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/first_draft_framework_july_30_2014.pdf.

⁴¹World Bank, 'Review and Update of the World Bank Environmental and Social Safeguard Policies. Plan for Consultations with External Stakeholders for Phase 2 of the Policy Review and Update', 2 August 2014, available at consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/phases/safeguards_review_consultation_plan_august_2014_2.pdf, at 2.

⁴²*Ibid.*, at 3.

⁴³World Bank, Review and Update of the World Bank Safeguard Policies, *supra* note 17.

⁴⁴World Bank, Review and Update of the World Bank's Safeguard Policies. Environmental and Social Framework (Proposed Third Draft), *supra* note 36, 11.

⁴⁵*Ibid.*

⁴⁶World Bank, Safeguard Policies Proposed Review and Update: Approach Paper, *supra* note 3, at 14.

⁴⁷See World Bank, Review and Update of the World Bank's Safeguard Policies. Environmental and Social Framework (Proposed Third Draft), *supra* note 36, at 11, 19, 22, 30, 36

⁴⁸*Ibid.*, at 37.

participants that called for the incorporation of human rights into the ESF, with borrowing countries ‘noting conflicts with the World Bank’s mandate’ and the identity of the World Bank as a reason not to incorporate international human rights.⁴⁹

The tensions between the various actors and the fundamental differences of opinion on crucial issues highlight some of the challenges when talking about deliberative democracy within international decision-making. The next section outlines the types of debates that a lens of deliberative democracy necessitates.

3. Deliberative democracy

Deliberative democracy is a process of decision-making where relevant actors join to debate common issues. Within deliberative democracy the needs and interests of each participant are taken into account and treated equally,⁵⁰ provided such interests are communicated through reasoned arguments.⁵¹ Within the deliberative model there are two spheres; the informal and the formal. The informal is characterized by debates amongst the people. The formal sphere refers to state-based, public institutions of decision-making, such as assemblies. The informal discussions between civil society actors should be fed into the formal decision-making processes.⁵² Habermas’s theory of deliberative democracy can be deconstructed into four overlapping component parts: the demarcation of the people, the public sphere, deliberation, and decision-making. Theorists of deliberative democracy stress the efficacy of the public sphere, emphasizing that debates within the public sphere *must* influence decision-making.⁵³ Given this, this article focuses on three aspects: the *demos*, deliberation, and the act of making a decision. These aspects of deliberative democracy can be used and critiqued to analyse the World Bank consultation process.

3.1 Constructing a *demos*

Debates abound within deliberative democratic theory about the appropriate criterion for demarcating *demos*. The all-affected principle is criticized for being too broad,⁵⁴ and the all-subjected principle is considered too narrow.⁵⁵ As the all-subjected principle refers to ‘those who are subject to a given governance structure’,⁵⁶ it is not appropriate in this case where there is a soft-law mechanism that regulates negotiations of finance agreements and the distinction between governed and governor is missing.⁵⁷ At its broadest, the all-affected principle refers to ‘all and only those who are affected by a decision’.⁵⁸ The utility of the ‘all-affected’ approach for global governance is that the *demos* is fluid and constructed as and when there are decisions to be made.⁵⁹

The meaning of ‘all-affected’ is contested, with scholars debating the threshold requirements. Some have argued for ‘fundamental interests’ as a limit, others consider the extent to which

⁴⁹*Ibid.*, at 19.

⁵⁰T. McCarthy, ‘Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue’, (1994) 195 *Ethics* 44, 55.

⁵¹See J. Cohen, ‘Reflections on Habermas on Democracy’, (1999) 12 *Ratio Juris* 385, 399–400.

⁵²Habermas, *supra* note 15, at 352; N. Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’, (1990) 25/26 *Social Text* 56, 75.

⁵³Habermas, *supra* note 15, at 375; Fraser, *supra* note 52, at 75.

⁵⁴N. Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (2010), 64.

⁵⁵S. Näsström, ‘The Challenge of the All-Affected Principle’, (2011) 59 *Political Studies* 166, 117.

⁵⁶Fraser, *supra* note 54, at 65. See also L. Valentini, ‘No Global *Demos*, No Global Democracy? A Systematization and Critique’, (2014) 12 *Perspectives on Politics* 789, 792.

⁵⁷Näsström, *supra* note 55, at 117, 123.

⁵⁸Valentini, *supra* note 56, at 793.

⁵⁹S. Wheatley, *The Democratic Legitimacy of International Law* (2010), 325.

interests are affected.⁶⁰ Important interests within global governance might range from human rights⁶¹ to financial stakes. Financial decision-making at an international level can affect ‘creditor institutions, debtor governments, investors in global financial markets, and residents’.⁶² Constructing an ‘all-affected’ *demos* within international decision-making is ‘complicated’ because of the range of actors with competing interests.⁶³ Scholarship on deliberative global governance has included NGOs, activists, journalists, corporations, members of governments and international organizations within the public sphere.⁶⁴

Theories of deliberative democracy are predicated on consensus and have traditionally assumed a homogenous polity.⁶⁵ Feminist scholars critique the lack of equality within *demos* that are presented as homogenous groups. Habermas’s bourgeois public sphere is predicated on the idea that the participants were social equals but this is an assumption that effectively works to bracket the participants’ differences in gender, race and class.⁶⁶ Fraser critiques Habermas’s conceptualization of the public sphere for being built on communication between particulars ‘as if’ they were equal.⁶⁷ The ‘as if’ assumption ignores the barriers groups might face, such as language, resources and information, and can potentially exclude voices and opinions of certain groups of society.⁶⁸ Asking about the *demos* within deliberative democracy can raise difficult questions about who should participate within the consultation and the equality between members within that *demos*.

3.2 Deliberation and decision-making

Deliberation, at its broadest, is suggestive of debate and discussion. Within the models of deliberative democracy there are particular rules that guide deliberation, which include; discussions predicated on reasoned arguments, the idea that no relevant actor is excluded from the discourse, everyone has the opportunity to speak, individuals should listen to one another and respond to one another, individuals should justify their positions to each other, and no one can be coerced.⁶⁹

Participation and inclusion are common markers of legitimacy within the literature on international law and international organizations.⁷⁰ Though, what participation and inclusion mean can vary. For Kuper inclusion refers to the range of actors from different social backgrounds,⁷¹ and for Teubner the utility of participation and inclusion is the plurality.⁷² In essence, these ideas of participation and inclusion speak to the scope of participation, or the number and variation of participants. It is this form of participation-based legitimacy that the World Bank appeals to in its promotional and informative literature on the ESF. The standard of deliberative democracy is more complicated.

For Habermas, deliberation means ‘[a]ll interested parties should have an equal opportunity to exercise influence in the process of bargaining, “so that all the affected interests can come into play and have equal chances of prevailing”’.⁷³ This can be broken down into two potentialities: first,

⁶⁰See R. E. Goodin, ‘Enfranchising All Affected Interests, and Its Alternatives’, (2007) 35 *Philosophy & Public Affairs* 40, 51.

⁶¹See C. Gould, ‘Self-Determination beyond Sovereignty: Relating Transnational Democracy to Local Authority’, (2006) 37 *Journal of Social Philosophy* 44, 54.

⁶²J. A. Scholte, ‘Global Governance, accountability and civil society’, in J. A. Scholte (ed.), *Building Global Democracy? Civil Society and Accountable Global Governance*, (2011), 8, 22.

⁶³*Ibid.*, 22.

⁶⁴Dryzek, *supra* note 15, at 24.

⁶⁵Wheatley, *supra* note 59, at 106.

⁶⁶See Fraser, *supra* note 52, at 62.

⁶⁷*Ibid.*, 63.

⁶⁸Young, *supra* note 16, at 54–5.

⁶⁹S. Chambers, ‘Discourse and democratic practices’, in S. K. White (ed.), *The Cambridge Companion to Habermas* (1995), 233, 239.

⁷⁰Kleinlein, *supra* note 4, at 41, 44.

⁷¹A. Kuper, *Democracy Beyond Borders: Justice and Representation in Global Institutions* (2006), 166.

⁷²G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2014), 122.

⁷³Habermas, *supra* note 15, 167; Wheatley, *supra* note 59, at 104.

equal opportunity to participate and second, equal chance of their views prevailing. Crucially, within deliberative democracy, the deliberations must feed into the act of decision-making; it is through reasoned arguments that participants convince one another to form a consensus.⁷⁴

Although deliberative democracy has been championed in scholarship on global governance, these potentialities within Habermas's theory weaken the utility of deliberative democracy for consultation processes such as the World Bank's reform of the ESF. The potential of equal opportunity and of prevailing can be undermined by power-dynamics. Equal opportunity to participate and to prevail at their weakest mean that in principle deliberations must be open to those affected.⁷⁵ Young would go further and argue for *genuine* participation, exposing the obstacles that participants might face when participating.⁷⁶ For example, Young highlights how location, language, and resources can act as barriers to participation and how voices can be patronized for not meeting a prerequisite standard of rationality.⁷⁷ Habermas argues that participants have an equal chance of their opinion prevailing.⁷⁸ Arguably, this means that within deliberative democracy no one actor should be able to claim an advantage.⁷⁹ However, this ignores power dynamics within the *demos*, where some actors can exert leverage over the decision-making.⁸⁰ For example, Levy has demonstrated how 'elite' actors, which could include civil servants and policy-makers, have power to shape deliberative processes.⁸¹ The potential of equality of opportunity and of prevailing raise a limitation of deliberative democracy; this model of democracy cannot provide guarantees that people's views will be taken into account. Given this weakness, it is questionable whether deliberative democracy is an appropriate standard for the World Bank consultation process.

Combining the component parts of deliberative democracy with these critiques, offers a rich set of challenges for international decision-making. When outlined, deliberative democracy sets a high threshold; it includes the efficacy of the public-sphere and a genuine connection between the *demos*, the process of deliberation, and the act of decision-making. The critiques, often from feminist theorists, expose how deliberative democracy brackets differences between actors and overlooks potential power-dynamics, which are critical challenges within international decision-making. The next section will use both the components of deliberative democracy and these critiques to analyse the World Bank consultation on the ESF.

4. Deliberative democracy and the World Bank safeguard reform

4.1 The World Bank ESF demos

Using the 'all-affected' principle to demarcate a *demos*, raises questions about the types of actors participating in the ESF consultation. The ESF impacts on a number of different categories of persons, and therefore potentially 'affects' a range of actors. The World Bank ESF, the ESS, and the Policy for Investment Project Financing is directed at borrowing states, the World Bank, and donor states. Within the ESF, there are obligations on borrowing states, due diligence obligation for the World Bank, and instructions on relations with donor states and multilateral or bilateral funding agencies.⁸² Thus, 'affected' could include borrowing countries, the World Bank,

⁷⁴Habermas, *supra* note 15, at 166.

⁷⁵Fraser, *supra* note 54, at 93.

⁷⁶Young, *supra* note 16, at 54–5.

⁷⁷*Ibid.*; Phillips, *supra* note 16, at 143.

⁷⁸Habermas, *supra* note 15, at 167.

⁷⁹Wheatley, *supra* note 59, at 103.

⁸⁰Phillips, *supra* note 16, at 147.

⁸¹R. Levy, 'The "Elite Problem" in Deliberative Constitutionalism', in R. Levy et al. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (2018), 351, 352–3.

⁸²World Bank, The World Bank Environmental and Social Framework, *supra* note 8, at 4–5, 55.

and donor countries. These actors could be considered to be ‘affected’ because the ESF places obligations on them.

The ESF also has implications for the countries in which the World Bank finances projects. This means that the ESF affects states in receipt of funding, as well as the communities that are both positively and/or adversely affected by the financing of projects.⁸³ Indigenous peoples are ‘affected’ by the ESF both because World Bank-financed projects can encroach on their rights, but also because they have participatory rights that are protected by the ESF. Within the consultation process, indigenous people had a stake in what the ESF would say about the scope of their participatory rights. Other funding agencies have to reach ‘materially consistent’ standards with the ESF⁸⁴ and it is, therefore, arguable that they have a stake in the content of the ESF.

Attempts to narrow the ‘all-affected’ principle refer to fundamental interests or take into account interests that are significantly affected.⁸⁵ This might exclude other funding agencies that were interested in the outcome of ESF reform, but did not have a fundamental interest at stake. Yet, these limits on the all-affected principle are subjectively defined and could lead to problems in the case of ESF where fundamental interests such as human rights, environmental concerns, and financial assets are at stake.⁸⁶ Within the ESF the human rights of project-affected communities are being balanced against the financial assets of the World Bank and its donor countries, and the potential financial interests of borrowing countries.⁸⁷

Discussing the ‘all-affected’ principle as the criterion for demarcating a group of relevant actors in the ESF consultation process highlights that increased plurality of actors does not necessarily ensure that the interests of the people, represented through civil society actors, are protected. In this instance, the World Bank’s choice of actors balances the interests of communities with the interests of the World Bank, borrowing countries, and donor countries.

When reading the ESF through a democratic lens, a pertinent question is how the World Bank constructed the *demos*. In this World Bank consultation, there is a mixture of selection and self-selection. The World Bank made decisions on the experts to consult and the participants questioned the World Bank’s process for selecting these experts, highlighting that experts on gender were not included in aspects of Phase 1.⁸⁸ The World Bank selects which actors consult on which questions. For example, in paragraph 35 of the Approach Paper it states, ‘[t]he Bank will undertake an internal dialogue on these areas, followed by consultations with *shareholders* and *external experts*’.⁸⁹ This means that there is a range of issues, which includes human rights, gender, disability, natural resources, and climate change, where the World Bank proposed to open consultation only to shareholders (i.e., member states), external experts, and World Bank staff. Thus, potentially ignoring the views of communities.⁹⁰ Moreover, as noted above, in Phase 2, the Bank selected countries to ensure a balance of middle- and low-income economies, and in Phase 3 the World Bank concentrated on consulting with government officials and implementations units within borrowing countries.

The World Bank set out to be global in scope; the consultation process was supposed to engage people, groups, and governments from around the world. Whilst stakeholders were invited by the

⁸³Human rights violations via Bank financed projects are documented. See, for example, M. Heupel, ‘Human Rights Protection in World Bank Lending: Following the lead of the US Congress’, in M. Heupel and M. Zürn (eds.), *Protecting the Individual from International Authority* (2017), 241.

⁸⁴World Bank, *The Environmental and Social Standards*, *supra* note 7, at 5.

⁸⁵Valentini, *supra* note 56, at 793.

⁸⁶Wheatley, *supra* note 59, at 325.

⁸⁷For a discussion on possibility in the *demos* see Goodin, *supra* note 60.

⁸⁸World Bank ‘Preliminary Report Out on Phase 1 of the Safeguards Review Consultations (Washington, DC)’, 20 April 2013, 67.

⁸⁹World Bank, *Safeguard Policies Proposed Review and Update: Approach Paper*, *supra* note 3, para. 35.

⁹⁰della Porta criticizes deliberative processes that focus on experts, rather than citizens; D. della Porta, *Can Democracy be Saved?* (2013), 174.

Bank, there was a process for other stakeholders to register to attend.⁹¹ This online registration process is arguably available to all. Importantly, the World Bank followed its Consultation Guidelines and examples of international good practice on consultations. This meant that consultation meetings were advertised in advance. Importantly, the World Bank stressed its effort to ensure that its processes were accessible to those persons that faced obstacles to participation; '[t]he World Bank made a special effort to reach out to stakeholders in rural and hard to reach areas, such as indigenous groups and people living in rural areas'⁹² and '[c]onsultation venues were accessible for persons with disabilities', sign language interpreters were available, and copies of the materials were printed in Braille.⁹³

However, summaries and transcripts of the consultation meetings with multiple-stakeholders highlight the limits of the World Bank's efforts to be inclusionary. There are repeated complaints about the short notice given for consultations,⁹⁴ and the lack of time to read circulated documentation.⁹⁵ Participants note the choice of locations for some of the consultation meetings were difficult for more rural populations or isolated people to attend.⁹⁶ Comments are made about the lack of translation for local languages, creating barriers to participation.⁹⁷ With respect to disability access, in Phase 1 of the consultation, a speaker complained of the lack of facilities for disabled persons:

There were no arrangements made to facilitate the participation of disabled persons in this consultation meeting. For example, there were no documents in Braille provided for the visually impaired, neither could they have access to the Power Point or complete the registration forms. There was no sign language interpreter for the hearing impaired. It should not be claimed that these consultation meetings are open and accessible to all if this is in theory only; they should be open in real terms.⁹⁸

⁹¹World Bank, 'World Bank Safeguard Policies Review and Update: Summary of Phase 2 Consultations and Bank Management Responses', 1 July 2015, 1.

⁹²*Ibid.*

⁹³*Ibid.*

⁹⁴World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Dakar, Senegal)', 18 November 2014; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Brussels, Belgium)', 10 November 2014, 1; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (Mexico City, Mexico)', 8 December 2015, 7.

⁹⁵World Bank, 'Review and Update of the World Bank Safeguard Policies: Phase 2 Feedback Summary (Brasília, Brazil)', 16 December 2014, 1–2; World Bank, 'Review and Update of the World Bank Safeguard Policies: Phase 2 Feedback Summary (Asunción, Paraguay)', 25 November 2015, 2; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Manila, Philippines)', 23 October 2014, 1; World Bank, 'Safeguard Policies Review – Multi-Stakeholder Consultation (Washington, DC)', 11 October 2014, 24. Though in contrast, the Bank was praised for circulating education in advance: World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Consultations – Feedback Summary (Beirut, Lebanon)', 3 November 2014, 1.

⁹⁶World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies Multi-stakeholder Consultation Meeting: Feedback Summary (Bengaluru)', 8 April 2013, 3; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (New Delhi India)', 5 November 2015, 1.

⁹⁷World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies Multi-Stakeholder Consultation Meeting: Feedback Summary (Bhubaneswar)', 10 April 2013; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Manila, Philippines)', *supra* note 95; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (New Delhi India)', *supra* note 96. In contrast, in Egypt participants praised the Bank for holding the consultation in Arabic and for translating documentation: World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Consultations – Feedback Summary (Beirut, Lebanon)', *supra* note 96, at 1.

⁹⁸World Bank, 'Review and Update of the World Bank's Safeguard Policies Consultation Meeting with Civil Society Organizations, (Buenos Aires, Argentina)', 12 March 2013, 3.

Similarly, in Phase 2, there were continued calls for documentation to be made available in Braille or enlarged print.⁹⁹

Moreover, comments from the consultation process highlight that there were people that did not or could not participate in the consultation process. One participant stated: 'I think one of my main concerns throughout this process is that it happened so quickly and that the communities are actually not here ...',¹⁰⁰ and another gave the example of a community organization that represents persons impacted by the Chixoy Dam in Guatemala, an organization that was not told about the consultation and were told it was 'too late to attend the multi-stakeholder consultation' when they tried to register.¹⁰¹ In Latin America, 'major indigenous peoples' organizations were not aware of the consultations happening in their countries'.¹⁰² Requests for consultations by CSOs were left unaddressed by the World Bank; for example, one participant argued that the World Bank had not responded to requests for consultation in Montreal.¹⁰³ One participant highlighted that diaspora communities were not consulted during Phase 1, despite the impact climate change has on those communities,¹⁰⁴ and another argued that 'peasant organizations, as well as relevant sub-groups, including small family farmers' were not present in discussions in Paraguay.¹⁰⁵ These sorts of comments highlight that voices were left out of the consultation process.¹⁰⁶ Feminist scholars have highlighted how a commitment to equality can work to bracket structural inequalities of power between these different actors.¹⁰⁷ These comments from the consultation highlight the obstacles to genuine participation for certain communities.

To meet the standard of deliberative democracy, the participants in the ESF consultation process would need to be 'all interested parties',¹⁰⁸ but reliance on this criterion alone to demarcate the *demos* is problematic. Focus on demarcating the *demos* using 'all-affected' allows for the participation of powerful economic actors and communities of people. Deliberative democracy, as a form of procedural legitimization, focused on treating participants 'as equals', cannot ensure the protection of substantive rights nor a 'just' outcome. Merely focusing on demarcating a *demos* using mechanisms such as the 'all-affected' criterion, does not expose the unequal power dynamics between the World Bank, the donors, the borrowing countries, and communities and activists, nor the potential barriers to participation for certain groups.

This discussion on *demos* highlights that *how* the World Bank chooses its participants for consultation needs further research and there needs to be a clearer, normative approach to the demarcation of the participants. Going for 'global' participation might satisfy a plurality participation-focused idea of legitimacy but the fusion of actors in this consultation process raises challenges. Feminist critiques of deliberative democracy ask hard questions about who should be included in decision-making processes and how much weight should be accorded to their views.

⁹⁹World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Consultations – Feedback Summary (Dar es Salaam, Tanzania)', 4 November 2014, 1.

¹⁰⁰World Bank, 'Safeguard Policies Review – Consultation Meeting (Washington, DC)', 15 November 2012.

¹⁰¹World Bank, Preliminary Report Out on Phase 1 of the Safeguards Review Consultations (Washington, DC), *supra* note 88, at 30.

¹⁰²*Ibid.*

¹⁰³World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Ottawa, Canada)', 7 January 2015, 1.

¹⁰⁴World Bank, Preliminary Report Out on Phase 1 of the Safeguards Review Consultations (Washington, DC), *supra* note 88, at 69.

¹⁰⁵World Bank, Review and Update of the World Bank Safeguard Policies: Phase II Feedback Summary (Asunción, Paraguay), *supra* note 95.

¹⁰⁶See also, World Bank, Review and Update of the World Bank Safeguard Policies: Phase 2 Feedback Summary (Brasília, Brazil), *supra* note 95 (suggests that there were several civil society movements missing from consultations); World Bank, Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (New Delhi India), *supra* note 96 (suggests people were not invited to the consultation).

¹⁰⁷Young, *supra* note 16, at 81, 108.

¹⁰⁸Habermas, *supra* note 15, at 167.

Reading the process using the feminist critiques of an all-affected principle exposes the inequalities of power that are not necessarily highlighted when discussing deliberative democracy. Asking the democracy question necessitates a debate on who should have a stake in decisions. Whilst it might be legitimate for both the World Bank and the affected communities to have a say in decision-making, it is not necessarily a just outcome that more powerful actors have an 'equal' say to the persons that the ESF was designed to protect.

4.2 Deliberation and decision-making in the ESF consultation process

The World Bank in its consultation exercise did construct processes that provide opportunities for a range of actors to participate. As noted above, consideration was given to access requirements for persons and the World Bank made efforts to reach rural communities.¹⁰⁹ There were a wealth of town-hall meetings that provided space for participation, and video links were used as a means of extending the participation. The sheer scale of participation, as well as the plurality of actors from a range of social and economic backgrounds that were involved, is praiseworthy.

However, mere inclusion and participation are not sufficient for deliberative democracy. Deliberative democracy calls for an understanding of how these groups of people participated.¹¹⁰ For deliberative democracy, there must be a genuine connection between the deliberative exercises and the act of decision-making; it is not sufficient for mere deliberation to take place. Deliberative democracy calls for discussions and debates between actors, as the idea is that actors can convince each other to form a consensus. An equal opportunity to participate and an equal opportunity to prevail in deliberations, underpins deliberative democracy.

If those are the ideal standards necessitated by deliberative democracy, then the summarized or transcribed comments from the consultation process expose problems with the deliberations in the ESF consultation. Consultations were often short and did not facilitate deliberation as understood within deliberative democracy. The quality of the consultation was criticized by participants, as the length of meetings was too short and there was not sufficient time to discuss all the issues.¹¹¹ Another concern that was repeated throughout the process, was that the consultation process did not allow deliberation between stakeholders; meetings with government representations were held separately from the consultation meetings with 'multi-stakeholders', often members of CSOs.¹¹² Holding separate meetings obscures reasoned debates between participants, where actors learn from each other and can adapt to reach a consensus.

Civil society actors and indigenous peoples were concerned that their comments were not given weight by the World Bank.¹¹³ One participant argues that the World Bank ignored calls from

¹⁰⁹See text at note 92.

¹¹⁰Inclusion alone is akin to transparency. See Buchanan and Keohane, *supra* note 5. Cf. T. D. Zweifel, *International Organizations & Democracy* (2006), 91–2.

¹¹¹World Bank, 'The World Bank Review and Update of World Bank's Environmental and Social Safeguards Policies Consultation Meeting with Civil Society Representatives (Guatemala City, Guatemala)', 10 April 2013; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Kathmandu, Nepal)', 28 November 2014; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Consultations – Feedback Summary (Cairo, Arab Republic of Egypt)', 28 October 2014, 1.

¹¹²World Bank, Safeguard Policies Review – Consultation Meeting (Washington, DC), *supra* note 100; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (Abuja, Nigeria)', 18 December 2015, 11; World Bank, Preliminary Report Out on Phase 1 of the Safeguards Review Consultations (Washington, DC), *supra* note 88, at 30; World Bank, Review and Update of the World Bank Safeguard Policies: Phase II Feedback Summary (Asunción, Paraguay), *supra* note 95; World Bank, Review and Update of the World Bank's Environmental and Social Safeguards Policies: Phase 2 Feedback Summary (Brussels, Belgium), *supra* note 94; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (Nairobi, Kenya)', 2 February 2016, 1.

¹¹³World Bank, 'The World Bank Review and Update of World Bank's Environmental and Social Safeguards Policies Consultation Meeting with Civil Society Representatives (Guatemala City, Guatemala)', 10 April 2013; World Bank,

certain community groups, offering ‘insensitive responses’ to the ‘pleas’ from people affected by World Bank-supported projects in Guatemala, Cambodia, Ethiopia, and Indonesia.¹¹⁴ As the meetings were held with Chatham House rules, and often summarized, it is difficult to assess whether some participants dominated proceedings over others, but it is pointed out that meetings with CSO consultation were shorter than the meetings with governments.¹¹⁵ Commentary on the meeting in Jakarta states that the meeting was ‘dominated by nongovernmental and CSO organisations’, at the expense of other parties that had been invited.¹¹⁶ These critiques demonstrate that the consultation was not predicated on an equal opportunity to participate.

The decisions on the ESF were ultimately taken by the World Bank management, namely the Development Committee, and approval of the final draft of the ESF was sought from the Board of Executive Directors at the World Bank. The World Bank acknowledged that consensus between the varying shareholders and stakeholders was difficult to find. There were two prominent methods the World Bank used to reconcile differences between stakeholders: one method ‘prioritized implementability’, whilst seeking to improve the coverage of environmental and social issues,¹¹⁷ and the other was to argue that negotiation was guided by the World Bank’s mandate.¹¹⁸

With respect to ‘implementability’ as a principle of reconciliation, there are clear examples where the World Bank has weakened provisions so as to accommodate the concerns of those borrowing countries implementing the ESSs. For example, in relation to the freedom of association and collective bargaining of workers, borrowing countries argued that there was inconsistency with national laws, and so the World Bank ‘clarifies that the objective of supporting the principles of freedom of association and collective bargaining of workers would be required *in a manner consistent with national law*’.¹¹⁹ Borrowing countries argued that the costs of estimating greenhouse gases is too onerous¹²⁰ and the World Bank placed limits on what was expected of borrowing countries.¹²¹ Similarly, in relation to Indigenous Peoples’ FPIC, borrowing countries feared this would amount to a veto, so the World Bank:

clarified that, for the purpose of ESS7 [on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities], *consent* refers to the collective support of affected Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities for the project activities that affect them, reached through a culturally appropriate process.¹²²

This means that projects can go ahead even if some groups or individuals disagree.¹²³ The World Bank states that it was responding to ‘Indigenous Peoples’ interest in FPIC’¹²⁴ but this is

Review and Update of the World Bank Safeguard Policies: Phase 2 Feedback Summary (Brasilia, Brazil), *supra* note 95; World Bank, ‘Review and Update of the World Bank’s Environmental and Social Safeguards Policies: Phase 2 Feedback Summary (Brussels, Belgium)’, *supra* note 94.

¹¹⁴World Bank, ‘Safeguard Policies Review – Multi-Stakeholder Consultation (Washington, DC)’, *supra* note 95, at 33–5.

¹¹⁵World Bank, ‘Review and Update of the World Bank’s Environmental and Social Safeguard Policies: Phase 3 Feedback Summary (Abuja, Nigeria)’, 18 December 2015, 10.

¹¹⁶World Bank, Preliminary Report Out on Phase 1 of the Safeguards Review Consultations (Washington, DC), *supra* note 88, at 20–1.

¹¹⁷World Bank, Review and Update of The World Bank’s Safeguard Policies. Environmental and Social Framework (Proposed Third Draft), *supra* note 36, at 1.

¹¹⁸World Bank, Safeguard Policies Proposed Review and Update: Approach Paper, *supra* note 3, at 12.

¹¹⁹World Bank, Review and Update of The World Bank’s Safeguard Policies. Environmental and Social Framework (Proposed Third Draft), *supra* note 36, at 23, 33.

¹²⁰*Ibid.*, at 21.

¹²¹*Ibid.*, at 33.

¹²²*Ibid.*, at 19.

¹²³*Ibid.*

¹²⁴*Ibid.*

disingenuous to the support of and call for strong FPIC during the consultation process.¹²⁵ Although it is arguable that within deliberative democracy participants cannot claim a privileged position,¹²⁶ within the ESF reform process the borrowing countries had decision-making power, rather than the communities.

The World Bank's Mandate is used as another tool for reconciliation, specifically in the debate on the incorporation of international human rights standards. The World Bank states:

The multiple and sometimes conflicting voices that claim to represent stakeholders' interests can lead to a polarized debate, and make it difficult to find consensus. The Bank will seek to strike the right balance, guided by its mandate, its overall development objectives, and implementation considerations.¹²⁷

In the Management's Response to the third consultation phase, it states:

Consistency with the Bank's Articles of Agreement was also raised as a major concern. Given the divergent views on human rights coverage in the ESF among shareholders and stakeholders, Management suggests that the current approach, addressing human rights in the Vision statement, be maintained.¹²⁸

Alston (and Human Rights Watch in their submission),¹²⁹ highlights the extent of stakeholders and interested parties petitioning for the inclusion of human rights.¹³⁰ There is a debate on whether the World Bank should have incorporated human rights, which will not be expanded upon here as this article is concerned with the process. Despite the calls by civil society actors, the World Bank's mandate prevailed. Any deliberation that could be said to 'take into account' the interests and concerns of participating stakeholders is weighed against the World Bank's mandate. In other words, the decision reached is not necessarily led by the concerns of participants but rather potentially trammelled by the World Bank's mandate. Human rights provisions within the ESF are an example of how in this World Bank consultation process, the negotiation and agreement is not reached through discussions between people and/or their representatives so as to reach

¹²⁵World Bank, 'World Bank National Dialogue with Indigenous Peoples in Nepal (Kathamandu)', 20–21 March 2014, 7; World Bank, 'World Bank Regional Dialogue with Indigenous Peoples (Guna Yala, Panama)', 30–31 January 2014, 2; World Bank, 'World Bank Regional Dialogue with Indigenous Peoples in Africa (Cape Town)', 4–6 December 2013, at 4; World Bank, 'The World Bank Review and Update of World Bank's Environmental and Social Safeguards Policies Dialogue Meeting with the Abya Yala Technical Committee (Latin American and the Caribbean Indigenous Network) (Washington DC, USA)', 25–27 November, 2013, 2; World Bank, 'World Bank Regional Dialogue with Indigenous Peoples in Southeast Asia (Manila)', 6–7 November 2013, 2; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Manila, Philippines)', 5–6 February 2015, 2; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Consultation with Indigenous Peoples Representatives. Draft Feedback Summary (Johannesburg, South Africa)', 21 November 2014, 2; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies: Phase 2 Feedback Summary (Hanoi, Vietnam)', 27 October 2014, 2; World Bank, 'Review and Update of the World Bank's Environmental and Social Safeguard Policies Phase 2 Consultations – Feedback Summary (New York, USA)', 24 September 2014, 1.

¹²⁶Wheatley, *supra* note 59, at 103.

¹²⁷World Bank, Safeguard Policies Proposed Review and Update: Approach Paper, *supra* note 3, at 12.

¹²⁸World Bank, 'Summary of Phase 3 Consultations and Bank Management Responses', August 2015, 8.

¹²⁹Human Rights Watch, 'Human Rights Watch Submission: World Bank's Draft Environmental and Social Framework', 7 April 2015, available at www.hrw.org/news/2015/04/07/human-rights-watch-submission-world-banks-draft-environmental-and-social-framework.

¹³⁰P. Alston, 'The World Bank as a Human Rights-Free Zone' (2017), in F. Lafontaine and F. Larocque (eds.), *Doing Peace the Rights Way: Essays in International Law and Relations in Honour of Louise Arbour* (Forthcoming), available at ssrn.com/abstract=3079899.

consensus through rational debate¹³¹ but instead agreement is reached by the World Bank management.

The World Bank's mandate evolves. It can be currently understood as:

[t]he World Bank promotes long-term economic development and poverty reduction by providing technical and financial support to help countries reform certain sectors or implement specific projects—such as building schools and health centers, providing water and electricity, fighting disease, and protecting the environment.¹³²

Zweifel points out that in 2006 the World Bank's mandate was interpreted as to 'fight poverty and improve living standards for people living in the developing world'.¹³³ Scholars have highlighted the shifting politicization of the World Bank as it strives to accommodate global challenges, not least the 2008 economic crisis;¹³⁴ some scholars argue that the reduction of poverty is a ruse to introduce liberal economics¹³⁵ and others emphasize the World Bank's competitiveness within a market of lenders, which results in the balancing of poverty reduction with profits.¹³⁶ Note also the shift from improving *people's* living to helping *countries*, which could be suggestive of a move to prioritize the developing countries over the interests of the people living there. In theory, if decisions are being made to ensure the reduction of poverty or the improvement of living-conditions, this is in favour of the communities within developing countries. However, the mandate is currently interpreted to refer to helping developing countries, rather than specifically the lives of their people. Another instance of the borrowing countries potentially having more leverage in the decisions on ESF reform and of elites, such as World Bank staff, shaping the deliberations.

Reliance on the mandate and on implementability as tools for reconciliation does not allow the people themselves to decide.¹³⁷ Deliberative democracy necessitates a genuine link between deliberations and the act of decision-making, and that link is broken in this consultation process. Under the deliberative democracy model, the decision reached should be one that all participants could agree on. For Habermas, consensus means that the decision is based on arguments that 'convince parties in the same way'.¹³⁸ Although this is a highly idealistic threshold, it expresses the crucial role of the people in the act of decision-making.¹³⁹ Using deliberative democracy as a lens exposes the gap between the deliberations and the act of decision-making, demonstrating that the weaker role for people within international decision-making.

The commitment to homogeneity within deliberative democracy would treat all participants as equal¹⁴⁰ and in the case of the ESF consultation process it would treat donors, borrowers, World Bank representatives, civil society representatives, and affected communities as equals. Yet, the *demos* constructed by the World Bank is far from homogenous and is rather constituted of a series

¹³¹Habermas, *supra* note 15, at 166.

¹³²International Monetary Fund, 'The IMF and the World Bank', 20 October 2017, available at www.imf.org/en/About/Factsheets/Sheets/2016/07/27/15/31/IMF-World-Bank.

¹³³Zweifel, *supra* note 110, at 87. See International Development Association, 'Articles of Agreement (effective 24 September 1960)', available at <http://www.pubdocs.worldbank.org/en/341581541440486864/IDAArticlesofAgreementEnglish.pdf>, Preamble and Art. 1.

¹³⁴See J. M. M. Pereira, 'Recycling and Expansion: An Analysis of the World Bank Agenda (1989 - 2014)', (2016) 37 *Third World Quarterly* 818, 834.

¹³⁵*Ibid.*, at 819; Hey, *supra* note 20, at 4.

¹³⁶T. Erkkliä and O. Piironen, '(De)politicizing Good Governance: The World Bank Institute, the OECD and the Politics of Governance Indicators', (2014) 37 *Innovation: The European Journal of Social Science Research* 344, 347; Sovacool, *supra* note 21, at 6.

¹³⁷della Porta has highlighted the 'missing links between the consultation, deliberation, decision and monitoring phases ...' in deliberative processes; della Porta, *supra* note 90, at 174.

¹³⁸Habermas, *supra* note 15, at 166.

¹³⁹J. Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (2012), 139.

¹⁴⁰della Porta, *supra* note 90, at 67.

of inequitable power struggles. For example, struggles between donor states and borrowing states,¹⁴¹ and also between borrowing countries, the World Bank and the communities adversely affected by investment projects. This article exposes the World Bank's deference to borrowing countries despite donor countries and civil society actors calling for greater protection in areas such as human rights and discrimination.¹⁴² As these actors are considered to be 'equal' under deliberative democracy¹⁴³ there are no mechanisms to ensure that the views of the people are heard, taken into account and acted upon. Within deliberative democracy people's views cannot be explicitly prioritized above others,¹⁴⁴ even though the borrowing states held more sway in this reform process, and rural or isolated groups were denied genuine access to consultation meetings.

The process leading up to the adoption of the World Bank's ESF is laudable in its attempt to engage internal and external stakeholders on a global scale. However, if a model of deliberative democracy is used, there are questions about the quality of discussions in the consultations, the role of the different actors in the consultation process, and the respective weight they had in decision-making. Discussing deliberative democracy, and its critiques, exposes the problems within the reform process. It exposes the inequalities of power between participants and the prevailing gulf between communities of people and international decision-making.

5. Conclusion

The World Bank consultation process on the ESF is a genuine attempt to strive for global participatory decision-making. The plethora of non-state actors involved, the breadth of countries that participated, and the intensity of the three-phase consultation are admirable. Focusing on whether this World Bank consultation process could be explained as an exercise in deliberative democracy, this article highlighted the types of debates that scholars need to have to discuss deliberative democracy within global governance.

This article exposed a number of problems with the ESF consultation process. It highlighted the problems of trying to construct a *demos* for a consultation process with multiple potential stakeholders, with competing interests, and diverging amounts of leverage within decision-making. In striving for global participation, or even to incorporate those affected by the ESF, the World Bank draws together a *demos* that differs widely in terms of their respective powers; borrowers and donors, bank staff and communities, as well as activists and civil society are treated as if they were equal. Comments from civil society actors during the consultation process expose the weak nature of the deliberation: there were people who could be said to be affected by the ESF that were not there; civil society actors were kept separate from government actors; and time constraints meant less opportunities for informed debates. Looking at how the World Bank made attempts to reconcile the opinions of different actors, highlights the gaps between the deliberations and the act of decision-making. The World Bank consultation process falls short of the ideal of deliberative democracy but there is still something to be learned from talking about these sorts of consultation processes through a lens of deliberative democracy.

By using deliberative democracy to analyse the World Bank consultation process, this article uncovers the uncomfortable questions around the types of actors invited to participate and their respective powers in the decision-making process. Critiques of deliberative democracy highlight the extent to which the model ignores power dynamics, brackets questions of difference, and seeks to homogenize the *demos* through an idea of equality. The weaknesses of the World Bank's consultation process on ESF highlight the challenges that are still faced in relation to power-struggles and injustices within international decision-making. There is still more that needs to be done to

¹⁴¹Heupel, *supra* note 83, at 261.

¹⁴²*Ibid.*, at 261.

¹⁴³Fraser, *supra* note 54, at 93.

¹⁴⁴Wheatley, *supra* note 59, at 103.

integrate people and communities into decision-making. Asking about deliberative democracy can uncover these power dynamics. Moreover, scholarship that strives to find examples of democratic decision-making should be mindful of the difficult questions that need to be addressed about the people participating in deliberations and their respective powers.