

DEVELOPMENTS

Book Review - David Szablowski, *Transnational Law and Local Struggles: Mining Communities and the World Bank* (2007)

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[David Szablowski, *Transnational Law and Local Struggles: Mining Communities and the World Bank* (2007), Hart Publishing: Portland (2007), ISBN 1-84113-639-5, 337 pp., 50 CDN.]

A. Introduction

In the past decades, the International Financial Institutions (IFIs), specifically the World Bank Group and International Monetary Fund (IMF), have been experiencing a crisis unprecedented since their creation at the Bretton Woods conference in 1944.¹ In the wake of the instability caused by the international debt crisis, many critics of the IMF from both the 'Global South' and North have emerged to contest the actions of the IMF.² This conflict was precipitated by defaults on loans in Mexico in 1982.³ The IMF's response of debilitating structural adjustment programs, many theorists claim led to the "Lost Decade" of

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¹ 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (Kevin Danaher ed., 1994). The institution that was created at Bretton Woods was not known as the World Bank but it was the International Bank for Reconstruction and Development. However, the World Bank group is now composed of 5 different entities, including the IBRD, there are the International Development Association, International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Center for the Settlement of Investment Disputes. The IFC and MIGA are responsible for private sector investment and as such are accountable to the Office of the Compliance Advisor/Ombudsman.

² For examples see: JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2000), JONATHAN A. FOX, *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGOS, AND GRASSROOTS MOVEMENTS* (1998), Peter Gibbon, *The World Bank and the New Politics of Aid*, 5 *EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH*, 35 (1993), RICHARD PEET, *UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO* (2003)

³ Adhip Chaudhuri, *The Mexican Debt Crisis, 1982*, PEW PROGRAM IN CASE TEACHING AND WRITING IN INTERNATIONAL AFFAIRS, Case #204 (University of Pittsburgh, 1988).

development in some developing countries.⁴ The World Bank's role has been similar. For the first time in its history, due to ever increasing protests from a worldwide network of NGOs led by the Indian NGO, Narmada Bachao Andolan (NBA), the Bank had to withdraw from the Narmada Dam project in India in 1993, due to allegations that the Bank was essentially funding the theft of land and livelihoods from indigenous people in the area.⁵ Additionally, the criticism of former World Bank Chief Economist Joseph Stiglitz in his work, *Globalization and its Discontents*, has also led to the questioning of the fundamental legitimacy of the World Bank and IMF.⁶

Recently, the World Bank has begun to implement changes to its policies in order to effectively address internal and external critics. Due in large part to the involvement of Amartya Sen and his theories in *Development as Freedom*⁷, the World Bank, under its then president James Wolfensohn, has tried to promote 'development with a gentler face', in order to regain some of its lost legitimacy.⁸ For example, in response to the aforementioned Narmada Dam controversy, the World Bank created an Investigation Panel to delve into any complaints due to state projects funded by the Bank.⁹ Similarly, the Office of the Compliance Advisor/Ombudsman (CAO) was instituted to ensure that complaints regarding the International Finance Corporation and Multilateral Investment Guarantee Agency can be addressed.¹⁰ Additionally, participatory development, ensuring that those who are being affected by the project have to be consulted, has been touted as a cornerstone of the Bank's programming.

⁴ See Marguerite Michaels, *Retreat from Africa*, 72 FOREIGN AFFAIRS, 98 (1993), Robin Broad, John Cavanagh and Walden Bello, *Development: The Market is Not Enough* in INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH, 392 (Jeffrey A. Frieden & David A. Lake, eds., 4.ed., 2000), AUGUST B. FRISCHIA AND JUDITH L. KOVACS, BEYOND THE LOST DECADE: DEBT AND DEVELOPMENT IN LATIN AMERICA (1994)

⁵ SANJEEV KHAGRAM, RESTRUCTURING WORLD POLITICS: TRANSNATIONAL SOCIAL MOVEMENTS, NETWORKS, AND NORMS 206-213 (2002).

⁶ STIGLITZ, *supra*, note 2.

⁷ AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999)

⁸ BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE, 152 (2003).

⁹ KHAGARAM, *supra*, note 5.

¹⁰ Office of the Compliance Advisor/Ombudsman, "About Us," available at <http://www.cao-ombudsman.org/html-english/about.htm>.

The book here under review, a Ph.D. thesis by David Szablowski of York University in Toronto, *Transnational Law and Local Struggles: Mining Communities and the World Bank*, assesses the World Bank at this particular moment in its current, troubled history. His focus on the Antamina mine in the Peruvian Andes allows him to explore both the closer and broader context of the Bank's development work. Szablowski's emphasis on the legitimacy challenges to the Bank's involvement in development projects is a powerful key to opening a clearer view on the question of legitimacy in transnational law. Szablowski's study is, most importantly, an exploration of the operation of a transnational legal regime managed by the World Bank aimed at mitigating social and environmental impacts of Bank funded projects. Szablowski looks at the global spread of transnational mining and the contestation over land and resources, which frequently involve sensitive and complex dispute resolution proceedings between the corporations developing the mines, the investors and the populations affected by the mining. Central to Szablowski's inquiry is the question as to how the World Bank seeks to legitimate its actions to those it most directly affects and how effective are these mechanisms.

This book review proceeds in two parts. First, it provides an overview of Szablowski's book, focusing in particular on his exploration of the Involuntary Resettlement dispute settlement regime of the World Bank in light of conflicts between the mining consortium and the displaced populations. In its second part, the review will address the two interlinked issues of transnational law and legitimacy in regulation to position Szablowski's book in the context of current debates on law and development.

B. General Overview

Although Szablowski explicitly works through his case study in the sixth chapter, the reader is made cognizant quite early on of the fact that the theoretical evolves around the very specific case of the Antamina copper-zinc concession in the Peruvian Andes. The *Compania Minera Antamina* (CMA) had purchased this mining concession in the San Marcos Region from the Peruvian national government but in order to obtain the land necessary to pursue the mining, the CMA was required to purchase the tracts of land from the peasant farmers or *campesinos* who had title to the land.¹¹ These farmers, many of whom are indigenous peoples of the Andean region, are an extremely variegated population with complex relationships to each

¹¹ DAVID SZABLOWSKI, *TRANSNATIONAL LAW AND LOCAL STRUGGLES: MINING, COMMUNITIES AND THE WORLD BANK* 170-177 (2007).

other and to the land.¹² Unfortunately, the land was often transferred through fraud and even when there was payment, it did not take into account the usufructory rights of non-title holders.¹³ Szablowski takes this all too familiar story in the transnational mining industry, wherein the indigenous contest that their rights have been violated at the expense of a large-scale development project, and teases out the legal relationships between the various actors.

The first chapter of the work focuses on regulation and legitimation. Szablowski looks at perceptions of legitimacy and how to evaluate strategies in light of the “*essential obscurity of processes of legitimation.*”¹⁴ The processes for legitimation of decision-making he outlines are 1. decision-making by appropriate authorities; 2. the autonomy of private decision-making, 3. public participation in decision-making and 4. expert decision-making.¹⁵ These, he posits, would comprise the right process in a regime such as that of the World Bank, which seeks to practice democratic governance.¹⁶ In this endeavour, Szablowski is ultimately inquiring as to the type of political identity these processes indicate, taking all law itself as constituting a social identity.¹⁷

In Chapter Two, Szablowski seeks to justify the necessity of his focus on the transnational and local as opposed to the national by illustrating the selective absence of the state. The policy of the Peruvian government, save the imposition of some environmental standards, has been to relegate the purchase of lands to a private transaction between landholders and the corporation, thereby rendering recourse to the state for protection for the *campesinos* or for validation of the corporation impossible.¹⁸ Having shown that the transnational and local are central, in Chapter Three, Szablowski addresses the regimes that exist to “certify” or legitimize the mining corporations such as industry standards and the transnational regime of the World Bank in response to activists’ attempts to “decertify” or delegitimize these corporations.¹⁹ This chapter does not engage in an

¹² *Id.*

¹³ *Id.*, 182-201.

¹⁴ *Id.*, 11.

¹⁵ *Id.*, 15-18.

¹⁶ *Id.*, 22-23.

¹⁷ *Id.*, 298-304.

¹⁸ *Id.*, 27-60.

¹⁹ *Id.*, 61-100.

in-depth analysis of the corporate accountability mechanisms that exist internationally, such as the Extractive Industry Transparency Initiative²⁰ or the United Nations' Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,²¹ however, the role of these regimes is not central to Szablowski's analysis.

The central position, as addressed in Chapter Four, is granted to the World Bank Safeguard Policy Regime, which exists to remedy the worst social and environmental impacts of their projects. Szablowski's focus is on the Involuntary Resettlement (IR) Policies in this regime and he fundamentally questions the legitimization strategies that are contained within this policy, a theme that will be picked up in the next section of this review. CMA was required to abide by these policies triggered in situations involving involuntary acquisition of land as MIGA guaranteed the investments made in the venture.²² In Chapter Five, Szablowski begins to analyze the actors in the dispute, the communities and the corporation. His discussion of the? Andean community rightly points out the variegated nature of the community and its complex social relations and also does the same for the types of mining corporations in the industry.²³

Szablowski continues into an extensive analysis of 'the law as it is lived' in Chapter Six. He describes in detail the land use practices of the people of the San Marcos region of the Andes and the local process of land acquisition. He then proceeds chronologically from the initial meetings between the actors to where many of the *campesino* communities became disenchanted with the corporations till the point that MIGA "takes over" from the CMA to assert the IR Policy on the situation. MIGA's involvement stemmed from the complaints from the community that were received by the President of the World Bank, then passed on to MIGA.²⁴ Chapter Seven assesses this World Bank Safeguard Policy and looks at the rationalities of decision-making used by the experts and discusses the influence of these rationalities at various stages of the dispute settlement through the

²⁰ Extractive Industry Transparency Initiative, available at <http://www.eitransparency.org>.

²¹ Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12 (2003), available at <http://www1.umn.edu/humanrts/links/NormsApril2003.html>.

²² SZABLOWSKI, *supra* note 11, 184.

²³ *Id.*, 137-162.

²⁴ This is not the typical complaint mechanism. Today, complaints would be directed to the Office of the Compliance Advisor/Ombudsman. *Id.*, 224-228.

consultations held with the indigenous persons.²⁵ Ultimately, in concluding, Szablowski returns to questions of legitimacy. It is to these questions that this review will now turn.

C. Legitimacy of the Transnational in the Local

As mentioned in the introductory section, gaining legitimacy remains key to the World Bank Group and the Safeguard Policies of the World Bank were the way in which this legitimacy would be achieved. Operational Directive (OD) 4.30, replaced by Operational Policy (OP) 4.12,²⁶ was to ensure that the displaced population benefited from the project that displaced it.²⁷ Involuntary resettlement was primarily to be avoided but where this was not possible, it was to be treated as a development project. There was to be full compensation for loss and even an attempt to “improve their former living standards, income earning capacity, and production levels”²⁸ There was to be significant emphasis on participation and effective reintegration.²⁹ Additionally if these procedures are then violated, the Investigation Panel or the Office of the CAO, depending on the division of the World Bank Group that the complaint was based on, should be able to conduct consultations to investigate the problem and create a mutually acceptable solution.

However, Szablowski throws cold water on this idea that the approach is supposed to be people-centered or rights-based as suggested by the World Bank Group. In Szablowski’s discussion of this policy, it seems that participatory development has been mere rhetoric. Largely, the policy neglects participation as it does not require that basic measures are taken to enable informed local input into the decision-making processes.³⁰ Szablowski criticizes the fundamental access to justice problems that he suggests replicate the ills of the liberal legal system that the World Bank system is to a certain degree premised on.³¹ He goes on to argue that the

²⁵ *Id.*, 243–249.

²⁶ The World Bank Operational Material, *Involuntary Resettlement*, OP 4.12 (2005) available at <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf/023c7107f95b76b88525705c002281b1/ca2d01a4d1bdf58085256b19008197f6?OpenDocument>.

²⁷ The World Bank Operational Material, *Involuntary Resettlement*, OD 4.30, Para 3, (1990) available at <http://www.worldbank.org/html/fpd/em/power/wbpolicy/430OD.stm>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ SZABLOWSKI, *supra*, note 11, 259.

³¹ *Id.*, 119.

World Bank participatory approach fails to account for power relations and is also highly expert driven as opposed to participant driven.³² Even in consultations, there is minimal input by the communities in the actual design of the process.³³ It is important here to note that despite the fact that there is “consultation”, there is no ultimate right of the community to refuse development.

One of the main problems that Szablowski identifies is that although rationality of public participation is evident in decision-making, it is the private sector business rationality that continues to be of primary importance in the practice of the IR policy.³⁴ This rationality places understandings in fundamentally cost-benefit analysis terms and participation is quite costly and may not be worth the effort. In addition, when public participation is exercised, it is exercised through the professional rationality of social specialists.³⁵ These social specialists, as experts, are vital weapons in the arsenal to gain legitimacy. The professional nature of the social specialists itself speaks to the oft criticized apolitical stance that the Bank attempts to portray. James Ferguson, in his seminal piece, *The Anti-Politics Machine: 'Development', Depoliticization, and Bureaucratic Power in Lesotho* stated that the main problem was that although development was intrinsically political, using technocratic language and practices, it was positioned as neutral and apolitical.³⁶

The World Bank's position on human rights has always, on the face of it, been a rejection of rights as conflicting with the Bank's anti-political mandate under its Articles of Agreement. However, more recently, it has argued that its poverty reduction projects obviously contribute to the achievement of social and economic rights.³⁷ This position gives the impression that the World Bank would like to be seen as promoting a rights-based approach to development through its current emphasis on participation, and that there is no need for it to take any further specific steps to implement a rights-based approach. Furthermore, the Safeguard Policies are a key example of an attempt by the World Bank to introduce this form of rights-based approach, which would necessitate participation.³⁸ As Szablowski

³²*Id.*, 124-127.

³³ *Id.*, 261-281.

³⁴ *Id.*, 243-249.

³⁵ *Id.*

³⁶ JAMES FERGUSON, *THE ANTI-POLITICS MACHINE: 'DEVELOPMENT', DEPOLITICIZATION, AND BUREAUCRATIC POWER IN LESOTHO* (1990).

³⁷ Gernot Brondnig, *The World Bank and Human Rights: Mission Impossible*, Carr Center for Human Rights Policy Working Paper T-01-05, 1-21.

³⁸ Andrea Cornwall and Celestine Nyamu-Musembi, *Putting the 'rights-based approach' to development into perspective*, 25 *THIRD WORLD QUARTERLY*, 1415 (2004).

points out, nowhere does the Safeguard Policy framework provide the community with rights as this would be overtly political.³⁹ It appears highly unlikely that the bank would countenance placing themselves as an actor within the discursive frame as having the duty to uphold rights or indeed, positioning themselves as rights-violators. The experience with the Investigation Panel or at present, the CAO, has not led to the World Bank taking this sort of responsibility.

Ferguson's criticism appears to be that the World Bank Group as a whole is far too technocratic and apolitical in an industry that is obviously quite the opposite. Szablowski's perspective is far more analytical than normative, stating that the World Bank's social specialists, who form a part of the technocracy, are a strategy that they use to effect legitimacy. However, these mechanisms are divorced from those processes by which legitimacy is developed locally, detracting from legitimacy.⁴⁰ Nevertheless, Anthony Anghie's analysis suggests that, in the wake of its crisis of legitimacy, the neutrality of the World Bank may in fact be its saving grace. He states that "*the law plays a crucial role in attempts by IFIs to legitimize themselves and consolidate and expand their power.*"⁴¹ Specifically, the IFIs were created by international law, which provided them with an independent legal personality on the transnational stage.⁴² IFIs as he states are "*international bureaucracies that rely on the authority they exercise on their rational legal character.*"⁴³ The appearance of rationality then becomes vital to this legitimacy. Therefore, there is a disconnect in the literature based on the legitimating nature of the technocracy.

Szablowski does suggest that the technocratic approach spurs a tension between the transnational and the local, between institutional law *a la* Weber,⁴⁴ which is the tradition that the World Bank seems to espouse, and 'law as it is lived', which would be how law would be practiced by the affected *campesino* communities. Szablowski analyzes how this presents a challenge to the transnational regime.⁴⁵ Szablowski's thesis focuses on the interaction between the transnational and the local, thereby breaking the bounds placed on analysis by traditional ideas of state sovereignty. It is an analysis of the interactions between, as he puts it, "*the law*

³⁹ SZABLOWSKI, *supra*, note 11, 119.

⁴⁰ *Id.*, 285.

⁴¹ Anthony Anghie, *International Financial Institutions in The Politics of International Law* in THE POLITICS OF INTERNATIONAL LAW, 217, 235 (Christian Reus-Smit ed., 2004).

⁴² *Id.*, 218.

⁴³ *Id.*

⁴⁴ MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION (1947).

⁴⁵ SZABLOWSKI, *supra*, note 11, 13.

makers and the law takers,"⁴⁶ looking at conceptions of interlegality, referring to the overlapping or intertwined action of different legal orders upon a single social situation.⁴⁷ His focus therefore is on the effect of the transnational regime on the law takers, or the Peruvian *campesinos*. This seems to take into account the almost strangling power relations that ultimately exist between the transnational and the local. Interestingly, however, Szablowski positions the bargaining between the CMA and the *campesino* community as a fledgling legal normativity created by the actors. This points to agency on the part of the community, which is in stark contrast to the victimhood with which the local community is typically portrayed.

In his conclusion, since participation seems to be an empty promise by the World Bank, Szablowski lays the promise of democratization at the feet of the NGOs. This strategy appears to be a sound one, after all, as Margaret Keck and Kathryn Sikkink point to the power of the Transnational Advocacy Network created by NGOs, and primarily the NBA, was an impetus for the World Bank Group to create its Investigation Panel.⁴⁸ Some have heralded the Investigation Panel as a demonstration of the potential of TANs to influence international economic organizations and as a "*precedent setting public accountability mechanism*."⁴⁹ However, in the wake of the promotion of social policy expertise, much of the NGO work seems to be integrated into World Bank policies.⁵⁰ Thus, the combative nature of NGO – World Bank relations may be characterized by more co-operation, which may in turn lend to the technocratizing and therefore co-opting of the NGOs' political and democratizing agenda. The appearance of legitimacy may arise through working with NGOs but a democratization of the World Bank may not follow.

D. Conclusion

Ultimately, Szablowski's work adds a valuable perspective to the literature on the World Bank, specifically deciphering how the Bank operates to legitimize its actions through social specialists and participatory models and questioning its

⁴⁶ *Id.*, 13–17.

⁴⁷ *Id.*, 292.

⁴⁸ MARGARET KECK AND KATHYRN SIKKINK. *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

⁴⁹ Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 *GLOBAL GOVERNANCE*, 279, 289 (2000).

⁵⁰ RAJAGOPAL, *supra*, note 8, 155.

ultimate effect. Analyzing what is primarily the World Bank's response to its critics, Szablowski informs the reader that although some steps have been made, there is still much work to be done. The Safeguard Policies, initiated to mitigate the worst excesses of World Bank projects, with specific concern granted to social and environmental damage done, do not seem to have had the effect of boosting legitimacy, especially in the preliminary stages of the project. In the context of Antamina mine, even with the involvement of the social specialists after MIGA came in to reassert the IR Policy, the promise of participatory development does not seem to be attained. His questioning of the nature of legitimacy, how it is achieved and the status of the World Bank achieving it on the ground enhances the understanding of one of the most important issues applicable to all international organizations, but facing the World Bank in particular.