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“The World Bank’s Sustainable Development Approach and the Need for a Unified Field of
Law and Development Studies in Argentina”

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Abstract

This paper argues that the World Bank’s adoption of the principle of sustainable development is an example of the persistence of the law and development approach. Indeed, the World Bank’s interpretation of the principle translates into its projects; through soft law and loan conditionality, it applies to the borrower and regulates behaviors at the country level. This potentially results in the legal transplantation of a cross-culturally valid principle. The paper will present a case study of the sustainable development principle’s application by the World Bank in Argentina: the “Riachuelo-Matanza Basin Sustainable Development Program”. Given the difficulties of implementing the program, the paper makes the case that, to bridge the gaps described by Trubek and Galanter, Argentina needs scholars specialized in law and development as a unified field in order to fine-tune the development approach of international development actors to national realities and thus create a real impact.

Keywords: law and development studies, World Bank, conditionality, sustainable development, Argentina.

I. Introduction

In their article “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,”¹ Professors David Trubek and Marc Galanter announced, for many, the death of the law and development field. Its fatal illness, they argued, was in part due to debatable assumptions held by the scholars of the time². Many of these assumptions have been studied and criticized over the years,³ corroborating the thesis of “self-estrangement” as described by Trubek and Galanter. When law and development

¹ See D.M. Trubek and M. Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, Wisconsin Law Review [1974], 1062.

² *Ibid.*, 1062-1102, at 1096.

³ See for instance B. Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 Cornell International Law Journal (2011), 209.

scholars criticize assistance programs that lead to the “legal transplantation”⁴ of “cross-culturally valid hypotheses”,⁵ they are condemning programs that many had themselves played an active role in.⁶ However, the work of development actors around the world has proven the outcome wrong: the legal approach to development is alive and well and there is a crucial need for systematic research in the field.

The paper argues that the World Bank’s⁷ endorsement of the principle of sustainable development is an example of the persistence of this approach. Indeed, when the principle translates into World Bank projects, it applies to borrowing countries through soft law and loan conditionality and regulates behaviors nationally. This potentially results in the “legal transplantation” of a “cross-culturally valid” principle.⁸ The paper will present a case study of the sustainable development principle as applied by the World Bank in Latin America. Due to rapid economic growth, social exclusion and weak national incentives, this principle is of particular importance in the region; its application through conditionality can have great impact.⁹ Finally, based on issues described in the case study, the paper attempts to show that,

⁴ *Ibid.*, 209-248, at 225.

⁵ Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1096.

⁶ *Ibid.*, at 1096.

⁷ The “World Bank” as used in this paper refers to the International Bank for Reconstruction and Development (IBRD).

⁸ Retaking the wording respectively of Tamanaha (2011), *supra* note 4, 209-248, at 225, and Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1096.

⁹ The paper will focus on the World Bank’s understanding of sustainable development, its application through a development program in Argentina and the related importance of law and development studies. It will not cover several related issues, such as: the debates around sustainable development’s application to multilateral development banks, as well as its interpretation and application by multilateral development banks -see on that matter D. Bradlow, “International Law and the Operations of the International Financial Institutions”, in D.D. Bradlow and D.B. Hunter (eds.), *International Financial Institutions and International Law* (The Netherlands: Kluwer Law International, 2010), pp.19-21; C.E. Di Leva, *International Environmental Law and Development*, 10 *The Georgetown International Environmental Law Review* (1997-1998), 501-549, at 504-506; G. Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 *The American Journal of International Law*, no. 4 (Oct. 1998), 642-665, 642; P. Sands, J. Peel, A. Fabra and R. Mackenzie, *Principles of International Environmental Law* (3rd ed., Cambridge: Cambridge University Press, 2012), pp. 214-217-; the normative force of sustainable development -see C. Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Leiden, Boston: Martinus Nijhoff Publishers, 2009); Sands, Peel, Fabra and Mackenzie (2012), *supra*, p.207-; or debates around the general efficiency or legitimacy of the World Bank’s legal reforms projects - T. Kreyer, *The Legal Turn in Late Development Theory : The Rule of Law and the World Bank’s Development Model*, 52 *Harvard International Law Journal*, no. 52 (Winter 2011), 288; F. Upham, “Mythmaking in the Rule-of-Law Orthodoxy”, in T. Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), pp.77-83; A. Santos, “The World Bank’s

in order to bridge the gaps described by Trubek and Galanter, there is a need for Argentine scholars to specialize in law and development as a unified field. Knowledge from this unified field can play a role in fine-tuning the development approach of international development actors, such as multilateral banks, to national realities and thus create a real impact in the region.

II. The “legal transplantation” of sustainable development through the World Bank’s activities

Trubek and Galanter have criticized the possibility of exporting norms and legal systems created in the United States to the Third World in order to modernizing the latter’s systems.¹⁰ The background rationale for this approach is that the U.S. legal system is a valid model elsewhere.¹¹ Needless to say, contrary to domestic laws such as those in the U.S., the principle of sustainable development¹² enjoys global legitimacy as it has been proclaimed through many international instruments;¹³ it is considered a broadly accepted objective of the international community.¹⁴ The most commonly cited definition of sustainable development

Uses of the “Rule of Law” Promise in Economic Development”, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006)-.

¹⁰ Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1080, 1085, 1092, 1097; R. Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (New York: Oxford University Press, 2009), pp. 46-53.

¹¹ Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1089.

¹² The paper considers sustainable development as a principle because of its broad acceptance, see Sands, Peel, Fabra and Mackenzie (2012), *supra* note 10, p.206; it doesn’t take into account the question of whether it is a principle in the sense of Article 38 of the Statute of the International Court of Justice or if it should rather be deemed a concept. On that matter see for instance D. Barstow Magraw, L. D. Hawke, “Sustainable Development”, in D. Bodansky, J. Brunnée, E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007), pp. 622-626; Voigt (2009), *supra* note 10.

¹³ See for instance: G.H. Brundtland et al., *Our Common Future: The Report of the World Commission on Environment and Development* (Oxford: Oxford University Press, 1987); United Nations Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development*, UN Doc. A/CONF.151/26 (Rio de Janeiro, 1992); World Summit on Sustainable Development, *UN World Summit on Sustainable Development: Plan of Implementation*, UN Doc. A/CONF.199/20 (Johannesburg, 2002); United Nations Conference on Sustainable Development, *The Future We Want, Report of the United Nations Conference on Sustainable Development*, UN Doc. A/CONF.216/16 (Rio de Janeiro, 2012).

¹⁴ See Voigt (2009), *supra* note 10, pp.11-31; M.W. Gehring and A. Newcombe, “An Introduction to Sustainable Development in World Investment Law”, in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International BV, 2011), p. 3. But see B.Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89

was expressed in the Brundtland Report, as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹⁵

Like other international organizations,¹⁶ the World Bank Group¹⁷ has endorsed sustainable development in several documents.¹⁸ Furthermore, the World Bank Group Development Strategy of October 2013 declares that:

“Sustainability ensures that today’s development progress is not reversed tomorrow and that the pace of progress does not flag in the future. Sustainability permeates all elements of the policy agenda (...). Environmental constraints are already affecting the progress of poverty reduction, and promoting shared prosperity is impossible without stepping up action to address such environmental challenges as climate change, investment in green technologies, and reforms to improve the efficiency of use of natural resources, including reform of regressive energy subsidies. Institutional strengthening is critical to ensure sustainable development and address the risks that could undermine progress.”¹⁹

As there is no consensus on the exact meaning of sustainable development,²⁰ the World Bank has developed its own interpretation, which is now an essential aspect of the

American Journal of International Law, no. 2 (1995), 470-486, at 483, stating that the promotion of environmental considerations in law and development studies may be deemed ethnocentric.

¹⁵ Brundtland et al. (1987), *supra* note 14. See on that matter for instance Sands, Peel, Fabra and Mackenzie (2012), *supra* note 10, pp.206-217.

¹⁶ See Voigt (2009), *supra* note 10, pp.18-19.

¹⁷ The World Bank Group entails the International Bank for Reconstruction and Development, the International Development Association, the International Financial Corporation, the Multilateral Insurance Guarantee Agency and the International Center for the Settlement of Investment Disputes.

¹⁸ See for instance the World Bank's Comprehensive Development Framework, see World Bank, *Comprehensive Development Framework Questions and Answers*, available at: <http://web.worldbank.org/archive/website01013/WEB/0__CO-12.HTM#_Toc507393752> , accessed 2 February 2014 (see on this topic Santos (2006), *supra* note 10, pp.203-204), or World Bank, *World Development Report 2003: Sustainable Development in a Dynamic World, Transforming Institutions, Growth, and Quality of Life* (New York: The World Bank and Oxford University Press, 2003).

¹⁹ World Bank, *World Bank Group Strategy, October 2013* (Washington: The World Bank Group, 2014), p.6, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/16095/32824_ebook.pdf>, accessed 2 February 2015.

²⁰ C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International BV, 2011), p.6.

World Bank’s strategy.²¹ It covers the three pillars of sustainability: economic, environmental, and social, together with intergenerational well-being.²² Its implementation calls for a range of actions undertaken through lending activities and technical assistance, including the response to environmental challenges, the introduction of reforms and the strengthening of human capacity and institutions.

The World Bank Safeguard policies encompass a variety of documents, generally binding on the organization’s staff,²³ and cover topics such as the protection of natural habitats and forests, or pest management.²⁴ The Safeguard policies describe the process that must be followed by the World Bank’s staff, but also what requirements the state (hereinafter, “the Borrower”) must fulfill in order to receive the funding. For instance, they determine the extent and coverage of the environmental impact assessment to be submitted by the Borrower²⁵ as well as the Borrower’s duties regarding public consultation,²⁶ disclosure,²⁷ or reporting on mitigatory measures.²⁸ In many cases, the Safeguard policies are stricter than national legislation. Sustainable development is set as a critical objective of the Safeguard policies, stating for instance that “The Country Assistance Strategy (...) identifies the key areas in which Bank Group support can best assist a country in achieving sustainable development and poverty reduction”²⁹ or “The Bank finances technical assistance (...) to help borrowers: (...) strengthen their human and institutional capacity for policy reform and

²¹ A.P. Thirlwall, *Growth and Development With Special Reference to Developing Economies* (8th Ed., Palgrave Macmillan, 2006), p.362.

²² World Bank (2003), *supra* note 19, p.14.

²³ L. Boisson de Chazournes, “Policy Guidance and Compliance: the World Bank Operational Standards”, in D. Shelton (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system* (Oxford: Oxford University Press, 2000), pp.282-285; M.A. Bekhechi, *Some Observations regarding Environmental Covenants and Conditionalities in World Bank Lending Activities*, 3 Max Planck Yearbook of UN Law (1999), 287; I.F.I. Shihata, *The World Bank Inspection Panel: In Practice* (2nd ed., Oxford: Oxford University Press, 2000), pp.43-44.

²⁴ See World Bank, “Operations Manual”, OP 8.40, available at <http://siteresources.worldbank.org/OPSMANUAL/Resources/EntireOM_External.pdf>, accessed 20 February 2015; S.E. Smyth, *Agency and Accountability in Multilateral Development Finance: An Agenda for Change*, 4 The Law and Development Review, no. 1 (2011), 64- 140, at 116.

²⁵ World Bank, “Operations Manual”, *supra* note 25, OP 4.01, BP 4.01; see Boisson de Chazournes (2000), *supra* note 24, pp.286-287.

²⁶ *Ibid.*, OP 4.01.XIV.

²⁷ *Ibid.*, OP 4.01.XV-XVIII.

²⁸ *Ibid.*, OP 4.01.IXX.

²⁹ *Ibid.*, BP 2.11.

sustainable development.”³⁰ Because they can determinate what the Borrower is to do in exchange for the Donor’s funding, the Safeguard policies translate into conditions placed on the Borrower. Until the loan agreement is signed, these are not enforceable under treaty law and can therefore be considered “soft law”.³¹ After the signing, conditions are part of an international treaty and are therefore binding.³² In consequence, through soft law and binding treaty conditions,³³ sustainable development as applied by the World Bank does influence and regulate behaviors at country level.³⁴

As sustainable development translates into conditions placed on the Borrower, the application of the principle of sustainable development by the World Bank corresponds to the approach described by Trubek and Galanter: it results in the exportation of a norm created by the international community and interpreted by the World Bank in borrowing countries, in order to modernize, or more exactly to make the latter’s system³⁵ more sustainable. This is the “legal transplantation” of a “cross-culturally valid” principle;³⁶ the law and development approach is alive and well.

³⁰ *Ibid.*, OP 8.40.

³¹ Di Leva (1997-1998), *supra* note 10, at 518-519.

³² D.A. Wirth, “Trade and Finance”, in D. Shelton (ed.), *Commitment and compliance: the role of non-binding norms in the international legal system* (Oxford: Oxford University Press, 2000), pp. 335-336.

³³ See for instance on environmental conditionality: Di Leva (1997-1998), *supra* note 10, 501; J.W. Head, *Environmental Conditionality in the Operations of International Development Finance Institutions*, 1 *The Kansas Journal of Law and Public Policy* (1991), 15.

³⁴ The IBRD and the IDA are in the process of reviewing and updating their common environmental and social Safeguard policies. The first draft has been published on 30 June 2014, and public consultations are ongoing. A final draft shall be presented in 2015. World Bank, *Consultations, Review and Update of the World Bank Safeguard Policies*, available at: < <http://consultations.worldbank.org/consultation/review-and-update-world-bank-safeguard-policies>>, accessed 11 February 2015.

³⁵ Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1080, 1085, 1092. Other well-known examples of law and development projects by the World Bank are the “Rule of law” projects, see for instance Santos (2006), *supra* note 10. On classical judicial reforms programs in Argentina, see M. Bohmer, *Access to Justice and Judicial Reform in Argentina*, Fifth Annual Colloquium on Clinical Legal Education, Columbia University Budapest Law Center / Public Interest Law Initiative, Open Society Justice Initiative, Uniwersyteckich Poradni Prawnych (Warsaw, 2002), pp.32-33.

³⁶ Retaking the wording respectively of Tamanaha (2011), *supra* note 4, 209-248, at 225, and Trubek and Galanter (1974), *supra* note 2, 1062-1102, at 1096.

III. The application by the World Bank of the principle of sustainable development in Argentina

Argentina, a country of over 40 million inhabitants, is classified in the very high human development (hereinafter, HDI) category by the UNDP, ranking 49th out of 187 countries and territories.³⁷ Life expectancy stands at 76 years, while the country has a 97.9 percent adult literacy rate.³⁸ Education and healthcare is free and provided by the state. However, the country suffers from many challenges. It is estimated that at least a third of the population works in the informal economy³⁹ and at least 2 million people live in slums.⁴⁰ The maternal mortality rate is 77 for every 100,000 live births, compared to an average of 16 in other HDI countries.⁴¹ Argentina ranks 93rd out of 178 countries on the Environmental Performance Index, showing alarming trends in deforestation, lack of protected areas and growing carbon emissions.⁴² Therefore, in response to periods of rapid economic growth, social exclusion and weak national incentives, the principle of sustainable development is of particular importance for the future of the country: its application through multilateral banks programs could produce great impacts. On that matter, the World Bank’s support of the Matanza-Riachuelo Basin’s clean-up plan is an interesting case study.

3.1. The Matanza-Riachuelo Basin: judiciary and World Bank interventions

Argentina’s Matanza-Riachuelo Basin (hereinafter, M-R Basin) is one of the most polluted places in the world.⁴³ The river is 64 kilometers long and runs through a highly industrial and urbanized area of Argentina, inhabited by 3.5 million people. It separates the

³⁷ United Nations Development Programme, *Human Development Reports: Argentina*, available at: <<http://hdr.undp.org/en/countries/profiles/ARG>>, accessed 9 February 2015.

³⁸ *Ibid.*

³⁹ I. Bermúdez, “El INDEC dice que bajó el empleo en negro, sobre todo en el noroeste”, Clarín, 16 September 2014.

⁴⁰ Techo, *Relevamiento de asentamientos informales 2013*, available at: <http://www.mapaasentamientos.com.ar/downloads/Relevamientos_de_asentamientos_2013_BAJA.pdf>, accessed 9 February 2015.

⁴¹ United Nations Development Programme, *Argentina: HDI values and rank changes in the 2014 Human Development Report*, 2014, available at: <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/ARG.pdf>, accessed 9 February 2015.

⁴² Yale University, *Environmental performance Index 2014*, available at: <<http://epi.yale.edu/epi>>, accessed 9 February 2015.

⁴³ Blacksmith Institute, “Top Ten Toxic Threats 2013, Matanza-Riachuelo, Argentina”, available at: <http://www.worstpolluted.org/projects_reports/display/114>, accessed 9 February 2015.

south of the City of Buenos Aires from the Province of Buenos Aires. More than 11,000 industries operate on its shores, including tanneries, meat processing, petrochemicals, and textile plants, many of which are not registered. The Matanza-Riachuelo River has been considered heavily polluted since the 19th century.

In 2004, seventeen persons filed a complaint before the Supreme Court against the Argentine government, the Province of Buenos Aires, the government of the City of Buenos Aires, and forty-four companies; they sought compensation for damages and joined a claim to bring the environmental harm to an end. After months of information gathering and public hearings, which resulted in a cleanup plan and the creation of an inter-jurisdictional body (the Administrative Authority of the M-R Basin – hereinafter, ACUMAR-), the Supreme Court issued its final decision in July 2008.⁴⁴ The ruling, considered a landmark case in Latin American environmental law, consisted of an order for the federal, provincial and city governments to promptly execute the cleanup plan, which addressed industrial pollution control, flood control, solid waste management, and urban rehabilitation, as well as the construction and management of wastewater treatment plants. In addition, the Court requested that ACUMAR assume the liabilities arising from any lack of compliance in executing the general environmental objectives, which are to improve the quality of life of M-R Basin inhabitants, restore the M-R Basin’s environment and prevent further damage. Two federal judges are in charge of overseeing the implementation of the cleanup plan.⁴⁵

In August 2009, the Argentine government and the World Bank signed a loan agreement⁴⁶ for 840 million USD to support several components of the cleanup plan. The objectives of “The Matanza-Riachuelo Basin Sustainable Development Adaptable Lending Program” are to “(i) improve sewerage services in the M-R River Basin and other parts of the

⁴⁴ *Mendoza, Beatriz Silvia y otros c/Estado Nacional y otros s/daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza - Riachuelo)*, M.1569.XL.

⁴⁵ The Federal District Court No.12 of the City of Buenos Aires is in charge of controlling all procurement processes including the elements of the plan to be financed by the World Bank, while the Federal District Court No.2 of Morón is in charge of the controlling all other aspects of the cleanup plan. The ruling can be deemed an internal process of law and development. See on the topic of the judiciary in law and development -see D. Kennedy, “Three Globalizations of law and legal thought: 1850-2000”, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006), pp.68-70-.

⁴⁶ Argentine Republic and International Bank for Reconstruction and Development, *Loan Agreement Matanza-Riachuelo Basin Sustainable Development Project, Loan Number 7706-AR* (1 September 2009), available at: <<http://documentos.bancomundial.org/curated/es/2009/09/11151281/loan-agreement-17706-ar-conformed>>, accessed 2 February 2015.

Province and City of Buenos Aires by expanding transport and treatment capacity; (ii) support a reduction of industrial discharges to the M-R River, through the provision of industrial conversion grants to small and medium enterprises; (iii) promote improved decision-making for environmentally-sustainable land use and drainage planning, and pilot urban drainage and land use investments in the M-R River Basin; and (iv) strengthen ACUMAR’s institutional framework for ongoing and sustainable cleanup of the M-R River Basin.”⁴⁷

In December 2014, the World Bank deemed the program “moderately unsatisfactory”,⁴⁸ as very little has been done so far: most results indicators show no progress from the beginning of the program, and only 24 percent of the loan has been disbursed.⁴⁹ In reality, the process has been far from easy but there is reason for hope: after a very long procurement phase of nearly five years for the very important sanitation component of the program, works that will equip the river with a high-performance wastewater system are about to begin.⁵⁰

3.2. The M-R Basin cleanup and World Bank social and environmental Safeguard policies

The influence of the World Bank’s interpretation of sustainable development on the program is evidenced in the loan agreement; as pointed out, the Borrower must comply with the conditions contained in the agreement, many of which contain environmental and social aspects. Some examples are given below.

⁴⁷ World Bank, *Implementation Status & Results, Argentina, The Matanza-Riachuelo Basin (MRB) Sustainable Development Adaptable Lending Program (P105680)*, 9 (16 June 2014), p.1, available at <<http://documentos.bancomundial.org/curated/es/2014/06/19683993/argentina-matanza-riachuelo-basin-mrb-sustainable-development-adaptable-lending-program-p105680-implementation-status-results-report-sequence-09>>, accessed 3 February 2015.

⁴⁸ World Bank, *Implementation Status & Results, Argentina, The Matanza-Riachuelo Basin (MRB) Sustainable Development Adaptable Lending Program (P105680)*, 10 (31 December 2014), available at: <<http://documentos.bancomundial.org/curated/es/2014/12/23130614/argentina-matanza-riachuelo-basin-mrb-sustainable-development-adaptable-lending-program-p105680-implementation-status-results-report-sequence-10>>, accessed 3 February 2015, p.2.

⁴⁹ *Ibid.*, pp.3-7.

⁵⁰ *Ibid.*, p.2.

3.2.1. Management of infrastructure’s environmental impacts

For the construction of the water collector, for instance, the World Bank requires that Argentina, through its water company:

“carry out a separate site environmental impact assessment (under terms of reference acceptable to the Bank) for the relevant works; (ii) approve, and/or cause to be approved, an environmental management plan or similar environmental instrument, acceptable to the Bank, for the relevant works (which plan or similar environmental instrument shall be based on the results of the environmental assessment mentioned herein, and the Bank’s comments on the results of said assessment, if any (...).”⁵¹

This clause shows the high degree of involvement of the World Bank in managing the environmental impact of one specific infrastructure. The international organization must first verify the conditions of the implementation of the environmental impact assessment submitted by Argentina. Then, the environmental management plan, based on said environmental impact assessment, is to be accepted by the Bank. At each step, the World Bank is guided by its Safeguard policies, which therefore have a significant influence on how the environmental impact assessment is to be carried out and on the design of the final environmental management plan approved by the state. Both are implemented by the water company. Therefore the World Bank’s environmental and social Safeguard policies do regulate behaviors nationally, *id est*, in this case, the state’s behavior as well as a public-private company’s behavior. The World Bank’s interpretation of the principle of sustainable development thus potentially has a major impact on the borrowing country.

3.2.2. Project environmental management plan

The World Bank defines the “Project Environmental Management Plan” as:

“the Borrower’s plan dated April 21, 2009, acceptable to the Bank (included as Chapter 11 of the Borrower’s environmental assessment for the Project dated April 21, 2009), which plan sets forth, inter alia: (a) the measures/actions to be taken during the construction and operation phases of the works (...) to eliminate or offset negative environmental impacts, or to

⁵¹ Argentine Republic and IBRD (2009), *supra* note 47, Schedule 2, Section I, D (b).

reduce the same to acceptable levels; and (b) the following programs: (i) a program to manage and mitigate impacts during the construction phase; (ii) a program to manage and mitigate impacts associated with industrial conversion; (iii) a program to monitor environmental trends in the Project’s area of influence (...); (iv) a program to manage and respond to the Project’s environmental contingencies; (v) a program to strengthen ACUMAR’s capacity (...).⁵²

This clause defines the project’s general “environmental management plan” (hereinafter, EMP) as understood by the Bank. It shows that the EMP had been submitted by Argentina and verified by the Bank during the appraisal and negotiations phase before the signing of the Loan Agreement, and according to the Bank’s environmental and social Safeguard policies. Through this clause, the World Bank ensures that elements such as the elimination or mitigation of environmental impact or institutional strengthening remain in Argentina’s general EMP. These features are part of the World Bank’s interpretation of sustainable development for the M-R Basin.

3.2.3. Resettlement

If an event leading to a population resettlement should occur, the World Bank requires Argentina, through its Department of Environment and Sustainable Development and its water company, to:

“prepare and present to the Bank a resettlement plan, acceptable to the Bank, which plan shall be consistent with the provisions of the Resettlement Policy Framework.”⁵³

According to its Safeguard policies, the careful management of resettlement is part of the World Bank’s interpretation of the principle of sustainable development⁵⁴. In case of resettlement, the Argentine state is to submit a plan, which is verified by the Bank and shall

⁵² Argentine Republic and IBRD (2009), *supra* note 47, Appendix, Section I, Definitions, 34.

⁵³ Argentine Republic and IBRD (2009), *supra* note 47, Schedule 2, Section I, F (b).

⁵⁴ The Bank links the issue of resettlement with the principle of participation and the necessity of addressing severe economic, social and environmental risks. It demands that: “where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs”; see World Bank, “Operations Manual”, *supra* note 25, OP 4.12, I and IIb.

comply with the Resettlement Policy Framework (hereinafter, RPF). This clause is another example of the local repercussion of the World Bank’s internal policies, in this case on Resettlement: the RPF was prepared by Argentina and accepted by the Bank in April 2009, prior to the signing of the Loan Agreement,⁵⁵ and following the conditions detailed in the World Bank’s Safeguard policies on “Involuntary Resettlement”⁵⁶. Again, the Bank is guided by internal policies, which become directly mandatory on the state: the resettlement plan must comply with the RPF, which must comply with the Safeguard policies. Safeguard policies, once again, regulate local behaviors.

The conditions contained in the clauses demonstrate the influence of the World Bank’s environmental and social Safeguard policies throughout the program. Soft law is already considered a means for development⁵⁷ during the appraisal phase, before it is “hardened” through international treaties, as seen for instance in the RPF or the EMP. Even if the application of the Safeguard policies does not result in the enactment of domestic law, they regulate behaviors nationally, influencing the state, its departments and even companies, for instance in the water collector case, although these policies may be more rigorous than national laws. This part of the process could definitely be deemed a “soft law and development” approach. The regulation process is more evident once conditions are placed on the Borrower through the loan agreement. The process can have, in practice, the same results as a legal reform,⁵⁸ albeit limited to project implementation. It can also result in institutional strengthening, as in the ACUMAR case. In sum, both soft law and treaty conditions in the M-R Basin program are means of implementing the principle of sustainable development as interpreted by the World Bank in Argentina.

⁵⁵ Argentine Republic and IBRD (2009), *supra* note 47, Appendix, Section I, Definitions, 37.

⁵⁶ See for instance World Bank, “Operations Manual”, *supra* note 25, OP 4.12 and BP 4.12.

⁵⁷ On the subject of law and development and soft law, see K. Rittich, “Second Generation Reforms and the Incorporation of the Social”, in D.M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge: Cambridge University Press, 2006), pp.206, 215.

⁵⁸ On three kinds of law reforms, see J.H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *American Journal of Comparative Law*, no. 3 (Summer 1977), 457-491, at 462, 463.

3.3. The difficulties of implementing the World Bank’s Sustainable Development program

The M-R Basin program represents an interesting example of the persistence of the law and development approach. According to most law and development scholars’ views, at least since “Scholars in Self-Estrangement”,⁵⁹ the reason for the difficult implementation of such a project is simply that the World Bank’s vision of sustainable development and its legal implications can hardly be transplanted onto a country’s unique context, which is deemed incompatible. However, in the context of this program, incompatibility is far from straightforward.

3.3.1. “Compatibility screening” from the outside

None of the most traditional reasons for the difficulties or failure of law and development projects really apply here.⁶⁰ First, there is no directly insurmountable economic barrier for the implementation of the program and corresponding cleanup of the river, as the country is rather wealthy: it ranks 20th on the World Bank’s GDP index, just after Switzerland and before Sweden,⁶¹ and 50th on the organization’s GDP per capita index.⁶² Nor are there questions of path dependency, as Argentina – a democracy for 32 years – has alternated political tendencies and reforms, from liberal politics in the 1990s to protectionism since 2003. There is no predatory political power or violent political struggles, nor any cultural factors such as informal alternatives to the legal system to blame for the non-implementation of the program. The government and parliament’s elections process is fairly uncontroversial; the civil law legal system is an effective mechanism of social control, and the checks and balance system, with the Supreme Court at its top, functions rather correctly.

In addition, the Supreme Court had ordered the cleanup of the area to take place based

⁵⁹ See Trubek and Galanter (1974), *supra* note 2, 1062

⁶⁰ Enumerating these most cited reasons, see W. Channell, “Lessons Not Learned About Legal Reform”, in T. Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), pp.138-139.

⁶¹ World Bank, *Gross Domestic Product 2013*, available at: <<http://databank.worldbank.org/data/download/GDP.pdf>>, accessed 9 February 2015.

⁶² World Bank, *GDP per capita, 2013*, available at: <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD?order=wbapi_data_value_2013+wbapi_data_value+wbapi_data_value-last&sort=desc>, accessed 9 February 2015.

on laws passed by the parliament;⁶³ following the ruling, laws and executive decrees have been passed to support its implementation. Two tribunals are in charge of controlling the implementation of the cleanup plan. Thus, the process was internally driven and one cannot conclude any apparent lack of ownership of the project, or that conditions were simply imposed on Argentina by the World Bank; on the contrary, the World Bank found strong ownership of the program in the country. Finally, the Supreme Court is now highly respected in Argentina. If an international consultant⁶⁴ had conducted such a compatibility screening, Argentina would certainly have passed it; the reasons for the implementation’s potential problems were hardly perceptible.

3.3.2. “Compatibility screening” from the inside

The river area covers three political districts, governed respectively by the City of Buenos Aires, the Province of Buenos Aires and the federal government. The federal government is at times an ally of the Province of Buenos Aires, while the city is a strong political opponent of the federal government.⁶⁵ Moreover, in this political context, the strongest actor is the federal government because of an “ultra-presidential” system and the centralized organization of its federal system. Political differences have weakened the Province of Buenos Aires, leaving the thirteen municipalities bordering the Riachuelo with varying degrees of alliance or opposition to the federal government. A common understanding and implementation of the project by these three political entities was, from the start, challenging.

In practice, the political context has translated into a multitude of program stakeholders, namely: the three governments, but also their specialized agencies and departments, such as the federal government’s Department for Environment and Sustainable Development, Planning Ministry and Comity of the Basin; ACUMAR, the inter-jurisdictional agency; and AySa, the Argentine water company in charge of the sanitation component, as

⁶³ Following the introduction of an environmental clause by the constitutional reform of 1994, Congress passed the general laws of environmental protection, for instance law 25.612 (industrial waste), law 25.670 (PCBs), law 25.688 (water), law 25.831 (information), law 25.916 (domestic waste), law 26.331 (forests), law 26.562 (burnings) and law 26.639 (glaciers).

⁶⁴ Channell (2006), *supra* note 61, pp.149-156.

⁶⁵ The World Bank may have been barred from this specific consideration because of the “political prohibition” provision of Article IV, § 10 of the IBRD’s statute.

well as the province’s municipalities. For the World Bank, this means at least twenty officials stakeholders to be reckoned with⁶⁶. Furthermore, in these five years, most cited entities have undergone changes of direction (there have been, for instance, four federal secretaries of environment), which are often accompanied by changes of vision regarding the implementation of the program.

Most importantly, although backed by the Supreme Court and the Parliament, the program lacks the support of the executive branch in all three districts, most importantly the federal government. The federal government’s strategy and fields of action are profoundly economic and social, with a strong emphasis on national industry protection, import substitution, reindustrialization and wealth redistribution. There is an intense legislative activity in Argentina as these strategies are mainly implemented through decrees and laws; the development of law⁶⁷ is considered a means to achieve the development model. The government has described this development model as a political, economic, social and cultural model in favor of inclusion and equity,⁶⁸ with three main challenges: becoming self-sufficient in energy supply, obtaining a fiscal surplus through import substitution and the increase of exports, and preserving and creating jobs.⁶⁹ The federal government very seldom mentions environmental protection and has practically never conducted an environmental protection campaign,⁷⁰ because natural resources are considered to be a means of economic development. The Director of Climate Change of the Department of Environment and Sustainable Development of the Nation has for instance declared that the exploitation of resources is the only available option, that the high environmental impact of certain activities can be compensated by their positive effects on the economy, and that adaptation to climate

⁶⁶ The number of stakeholders is likely to have been identified as a risk in the World Bank’s evaluation of the program.

⁶⁷ Tamanaha (2011), *supra* note 4, 209-248, at 225.

⁶⁸ “Acto de anuncios de desarrollo social y salud: Palabras de la Presidenta de la Nación”, 15 October 2014, available at: <<http://www.presidencia.gob.ar/discursos/28032-acto-de-anuncios-de-desarrollo-social-y-salud-palabras-de-la-presidenta-de-la-nacion>>, accessed 10 February 2015.

⁶⁹ “Capitanich: «Con este modelo Argentina logró inclusión, equidad y desarrollo productivo»”, 23 October 2014, available at: <<http://www.presidencia.gob.ar/informacion/actividad-oficial/28057-capitanich-qcon-este-modelo-argentina-logro-inclusion-equidad-y-desarrollo-productivoq>>, accessed 10 February 2015.

⁷⁰ This is also true for the Province of Buenos Aires but less for the City of Buenos Aires which has developed some environmental public policies, concerning for instance the recycling of domestic waste as well as cycling infrastructure.

change shall be given priority over the mitigation of its effects.⁷¹ The democratic character of Argentine presidential elections demonstrates that environment is not considered a priority by the Argentine population at the time of voting; citizens are most concerned with drug trafficking, corruption, security, rising prices and poverty.⁷² This may explain why the federal government has failed to act on the M-R Basin ever since coming into power in 2003 and until the Supreme Court’s ruling in 2008, as well as the relative passiveness of the city and the province. The balance of economic gains and political support versus environmental protection is clearly at stake in the M-R Basin’s cleanup, where a great number of people could lose their jobs and incomes due to the potential closing of many small companies operating on its shores.

The Supreme Court ruling, although bolstered by previous and subsequent laws and decrees, as well as motivated by real and urgent needs in the area, is an example of judicial activism: it is not in line with the Executive’s political agenda. Consequently, the World Bank’s interpretation of the principle of sustainable development, encompassing all social, economic and environmental pillars, fits the Argentine Supreme Court’s interpretation, but is not consistent with the executive branch’s model of development,⁷³ whether sustainable or not, which concentrates on the first two pillars. Moreover, there is growing opposition between the Supreme Court and the federal government.⁷⁴

In sum, Argentina’s political model of development and the functioning of its institutions represent a globally difficult context for the implementation of such a project.

⁷¹ "La explotación de los recursos naturales es la única opción", 1 December 2014, available at: <<http://www.ambiente.gob.ar/?aplicacion=noticias&idarticulo=13333&idseccion=12>>, accessed 10 February 2015.

⁷² "El narcotráfico ya encabeza las preocupaciones de la sociedad", La Nación, 9 March 2014.

⁷³ On the differences of conceptions of sustainable development between the North and the South, see U. Beyerlin, *Bridging the North-South Divide in International Environmental Law*, 66 Heidelberg Journal of International Law (2006), 259.

⁷⁴ Another reason for the difficulties in the program implementation and a consequence of the others, perhaps impossible to foretell even for an insider: during the long duration of the procurement process, Argentina’s economic policies have changed. Foreign exchange rules have been tightened and the Argentine peso has lost value. As a result, new and lengthy negotiations have arisen with the selected companies regarding works assessment and payment currency, increasing the delays in program implementation.

IV. Law and development studies in Argentina

Law and development scholars have said this for a long time: law is “society specific”.⁷⁵ Each society is composed of a unique set of political, cultural, historical, economic and geographical elements, from which law derives.⁷⁶ Law is thus connected, and secondary, to society.⁷⁷ It is particularly difficult for any external initiative to, first, identify areas in a legal system that can be reformed and, then, to implement these reforms.⁷⁸ The M-R Basin example shows why there is a need for strong law and development research in Argentina, based on detailed local knowledge of development models, values, conditions and incentives.⁷⁹ Knowledge from this unified field can have a role in assessing internal models and fine-tuning the development approach of international development actors, such as multilateral banks, in keeping with national realities. For the advancement of such research the country presents some disadvantages, but also, fortunately, many advantages.⁸⁰

4.1. Disadvantages and advantages for the Law and Development field in Argentina

Constituting the field in Argentina would require overcoming several barriers. First, development as an academic discipline is mostly economic; although the country has compelling literature on various other aspects related to law and development,⁸¹ there is very little recent work addressing law and development as a whole,⁸² nor is it taught as an academic course. University professors are generally part-time in Argentina, working full-time in the private or the public sector in addition to their classes. Therefore, conflicts of interest and lack of time may interfere in the study of law and development. From a practical point of view,

⁷⁵ Merryman (1977), *supra* note 59, at 479.

⁷⁶ Tamanaha (1995), *supra* note 15, at 484.

⁷⁷ *Ibid.*, at 484.

⁷⁸ K.E. Davis, M.J. Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 56 *The American Journal of Comparative Law* (2008), 895-946, at 896; Tamanaha (2011), *supra* note 4, 209-248, at 243.

⁷⁹ Davis and Trebilcock (2008), *supra* note 79, at 919, 945-946.

⁸⁰ Some findings of this section are based on the author’s academic experience in Argentine Universities, teaching different courses related to law and development studies (Universidad Austral -course on International Development Cooperation; Universidad Torcuato Di Tella – Conditional Cash Transfers and Development; and Universidad de Palermo – Law and Sustainable Development).

⁸¹ One can mention some local academic research on tax law and development, law and communication development, sustainable development or international law of development.

⁸² On law and development in the Region, see C. Fernández Blanco, *Derecho y Desarrollo: Una visión desde América Latina y el Caribe* (City of Buenos Aires: Editores del Puerto, 2013).

international literature on law and development is not easily accessible. Its absence from libraries and bookstores can be attributed to a lack of interest: development strategy is generally conceived to be a national issue which should not be influenced from the outside⁸³. As a consequence, costs are quite high for the few scholars who are interested.

On the other hand, the academic community is strong, with several well-ranked universities and dedicated scientists. Prominent scholars are influential and well informed. The relationship between the three powers and universities is particularly tight. Many members of the judiciary, legislative and executive branches, as well as politicians or journalists, are also university professors. Some universities work as clusters of ideas for political tendencies, providing both support and critique. In spite of difficulties, the academy in Argentina has the potential to undertake strong and influential law and development research. Of course, the field would be multidisciplinary, include different methodologies and entail opposing views of law, development, the role of the state and foreign actors in that context. However, it could be unified in its research perspective, namely on how both soft and hard law should influence the local process of development.

4.2. A unified field and the link between the state, the academy and development banks

The situation in Argentina is rather contradictory: international law and development approaches are undertaken in the country, even if development is considered an internally driven process. International actors understand development as being an international process, which is not consistent with Argentina’s political actors’ vision of a national development process. This can result in a dialogue of the deaf and in problems when it comes to implementing law and development projects, benefitting neither the country, nor its population, nor the donor. Specialized programs of study in this field would therefore be extremely relevant. Law and development scholars could study, clarify and conceptualize the executive branch’s theory of development, its vision of the relationship between law and development, and compare their findings with competing theories. The issue of sustainable development is particularly sensitive because of the differences between perspectives from

⁸³ See for instance “Desde la ONU, CFK le contestó al FMI y volvió a pedir diálogo por Malvinas”, Perfil, 25 September 2012.

North and South:⁸⁴ questions need to be answered regarding the country’s interpretation of the principle, followed by proposals for adaptations and new strategies. The critical environmental challenges faced by the country should be taken into account. International literature would definitely be useful for scholars to take stock of how the discipline is approached abroad, enriching the context-specific research and law and development theories formulated by Argentine scholars.

Although foreign aid accounts for only 0.02% of Argentina’s Gross National Income,⁸⁵ development banks provide important investment opportunities to the Argentine state. As seen in the M-R Basin case, this can go toward solving the critical environmental situation and bring model environmental and social safeguards. Law and development scholars could work as a nexus for analysis, information and adaptation between these institutions and the state. They should be able to identify, discuss and communicate actual demands and needs to the government and foreign actors, as well as potential problems faced by law and development projects, and propose context-specific solutions.⁸⁶ For the academy, soft law as the World Bank’s environmental and social Safeguard policies is particularly interesting. When scholars are knowledgeable about local development strategies as well as the social, economic and environmental context, they can become significant interlocutors for both the World Bank and the country, providing consultation on the creation of Safeguard policies, during appraisal and negotiation, for the inclusion of Safeguards in loan agreements and for the interpretation and application of the loan agreement’s conditions. Scholars’ input should bridge gaps between the state and foreign actors and strengthen the impact of projects.

J.H. Merryman has described the characteristics of a scholarly field as: “a paradigm, group of interested scholars, funding and institutional bases, regular lines of communication

⁸⁴ Beyerlin (2006), *supra* note 74.

⁸⁵ United Nations Development Programme, *supra* note 38, accessed 9 February 2015.

⁸⁶ On the relevance of such a field of study, see Davis and Trebilcock (2008), *supra* note 79, at 946; V. Gessner, “Law as an Instrument of Social Change”, in N.J. Smelser and P.B. Baltes (eds.), *International Encyclopaedia of the Social and Behavioral Sciences* (Amsterdam, 2001), vol.12, p.8495; F.C. Sherman, *Law and Development Today: The New Developmentalism*, 10 *German Law Journal*, no.9 (2009), 1257-1273, at 1272; D.M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 *The Yale Law Journal*, no.1 (1972), 1-50, at 2; D.M. Trubek, “Law and Development”, in N.J. Smelser and P.B. Baltes (eds.), *International Encyclopedia of the Social and Behavioral Sciences* (Oxford: Pergamon, 2001), p.8445.

and publications.”⁸⁷ Because of the need for analysis of development strategies and support for the creation of significant development programs, this paradigm exists in Argentina. Now it would be important to form a group of interested scholars and obtain institutional support to create meaningful communication and publications. To this end law and development studies should be improved and expanded. This would respond to Trubek and Gallanter’s objective in writing “Self Estrangement”, which was, in Trubek’s words, “(...) to strengthen law and development scholarship by distancing the academic project from immediate activist policy agendas and encouraging the development of more systematic empirical research and conceptualization. The hope was that in the long run the academy could come up with better and more effective ideas for legal assistance to developing countries.”⁸⁸

Conclusion

In August 2009, the Argentine government and the World Bank signed “The Matanza-Riachuelo Basin Sustainable Development Adaptable Lending Program”. The influence of the World Bank’s endorsement and interpretation of the principle of sustainable development is evidenced in the program’s Loan Agreement: through conditions, the Safeguard policies regulate the behavior of the state, its departments and even companies. Both soft law and treaty conditions are means of implementing the principle of sustainable development, as interpreted by the World Bank. The process can have, in practice, the same results as a legal reform, albeit limited to project implementation; it can also result in institutional strengthening.

The World Bank has deemed the program “moderately unsatisfactory”. None of the most traditional reasons for the difficulties posed to law and development projects actually apply. In reality, a common understanding and implementation of the project by the City of Buenos Aires, the Province of Buenos Aires and the federal government was challenging from the start, because of political tensions and the great number of stakeholders involved. Moreover, while the World Bank’s interpretation of the principle of sustainable development,

⁸⁷ Merryman (1977), *supra* note 59, at 457.

⁸⁸ Trubek (2001), *supra* note 87, p.8444.

encompassing all social, economic and environmental pillars, is consistent with the Argentine Supreme Court’s interpretation, it is not in the case of the executive branch’s model of development, which focuses only on the social and the economic pillars.

This case is an example of why there is a need for strong law and development research in Argentina based on a detailed local knowledge of values, conditions and incentives. There is a risk of a dialogue of the deaf between international actors viewing development as an international process and the opposite vision of Argentine political actors. Law and development scholars could study the executive branch’s theory of development and work as a nexus for analysis, information and adaptation between institutions such as the World Bank and the state. The local significance of the principle of sustainable development as well as the influence of development institutions’ soft and hard law should be particularly interesting topics for Argentina’s law and development academy.

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